

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2016050941

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on May 18, 2016, naming San Francisco Unified School District. The matter was continued for good cause on June 24, 2016.

Administrative Law Judge Rebecca Freie heard this matter in San Francisco, California, on August 16, 17, 18, 24, 25, 26, 31, and September 1, and 13, 2016.

Lina Foltz, Attorney at Law, represented Student. Student, Mother, and Aunt attended all days of the hearing, except for absences at the end of some days when the ALJ and attorneys discussed the admission of documentary evidence. Aunt was not in attendance during the morning on the last day of hearing. Chan Aye, interpreted for Mother all dates except for August 24, 25, and 26, 2016. There was no interpreter (with the consent of the parties) on August 24, 2016. Kyaw Swa Linn interpreted for Mother on August 25, and 26, 2016.

Diane Beall, Attorney at Law, represented San Francisco. Elizabeth Blanco, Chief of Special Education for San Francisco, attended most of the hearing as its representative.

In her absence, Damian Huertas, the Supervisor of High School Special Education Services for San Francisco attended the hearing. There were brief periods of time when there was no San Francisco representative in attendance.

The matter was continued to October 10, 2016, to allow the parties to submit written closing arguments, which were timely received. The record was then closed and the matter was submitted for decision.

## ISSUES

- 1) Did San Francisco fail to meet its child find obligation between May 19, 2014, and continuing through January 14, 2015, thus denying Student a free appropriate public education, by failing to assess her?
- 2) Did San Francisco fail to provide Student with a FAPE from January 14, 2015, through December 17, 2015, by failing to find her eligible for special education under the eligibility category of other health impairment?
- 3) Did San Francisco fail to provide Student with a FAPE from May 19, 2014, through December 17, 2015, and continuing thereafter, by failing to provide her with special education and related services that would meet her unique needs and provide her with educational benefit?
- 4) Did San Francisco deny Student a FAPE by improperly exiting her from high school on December 17, 2015, by awarding her a high school diploma based on credits that were earned through classes that did not provide her with meaningful educational benefit?

## SUMMARY OF DECISION

Student contends she should have been assessed for special education and made eligible under the category of other health impairment, and San Francisco's delay in assessing her and refusal to find her eligible for special education denied her a FAPE.

Further, Student claims that San Francisco prematurely exited her from high school in December 2015 and asks that her high school diploma be rescinded. San Francisco contends that: Student was capable and performing well in school, and did not need special education to access the curriculum; accommodations pursuant to a 504 plan were sufficient to meet her needs; and her graduation was valid.<sup>1</sup>

This Decision finds that San Francisco failed its child find obligation from May 19, 2014 to January 14, 2015. However, since Student was not eligible for special education during this time period, this procedural violation did not deny her a FAPE. When San Francisco finally did assess Student, its eligibility assessment was flawed because it did not have a health professional conduct a health evaluation, even though Mother had asked that Student be assessed to see if she met eligibility criteria under the categories of other health impairment, or orthopedic impairment. As a result, the individualized education program team, including Student and Mother, did not have sufficient information to meaningfully participate in the decision-making process.

When the assessment San Francisco did complete was reviewed at the IEP meeting in January 2015, San Francisco glossed over the fact that Student had not attended school for over one year, due to a medical diagnosis of complex regional pain syndrome. Although San Francisco provided Student accommodations pursuant to a

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<sup>1</sup> A Section 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, such as learning. OAH does not have jurisdiction over claims made under this Section.

series of 504 plans, many of these accommodations were special education services and showed that Student was in need of special education services. For example, her homebound instruction was provided to her by special education teachers, and assistive technology was provided by San Francisco's Special Education Services.<sup>2</sup> Therefore, in January 2015, San Francisco should have found Student eligible for special education under the category of other health impairment.

Because San Francisco did not find Student eligible for an IEP, she was denied the protections of the Individuals with Disabilities Education Act, including the setting of goals for her to return to school and transition planning, and thus she was denied a FAPE from January 14, 2015, and forward. Although this Decision finds that OAH does not have jurisdiction to rescind Student's high school diploma, the circumstances under which it was awarded were considered in crafting remedies for the denial of a FAPE by San Francisco.

## FACTUAL FINDINGS

### JURISDICTION

1. Student resides with Parents within San Francisco's boundaries, and has done so at all times at issue in this matter. She is 19 years of age and has held her own educational rights since reaching the age of majority in January 2015. Student was placed on a 504 plan in December 2013, and remained on one until San Francisco awarded her a high school diploma on December 17, 2015. She was assessed for special education during the 2014-2015 school year, but San Francisco determined that she did

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<sup>2</sup> During the hearing, the parties and witnesses referred to the instruction Student received in her home as home-hospital instruction or homebound instruction. The latter phrase will be used in this Decision.

not meet the eligibility criteria for special education.

### 2012-2013 SCHOOL YEAR<sup>3</sup>

2. Student applied for admission to Lowell High School at the end of her eighth grade year, the 2010-2011 school year. Lowell has 2,700 students, and it is highly competitive in its admissions process. Only a fraction of the students who apply are admitted. Students who graduate from Lowell not only go to college, but they are almost always admitted to their first choice college. Approximately 100 students at Lowell have IEP's.

3. Student was not admitted to Lowell for her freshman (ninth grade) year. Instead, she was admitted to her second choice, George Washington High School. However, Lowell accepted her for her sophomore (tenth grade) year, the 2012-2013 school year.

4. On November 30, 2012, Student fell in her Physical Education class and landed on her right wrist. She experienced pain and swelling and went to the school nurse, Maryann Rainey, who looked at the wrist, determined it was not broken, and sent her back to class. Ms. Rainey has been a nurse for nearly 40 years and is a credentialed school nurse. She began working for San Francisco in 2001, retiring in 2015. She is also a licensed pediatric nurse-practitioner.

5. After school on November 30, 2012, Student's family took her for medical treatment at the University of California San Francisco Hospital. She was ordered to limit use of her wrist, and began to receive physical and/or occupational therapy, which continued into February 2013. Student is right handed, and her speed and ability to

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<sup>3</sup> Although this period of time is not encompassed by the issues, it is background that informs the issues.

write and type was affected by the injury. Although Student had received A's and B's in her freshman year at Washington, and had performed well on statewide standardized testing, she completed the 2012-2013 school year at Lowell with only one A. She received a D in Honors Chemistry, a C in Honors English, and B's in three other academic courses. Student's academic counselor, Candace Boran, who worked at Lowell for two years as an academic counselor and holds a pupil personnel services credential, believed her lower grades were due to the injury. However, Student still did well on statewide standardized testing that school year.

## 2013-2014 SCHOOL YEAR

### Fall Semester

6. Many high schools nationwide offer Advanced Placement classes in many subjects. These are classes delivering college level curriculum and designed to help students who take them pass a national standardized test for the subject, referred to as the AP exam. If a student passes an AP exam, s/he can be given college credit for the course if s/he subsequently enrolls in a college or university following high school. The teachers for AP classes must be nationally certified to teach them. The curriculum is generally the same nationwide. Although a student need not pass or even take an AP class to take the related exam, completing the AP coursework for a specific AP exam is a major advantage. Most AP classes are designed for students who are in the eleventh or twelfth grade.

7. Testimony established that Lowell offers more AP classes than any other public high school in San Francisco. At the beginning of the 2013-2014 school year, Student's junior (eleventh grade) year, she lobbied Ms. Boran, to be allowed to enroll in

several AP and Honors classes.<sup>4</sup> Ms. Boran was reluctant to have her do so due to Student's wrist injury and falling grades after the injury. However, Student persevered and was subsequently enrolled in AP Biology, Pre-Calculus, AP English, AP U.S. History, Honors Physics, and Chinese.<sup>5</sup>

8. In October 2013, Student began to have increasing pain in her right wrist. It took her much longer than before to complete her homework, and often she could only write by clenching the pencil or pen in her right fist. She began to miss school, or arrive late to school, and again sought medical care at UCSF Hospital.<sup>6</sup>

9. Student's medical providers began sending notes to school seeking to excuse Student's absences, and on November 7, 2013, and November 14, 2013, notes were sent asking that schoolwork be modified to reduce the need for written assignments, and that Student be given more time for tests. However, it appears that some of these notes may have only gone to the attendance office and were not sent to

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<sup>4</sup> Many high schools offer Honors classes in various academic subjects for students who are considered to be high-achievers. These classes are more rigorous than the classes offered to other students in those subject areas.

<sup>5</sup> Multiple languages are spoken in China. The two most common are Mandarin and Cantonese. However, Student's transcript refers to the language she studied to be "Chinese," without distinguishing whether it was Mandarin or Cantonese.

<sup>6</sup> The attendance records for this school year do not accurately reflect Student's attendance. If a teacher did not send in an attendance report for a period, the attendance record defaulted to reflect a student was present for the class. Therefore, if one looks at the attendance records it often appears that Student attended a full or partial day of school even when she did not attend at all.

Ms. Rainey, who was the 504 coordinator at Lowell. Other notes asking that assignments be modified to minimize writing, and that Student be given extra time on tests were to be given to teachers by Student, but it is unclear whether this occurred. There was no evidence that any teacher ever modified classwork for Student or gave her more time for tests in November 2013. By mid-November Ms. Rainey was in contact with Student's primary care physician, Loris Hwang, M.D. At this time, Student was being extensively evaluated to see what was causing the pain and swelling of her right wrist, and what could be done to treat it.

10. Ms. Rainey contacted Student's teachers to inform them of Student's medical condition and needs on November 20, 2013. After this notification, only Student's AP U.S. History teacher, Stephanie Bellville, made any attempt to communicate with Student and express a willingness to provide her with accommodations.

11. On December 2, 2013, a meeting was held to determine if Student could qualify for a 504 plan. Student, Mother and Aunt, as well as Ms. Rainey, and Ms. Boran attended the meeting. The team decided that Student did qualify for a 504 plan, and the following accommodations were to be provided: 1) a peer notetaker; 2) extra time to complete assignments; 3) oral testing (plus some written) for AP U.S. History; 4) extra time for testing in Pre-Calculus, Chinese, English, Physics and Biology.

12. Student returned to school on December 3, 2013, expecting all of the accommodations discussed at the previous day's 504 meeting to be in place. They were not in place that day, or any day after that. Student became discouraged and stopped attending school on December 13, 2013.

13. Final exams for the fall semester were administered the week of December 17, 2013, and winter break began December 20, 2013. Student did not take any of her final exams because Parents did not want her to continue attending school, Parents felt strongly that Student should be resting and concentrating on healing. By this time,

Lowell staff knew that Student was receiving physical or occupational therapy for her wrist, was taking pain medication, and was becoming depressed due to her medical condition. Around this time, Ms. Boran suggested that Student receive counseling at the Wellness Center on the Lowell campus.

14. Aunt took on the role of being an intermediary between the family and Lowell. She was in communication with Ms. Boran, Ms. Rainey, and a Lowell Assistant Principal, Margaret Peterson. Ms. Peterson has a teaching credential and an administrative credential, and has worked for San Francisco for 20 years.

15. Aunt received inconsistent information from Ms. Boran, Ms. Rainey and Ms. Peterson. For example, prior to the 504 meeting in December, Aunt suggested that Student take a reduced load of just three classes for the spring semester, but Ms. Boran told her that was not possible. However, right before winter break began, Ms. Rainey wrote to Aunt to suggest that Student take just three classes for the spring semester.

16. During November and December 2013, Student was undergoing extensive medical testing to determine the cause of her intensive pain. Initially, she wanted to continue her enrollment at Lowell, and wanted to take a full load of classes for the spring semester. However, Parents wanted Student to take a "leave of absence" from school for the remainder of the 2013-2014 school year so that she could "heal." Aunt believed that there was a middle ground where Student could take only three classes for the spring semester, or could receive homebound instruction. However, Lowell staff believed that Student could receive homebound instruction only if she was physically unable to leave her home, and Ms. Rainey conveyed this information to Dr. Hwang.

17. At the end of the fall semester Student received the following grades: F's in Pre-Calculus, and AP Biology, D's in Chinese and AP U.S. History, and C's in Honors Physics and AP English.

## Spring Semester

18. It is unclear if Student was ever enrolled in any classes when the spring semester began at Lowell in early January 2014 following winter break. She did not come to school at all. On January 7, 2014, Aunt informed Ms. Boran via email that Student was not returning to school at that time.

### 504 MEETING OF JANUARY 24, 2014

19. On January 24, 2014, there was another 504 meeting. Student, Aunt, and Mother attended the meeting. Ms. Peterson, Ms. Rainey, Ms. Boran, and Tracy Joseph, Psy.D., Lowell's school psychologist, represented San Francisco at the meeting. Dr. Joseph received her Psy.D. in 2012, and has her pupil personnel services credential as a school psychologist. She has worked as a school psychologist at Lowell since 2006.

20. Also attending the 504 meeting was San Francisco's assistive technology specialist for the 2013-2014 and 2014-2015 school years, Karen Baca. Ms. Baca's position was under the auspices of San Francisco's Special Education Services for both of these school years. Ms. Baca has 30 years experience working with people with disabilities. She has two California teaching credentials, one a multiple subject elementary credential, and another in special education to teach physically and health-impaired students. She received her degree in assistive technology from California State University, Northridge in 2005, and also has a certificate in assistive technology. Ms. Baca was previously a teacher of students with orthopedic impairments with San Francisco. She spent seven years providing assistive technology services for school districts after receiving her assistive technology degree. She has provided services to several hundred students, and only 10 of those students were not in special education. During Ms. Baca's two years with San Francisco, only two of the 80-plus students receiving assistive technology services each school year were not special education students, and Student was one of those two.

21. At the beginning of the 504 meeting, San Francisco presented the family with a copy of a two-page letter from Dr. Hwang addressed to Ms. Rainey and the 504 team. In the letter, Dr. Hwang explained that Student was still undergoing medical testing to determine the cause of her increasing pain. Dr. Hwang detailed four previous written communications sent to Lowell by staff from UCSF Hospital asking that Student be given various accommodations, and stated that Ms. Rainey had told her that Student could only receive homebound instruction if she was "homebound." In her letter, Dr. Hwang stated that Ms. Rainey had defined homebound "as not being able to leave home and not being able to physically attend school." Based on this definition, Dr. Hwang was unable to certify that Student required homebound instruction. Although Ms. Rainey denied saying this when she testified, she did nothing at the 504 meeting, or anytime thereafter, to correct Dr. Hwang's perception of what she was required to certify so that Student could receive homebound instruction.

22. At the 504 meeting on January 24, 2014, Ms. Baca described speech-to-text software that Student could use when she returned to Lowell as a full time student. Speech-to-text technology is software that is installed on a laptop computer or tablet, and when a person dictates into the device, equivalent text is produced on the screen. This text can then be edited either manually, or through the speech-to-text software, depending on the system. However, a person must be trained to use this technology, a special microphone must be used, and the technology becomes more reliable as it becomes accustomed to the speaker's voice, and the speaker gains more experience using the software.

23. Ms. Baca also described notetaking via smart-pen technology. A peer notetaker would use the device to take notes and the notes would then be transmitted to an iPad that would be given to Student. Portions of the notes could then be subsequently transferred into other documents as necessary, such as papers or tests.

24. The parties agreed to the following 504 accommodations, but only if Student returned to Lowell: 1) peer notetaker using smart-pen technology; 2) 100 percent extra time on all assignments and the ability to use speech-to-text technology to complete assignments; 3) 100 percent extra time on tests, and administering tests orally, or giving them in a separate area if speech-to-text technology was to be used for testing; 4) reduced schedule, as needed; and 5) priority seating next to the teacher and near the board so technology could be accessed. The 504 document noted that Special Education was supplying the assistive technology.

25. It was unclear at the meeting's end when Student would return to Lowell, or what courses she would be taking if she did. She was still undergoing medical testing to determine what was causing the pain. Parents were very reluctant to have her return to school. She was not only experiencing pain in her right wrist, but the pain had traveled to her right shoulder and her leg. Her toes were beginning to discolor, and she required personal care from Mother in many areas, including dressing and toileting. Medication did little to ameliorate the pain, and often Student could not sleep due to the pain she was experiencing.

26. At the 504 meeting, Aunt, acting as spokesperson for the family, asked that San Francisco meet certain conditions before Student could return to Lowell. She tried to explain Student needed transportation to and from Lowell. Previously Student had taken public busses operated by the San Francisco Municipal Transit Agency, referred to as "Muni" by witnesses. It took one hour each way to travel from home to school and back. The family believed that Student's physical condition would make it difficult for her to take a Muni bus, and asked if transportation could be provided between home and Lowell. Aunt also expressed concern about Student's mobility on the Lowell campus, and whether she could physically traverse the campus to get from one class to another. Aunt also asked that San Francisco/Lowell, provide a written document

that would “guarantee” Student’s safety if she was to return to Lowell.

27. Although the Lowell attendees at this 504 team meeting stated during the meeting that Student was not eligible for transportation to and from school, over the next few days Ms. Peterson and Ms. Baca made inquiries, and discovered that there was a possibility that Student could obtain transportation from San Francisco. However, this information was never conveyed to the family.

28. Aunt, Mother, and Student testified that the family asked about whether Student was eligible for an IEP at this meeting. However, none of the five San Francisco witnesses who attended the January 2014 meeting remembered such a discussion. It is found that the family members who attended the meeting did not request an IEP or that Student be assessed for one at that time. However, the testimony of Student, Mother, and Aunt was otherwise generally credible.

29. At the end of the 504 meeting, San Francisco asked Mother and Aunt to notify Lowell about whether or not Student would be returning, and when. Ultimately, the family decided that Student should not attend school, and still believed that it was possible for Lowell to give her a “leave of absence” for the spring semester. Therefore, on February 12, 2014, Ms. Peterson contacted the San Francisco Pupil Services Department, which addresses problematic school attendance.

30. After the 504 meeting on January 24, 2014, Ms. Baca began email correspondence with various individuals exploring whether a laptop computer with speech-to-text software could be made available to Student. No one from Lowell contacted Ms. Baca about the speech-to-text software until April 2014.

#### 504 MEETING OF MARCH 25, 2014

31. On February 21, 2014, the first of a series of “truancy letters” signed by Lowell’s principal was mailed to Parents. They were asked to contact Lowell to discuss a solution to Student’s extended absence from school. Parents did not respond.

32. A second truancy letter was sent on March 7, 2014, in which Parents were informed that they would be notified of a mandatory conference at Lowell, and they were advised that Student's continued absence could result in a referral to the School Attendance Review Board, the Probation Department, and/or the District Attorney.

33. On March 17, 2014, another letter was sent to Parents offering a conference on either March 25, 26, or 27, 2014. Parents were informed that all of the offers made at the 504 meeting in January 2014 would be discussed. The options were 1) return to Lowell with a "light" schedule; 2) the provision of assistive technology including speech-to-text for use in the school setting; 3) transfer to Independence High School, which offered independent study courses, and required limited attendance at the school; or 4) Student could obtain her "general education diploma" (GED) by passing the GED test, which would exempt her from compulsory school attendance.<sup>7</sup>

34. On March 25, 2014, another 504 meeting was held at Lowell. Attending were Mother, Aunt, and Student, as well as Dr. Joseph, Ms. Peterson, Ms. Boran, Ms. Rainey, and John Zamora, from Pupil Services. All of the options mentioned in the March 17, 2014, letter were discussed. The family agreed to visit Independence that afternoon, primarily because Mother believed she and/or Father could be arrested if some sort of arrangement was not made for Student to attend school somewhere immediately.

35. Mother, Aunt and Student then went to Independence, accompanied by Ms. Rainey and Dr. Joseph. The principal of Independence gave them a tour of the facilities, but advised them it might take as long as two to three weeks before Student could be enrolled at Independence since it was full. However, when the principal

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<sup>7</sup> The General Educational Development test is an exam that is offered in both the United States and Canada, as well as internationally in some cases. The GED certificate is considered by some to be the equivalent of a high school diploma.

discussed Student's situation with the visitors, the Lowell 504 team members finally realized that Student's physical limitations were sufficient to meet the criteria for homebound instruction, even though she was physically able to leave her home for medical appointments, etc. Student now had a diagnosis of complex regional pain syndrome and was receiving physical therapy and acupuncture treatments weekly, and had multiple medical appointments each month.

#### HOMEBOUND INSTRUCTION BEGINS

36. Ms. Rainey sent the homebound instruction packet to the family on March 27, 2014. The packet made reference to Education Code sections related to special education such as Education Code section 56100, subdivision (a). One of Student's physicians completed and signed the appropriate page to authorize homebound instruction on March 31, 2014, indicating that Student could return to school in six weeks.

37. Ellen Speiser, a content specialist with San Francisco's Special Education Services, was the coordinator for homebound instruction. Ms. Speiser has a special education teaching credential. High school students who are receiving homebound instruction have their courses chosen for them by their academic counselor. Counselors choose courses that the student requires for a high school diploma. Ms. Boran decided that Student should take two classes, one to cover the second semester of U.S. History, and another, via computer, to cover the second semester of eleventh grade English. Ms. Baca was contacted so that speech-to-text equipment could be provided to Student. A 504 meeting was held in mid-April to modify the 504 plan so that it included

homebound instruction and assistive technology.<sup>8</sup>

38. Once Student's application for homebound instruction was approved, Ms. Speiser sent out an email to San Francisco's special education teachers to find someone qualified to teach U.S. History to provide that homebound instruction to Student. She located a part-time teacher at Galileo High School, Hilary Mimnaugh. Ms. Mimnaugh has a special education teaching credential and majored in U.S. History in college. Although it appears that Ms. Mimnaugh had agreed to teach Student by the middle of April, instruction did not begin until April 29, 2014.

39. Ms. Mimnaugh came to Student's home twice a week and worked with her for two and a half hours each session. Ms. Mimnaugh collaborated with the AP U.S. history teacher at Galileo to ensure that Student was receiving the equivalent instruction that she would receive in an AP U.S. History class. However, the class does not appear as an AP class on Student's transcript, because Ms. Mimnaugh was not a certified AP U.S. History teacher. Although Student had stopped attending Lowell in December 2013, she had continued to read her AP U.S. History textbook. On May 29, 2014, Ms. Mimnaugh orally administered a final exam for the second semester of U.S. History and Student received a B. Student took the AP U.S. History exam in the spring of 2016 and scored a five, the highest score one can receive.

40. In regards to the online computer course for English, it was decided that Student would not take that course at that time. It was thought that taking both courses at the same time would prove to be difficult for Student, and it was unclear whether she had the physical ability or stamina to take the course. In addition, the evidence

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<sup>8</sup> Several documents related to various 504 meetings have dates on them that are different than the date a meeting was held, or the date when the plan was signed, so it is difficult to ascertain, at times, when a specific 504 meeting took place.

established that the internet service in Student's home was intermittent, and the home was being remodeled which often resulted in power outages.

#### ASSISTIVE TECHNOLOGY

41. Ms. Baca came to Student's home twice in May 2014 to determine which speech-to-text software would be most appropriate for her. She determined that the best program was the most recent version of Dragon Professional software. Ms. Baca left her position with San Francisco at the end of May 2014, and she was uncertain if she would return. However, before leaving she left instructions as to what type of laptop would be needed to support the Dragon Professional software, as well as information concerning the specifics of the Dragon program she was recommending for Student. Ms. Baca believed that the computer and software would be ordered before summer.

42. No one ordered the laptop or software during the 2013-2014 school year. However, before she left at the end of May 2014, Ms. Baca was able to find an iPad that San Francisco had which had a speech-to-text program on it. Although the program did not really meet Student's needs, Ms. Baca instructed her on how to use it in May 2014, reasoning that it would be helpful for Student to become familiar with how speech-to-text programs worked.

#### 2014-2015 SCHOOL YEAR

43. At the beginning of the 2014-2015 school year, Mother submitted the paperwork to extend Student's homebound instruction. Another 504 meeting was held on September 3, 2014. Attending were Mother, Aunt, Ms. Rainey, Ms. Peterson, Student's new academic counselor Josephine Ho (who holds a pupil personnel services credential), and San Francisco's 504 coordinator (another school nurse) Diane Goldman. Lowell's information technology specialist attended part of the meeting. The 504 plan that was developed called for Student to receive homebound instruction for 300

minutes per week, and she was to be provided with a laptop computer with speech-to-text technology.

44. Jan Allen, a credentialed special education teacher was assigned to be Student's homebound instructor. Ms. Allen received her secondary education credential in 1973, and finished her master's degree in special education in 1976. She has worked in the field of education for 30 years, many of them as a resource specialist program teacher.

45. Ms. Ho determined what classes she thought Student should take in order to graduate from high school, and decided that Student should take Economics and Study Skills. Study Skills is a class period that is offered to students at Lowell and other San Francisco high schools who are struggling in one or more classes. It is taught by special education teachers, although students without IEP's may be enrolled in the class. Students who take the class are awarded elective credits. The teachers in Study Skills classes may work individually with Students to teach them notetaking strategies, test-taking strategies, time management strategies, and other tools to assist learning. Sometimes the teachers provide instruction to individual students if it appears the student is lacking a basic skill necessary to succeed in a course. Typically students complete homework in these classes. Another similar course called Skills Strategies is similarly designed for struggling San Francisco students, although it is not a special education class, nor necessarily taught by special education teachers. The descriptions of both courses are very similar in the 2013-2014 San Francisco high school course catalog, and there was credible testimony from Ms. Allen that there was little difference between the classes, and she had taught both.

46. At the time Student began her homebound instruction, she needed at least 30 units in elective credits to graduate from Lowell with a high school diploma. Based on the way San Francisco structured the homebound instruction program, it was

nearly impossible for a student receiving homebound instruction to earn elective credits. It was determined by Lowell that because it took Student longer to complete assignments, she was entitled to credits above and beyond the regular class credits for the academic courses she was taking, and this was why she was enrolled in Study Skills as well as Economics for the fall semester. Student would then “earn” five elective credits. This was not fair to Student. She was taking only one academic class for each of the semesters at issue in this case, with the exception of the spring semester of the 2014-2015 school year, when she took two. There was no specific testimony or other evidence as to the length of time it took Student to complete assignments compared to other students taking the same classes. By giving Student credits for Study Skills that were not actually earned, she was deprived of the opportunity to take meaningful elective classes of her choice.

47. Although Ms. Allen testified that she sometimes discussed notetaking with Student because her writing ability was so limited, or prelearning a subject by looking at the headings of assignments before beginning to read them, it was apparent that these discussions took only a few minutes of the time Ms. Allen spent with Student each semester, and both Ms. Mimnaugh and Ms. Allen testified that Student was very capable, and familiar with these strategies.

48. Ms. Allen was not credentialed to teach Economics, nor had she ever taught it before. Therefore, a Lowell Economics teacher was designated as the “teacher of record,” and he provided Ms. Allen with the curriculum and assignments. Ms. Allen credibly testified that she learned Economics alongside Student by helping her with assignments. Student could just have been provided the curriculum and assignments without the intervention of Ms. Allen. Without the ability to teach Student economics, it is unclear why Ms. Allen was assigned to teach this course. Student worked extremely hard to complete the course, in part because of problems with her San Francisco-

supplied speech-to-text software, as discussed below, and in part because the teacher of record was unwilling or unable to modify assignments for Student to accommodate her disability. And he would not permit Ms. Allen to do so either, but Ms. Allen did whatever she could to assist Student so she could complete the required assignments. For example, Ms. Allen used her own computer to help Student to complete PowerPoint assignments that Student was unable to complete using the assistive technology San Francisco had given her. Student received a B for the Economics class, and an A for Study Skills. Student was not given any separate course work for Study Skills and the class appeared on her transcript without any actual curriculum being provided, or instruction being given.

49. In November 2014, Student's physician asked again that the homebound instruction continue. Student continued to have pain in her entire right side that not only made it impossible to use her right hand and arm, but also impeded her ability to walk easily. Student told Ms. Allen that sometimes the pain made it difficult for her to concentrate. San Francisco extended the homebound instruction again.

#### IEP Request

50. On September 19, 2014, Mother sent a request addressed to Dr. Blanco asking that Student be assessed to see if she was eligible for special education under the categories of other health impaired, orthopedic impairment, or emotional disturbance. Dr. Joseph created an assessment plan dated October 14, 2014, and sent it to Mother who signed it on October 24, 2014, and returned it to San Francisco. Dr. Joseph received it on November 3, 2014.<sup>9</sup> The assessment plan called for Student to be

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<sup>9</sup> Timeliness of the assessment process was not raised as an issue and is not addressed in this Decision.

assessed in the following areas: academic achievement, intellectual development, and social/emotional, with an occupational therapy screening written next to a checked box titled "Other." San Francisco did not check the box for a health assessment. However, in assessing Student to determine if she met the criteria for special education as other health impaired or orthopedically impaired due to a medical condition, a formal health assessment would have been necessary given her medical condition.

51. Mother sent a letter when she returned the signed assessment plan and notified San Francisco that the parent rights form was missing. She also asked "why the health and motor development box was not marked" in the assessment plan, and why "motor development [was] covered under 'other[.]'" San Francisco subsequently sent the parent rights form to Mother, but there was no response to the remaining questions in the letter.

#### Assistive Technology

52. Ms. Baca returned to San Francisco shortly after the beginning of the school year. Again, she was the only assistive technology specialist for San Francisco for that school year, in spite of the fact that approximately 53,000 students were attending its schools. She discovered that the appropriate laptop and software for speech-to-text had never been ordered for Student, but was assured that would occur right away. In November 2014, Ms. Baca received a laptop with a version of Dragon speech-to-text software to take to Student. However, the Dragon program on the compact disc given to her was a much older version of Dragon that was not Dragon Professional, which is what Ms. Baca had determined was appropriate for Student. Further, Dragon software is always sent to the purchaser with both a compact disc that contains the software, as well as a microphone/headphone set, but the microphone/headphone set was not included when Ms. Baca received the CD and laptop.

53. Ms. Baca loaded the software on the computer, took it to Student and

conducted a couple of training sessions with her. Ms. Baca gave Student one of her own microphone/headphone sets, but it was not completely compatible with the program. Within a couple of weeks, it was obvious that this particular Dragon software was both outdated, and not appropriate for Student, due to the complexity of her schoolwork. Ms. Baca negotiated with her superiors to order the most current Dragon Professional software for Student, but ran into resistance due to cost, and it took time to get the order approved and transmitted.

54. In January 2015, the appropriate Dragon software was delivered to Ms. Baca by Ms. Goldman. Once again, there was no microphone/headphone set. Ms. Baca was not willing to give the software to Student if she did not have the right microphone/headphone set that would make the program work at its best. At the end of May 2015, Ms. Baca delivered the Dragon Professional software to Student, and provided her with an appropriate microphone/headphone set that she purchased with her own money since one had finally been ordered by San Francisco, but had not arrived. Ms. Baca often provided her own equipment to the students she serviced in San Francisco because the ordering process was so cumbersome.

55. Ms. Baca left San Francisco for other employment at the end of May 2015. However, in the fall, Student emailed Ms. Baca about problems she was having interfacing the Dragon program to her Word program. Ms. Baca referred Student to the assistive technology supervisor for the 2015-2016 school year, providing her with complete contact information. Ms. Baca also provided Student with her new work address and offered to assist Student with the problem if San Francisco could not correct the problem.

#### San Francisco Assessments

#### PSYCHOEDUCATIONAL ASSESSMENT

56. Dr. Joseph met with Student on two separate days in December 2014, and

administered several tests to Student. Her report was completed in January 2015. Dr. Joseph administered the Kaufman Assessment Battery for Children, Second Edition, and the Developmental Neuropsychological Assessment, 2nd Edition (sometimes referred to as the NEPSY II) to determine Student's cognitive abilities. The Woodcock Johnson-III Tests of Achievement were administered to gauge Student's academic achievement compared to same age peers.

57. Mother, with the assistance of Aunt, completed the Behavior Assessment System for Children, Second Edition questionnaire, as did Ms. Allen. This instrument provides guidance as to the social/emotional health of the subject. In addition, Student also completed the self-report edition of the Behavior Assessment; the Reynolds Adolescent Depression Scale, 2nd Edition; the Multi-Dimensional Anxiety Scale for Children, Second Edition; and a sentence completion task. All of these materials were valid and reliable for the purposes for which they were used. They were also comprehensive and tailored to evaluate specific areas of educational need. Trained, knowledgeable, and competent district personnel must administer special education assessments. As a school psychologist, Dr. Joseph was trained, knowledgeable and competent to administer these tests. Also, Dr. Joseph did a record review, and observed Student on the two occasions in December 2014 when she conducted her testing.

58. In the initial part of the assessment report Dr. Joseph prepared, she stated as the "Reason for Referral," that student was "being evaluated to help determine eligibility as a student with an educational disability under the categories of Other Health Impaired (OHI) and Emotional Disturbance (ED)." Although Mother had asked, in her request for assessment, that Student be assessed to see if she qualified under the eligibility category of orthopedic impairment, this was not discussed anywhere in Dr. Joseph's report.

59. A formal health evaluation was not conducted, although Student was

unable to attend school due to a medical condition. Such an evaluation and written report is normally completed by a school nurse or physician. Dr. Joseph, a school psychologist, appears to have written the Health and Development section of the report.

60. In the Health and Development section of the report, it was reported that Student suffers from complex regional pain syndrome. Dr. Joseph also reported that she had a telephone conversation with Dr. Hwang on January 8, 2015. Based on that conversation, Dr. Joseph reported that Student's "medical diagnosis seems to have morphed into Amplified Pain Syndrome where the body's nervous system registers abnormal sensitivity to pain." Dr. Joseph described Student having "limited use of her hands" associated with this diagnosis. However, nothing was said about the fact that the pain was occurring on all of the right side of Student's body, including her right leg. When a physician other than Dr. Hwang completed the Homebound Instruction application in November 2014, that doctor stated that Student had "limited ability to write, slow ambulation and limited use of [her] right arm and leg." The evidence established that at least since late winter or early spring of 2014, Student began to experience pain that affected her ability to walk easily, and this was still evident when the ALJ observed her during the course of the hearing. At the time of Dr. Joseph's report Student was seeing multiple medical doctors including a pain specialist from whom she was also receiving counseling.

61. In the Health and Development section of her report, Dr. Joseph also reported that Student had a history of migraines and a blood disorder, which was described during the hearing as causing her to bleed heavily if injured. This disorder prevented Student from being able to take many medications for her constant pain such as aspirin or ibuprofen.

62. Dr. Joseph conducted her testing of Student in English. Although Student is bilingual in both Burmese and English, she tested as early advanced in the Listening

category, and advanced in all other categories of the California English Language Development Test in January 2010, and English is her preferred language. Therefore, it was appropriate to test her in English. All of the testing completed was standardized and normed so as not to be racially, sexually, or culturally biased.

63. Dr. Joseph described Student's academic history since she entered Lowell in 2012, including the injury to her wrist, and the subsequent actions that occurred including the 504 meetings and resultant 504 plans, as well as how Student had begun to receive homebound instruction in 2014. Dr. Joseph stated that Student has "access to a district provided laptop that has talk-to-text technology . . . ." However, the psychoeducational assessment also criticized the software as being inadequate for Student's needs. In other parts of her report Dr. Joseph discussed information she received from Mother, Aunt, and Ms. Allen about the shortcomings of the software, and how frustrating it was for Student to use.

64. The results of the Kaufman showed that Student had average cognitive ability. The results of the NEPSY showed no processing deficits. Her scores on the Woodcock-Johnson showed average to superior ability in all areas tested. Student was not administered the tests in Math Calculation and Written Expression because they required her to write. However, she was able to demonstrate to Dr. Joseph that she understood math concepts and had the ability to complete math problems. Her grade for each semester in Honors Geometry for the 2011-2012 school year was a B, and she received a B in Advanced Algebra for both semesters at Lowell during the 2012-2013 school year. She received passing grades when she took Pre-Calculus 1 and 2 in summer school in 2013.

65. Dr. Joseph completed a chart showing some of Student's grades for high school courses she had completed by the time of the report, and most of her grades were in the A and B range. However, she only included the grade of B Student received

for the homebound U.S. History course for the 2013-2014 school year, and did not report Student's very low grades for the first semester of the 2013-2014 school year.

66. Student's scores on the instruments that assessed her emotional/social health were concerning. On the Behavior Assessment both Mother's and Ms. Allen's responses were very consistent, and showed Student to be in the clinically significant range in the domain of Internalizing Problems. Scores in that range "suggest a high level of maladjustment," and it is the most concerning score attainable. In addition, both Mother and Ms. Allen rated her in the clinically significant range in the area of Somatization, and in the lower at-risk range in the areas of Anxiety and Depression. Mother also rated her in the clinically significant range in the area of Leadership in the Behavioral Symptoms domain. With the exception of at-risk scores in the area of Withdrawal, all of Mother and Ms. Allen's scores in other domains and areas were in the average range.

67. Student also completed the Behavior Assessment Self-Report. She rated herself in the clinically significant range in the area of Attitude to Teachers, and the domain of Internalizing Problems. In that domain, she rated herself in the clinically significant range in the areas of Depression, Sense of Inadequacy, and Somatization. With the exception of a few at-risk scores in other areas the rest of Student's self-rating scores on this instrument were in the average range.

68. Student also completed the Anxiety Scale. There are six domains in which testing is conducted. In the Physical Symptoms domain, her score was "very elevated," the highest range, as was her score in the Separation/Panic domain. Her score in the Anxiety Disorder Index was "elevated," which is the second highest range. Her total score was in the very elevated range.

69. The Reynolds scale is another self-rating scale that Student completed to assess her level of depression. There were scores in four different areas. In two of them,

Anhedonia/Negative Affect and Somatic Complaints, Student was in the highest range, "severe clinical depression." Her scores were in the "normal" range for Dysphoric Mood and Negative Self-Evaluation, and her Total Depression score was in the "mild clinical depression" range.

70. At the end of the report, Dr. Joseph reviewed Student's test results to determine whether she met the criteria of eligibility for special education for other health impairment. Although she noted that Student did have "some degree of limited strength, vitality, and alertness due to a chronic or acute health problem that adversely affect her educational performance[,]" Dr. Joseph claimed that it did not appear that Student required special instruction and/or related services to benefit from her education because she was performing well in her homebound instruction courses, and had average to superior scores on the Woodcock Johnson. This is despite the fact that Student was receiving all of her instruction from special education teachers when she received her grades in the homebound instruction program.

71. In evaluating whether Student met the criteria for special education eligibility under the category of emotional disturbance, Dr. Joseph found that Student "does appear to be experiencing pervasive mood of unhappiness and depression," but found they were due to her physical health issues. Dr. Joseph did not explain why the underlying cause of Student's pervasive mood of unhappiness or depression would have any impact on a determination of eligibility. Dr. Joseph found that this "[did] not appear to be adversely affecting her ability to access her education," despite the fact Student was unable to attend her regular high school and participate in a regular schedule of coursework. She opined that Student could be accommodated by homebound instruction and other accommodations via a 504 plan, and also found that Student could be accommodated by 504 interventions once she was able to return to a school setting, even if only for a portion of the school day. However, there was no evidence

that anyone at Lowell made any attempt to facilitate Student's return to school once she began to receive homebound instruction.

#### OCCUPATIONAL THERAPY SCREENING

72. A San Francisco occupational therapist conducted a screening of Student in December 2014 and provided a written report. Her screening consisted of an observation of Student, and a document review. Student informed the occupational therapist that she was now able to toilet independently, but still relied on Mother to assist her in dressing. She continued to participate in physical therapy through her medical provider. The occupational therapist did not recommend that Student receive a formal occupational therapy assessment. However, she stated that if/should Student return to school, another screening should be completed to determine if she required a formal assessment, since it might be found that Student required occupational therapy to learn how to complete dressing and toileting in the school setting. San Francisco did not explain why a complete occupational therapy assessment was not completed and just a screening offered. The screening that was completed did not address Student's difficulty writing and typing, two critical areas of need for Student.

#### IEP TEAM MEETING AND 504 MEETING OF JANUARY 14, 2015

73. An IEP team meeting was held on January 14, 2015, to review Dr. Joseph's report and the occupational therapy screening report, and to determine if Student was eligible for special education. Attending the meeting were Student, Aunt, Mother, Ms. Peterson, Dr. Joseph, Ms. Ho, Ms. Rainey, Audrey Stevenson (a special education teacher at Lowell), the occupational therapist, and Ms. Allen, via telephone. Ms. Allen was

designated as a general education teacher.<sup>10</sup>

74. Dr. Joseph and the occupational therapist reviewed their reports. Ms. Allen discussed Student's academic progress during the fall term and bemoaned the fact that Student's internet service was spotty, the speech-to-text software did not do PowerPoint, and there was a reluctance of some teachers to modify assignments to allow her to use Microsoft Word to account for that. It appears there was little, if any input from Student, Mother, and Aunt.

75. San Francisco's team members determined that Student did not qualify for special education under either the category of other health impaired, or that of emotional disturbance. There was no discussion of whether she qualified under the category of orthopedic impairment. No one questioned the fact that Student had not attended Lowell for over one year, and had spent over eight months receiving homebound instruction from teachers with special education credentials. Nor did anyone comment about the apparent refusal of the Economics teacher of record to modify his assignments in light of Student's disability. Instead, the San Francisco team members believed that Student was not eligible for special education because she was getting good grades and was able to access the high school curriculum in the homebound setting, despite her inability to take a regular amount of classes or attend school.

76. Student was now 18, and was given the IEP to sign. She told the team that she wanted to take it with her to review with Father. Approximately one month later she returned the IEP consent page stating she agreed with the IEP with exception. She wrote on the form that "most of the facts on the evaluation sheets were not correct." Student

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<sup>10</sup> Student has not claimed procedural violations in terms of attendance at this meeting, and no factual findings are made in this regard.

testified credibly that there was no place on the form to say that she did not consent to the decision, so that is why she checked the box she did, with her written comment. Immediately following the IEP meeting a brief 504 meeting was held and it was agreed that the 504 plan from September 2014 would continue as is.

77. On January 14, 2015, after the IEP/504 meeting ended, Dr. Joseph sent an email to Ms. Baca expressing her concern about the inadequacy of Student's speech-to-text software and equipment. Ms. Baca responded saying she had ordered the correct equipment, and also expressed concern about Student's mental and physical health. Dr. Joseph responded and acknowledged how challenging the ordering process was in San Francisco, and told her that Student had begun to see a therapist who was a pain specialist.

#### Spring Semester Courses

78. Ms. Allen continued as Student's homebound instructor. For the spring semester Student took the second semester of 11th grade (junior) English, and American Democracy. Other than ongoing problems with the outdated Dragon software, Student experienced little difficulty completing the coursework, earning an A in both courses. Ms. Allen was qualified to teach English, and the American Democracy teacher of record was cooperative in complying with Ms. Allen's requests for accommodations and modifications she believed Student needed. Ms. Allen had previously taught American Democracy, so she was familiar with the course. Student also earned 10 credits in Skills Strategies with a grade of P[assing], despite there being no coursework for these classes. However, there were still problems that semester: Student was unable to log into her School Loop internet account at times during that semester which impeded her ability to obtain important information she needed to access her education.

79. At the end of the spring semester Ms. Bellville, Student's AP U.S. History

teacher from the 2013-2014 school year, prepared study materials for Student to take the first semester AP U.S. History exam, since her transcript reflected a D in that course for the 2013 fall semester. Student received a C, and her AP U.S. History grade was changed from a D to a C. Also, at some point before the 2015-2016 school year began, her 2013 fall semester grade in Chinese of a D became an Incomplete, which served to improve her cumulative grade point average.

### 2015-2016 SCHOOL YEAR AND GRADUATION

80. When the 2015-2016 school year began, Student anticipated that she would meet graduation requirements by the end of the school year, and would then receive a high school diploma. She was a fifth year senior. She had passed the California High School Exit Exam in both Math and English when she took it in February 2013. Ms. Allen continued to be Student's teacher for homebound instruction for the fall semester of the 2015-2016 school year.

81. Students must complete four years of coursework in English Language Arts in order to graduate from Lowell. For the first three years of high school at Lowell there is a required English course for each year, including AP English classes. For the fourth year, students are able to take two semester-long courses to meet this requirement, and for the 2015-2016 school year several different courses were available. At the beginning of the fall semester Student enrolled in a semester-length course entitled European Literature. It was anticipated that she would take another semester-length English Language Arts course in the spring, and then her English Language Arts requirement would be satisfied.

82. Although Student had wanted to take additional math and science classes after she began to receive homebound instruction, she was told that she could not take math classes because no qualified teacher could be found to teach the higher-level classes she was qualified to take, such as calculus. Students must take a minimum of two

years of math in high school in order to graduate, and Student had met the minimum requirements for math before she stopped attending school at Lowell. She had also met the minimum requirements of two science classes before she stopped attending school at Lowell, and Student was told she could not take any further science classes as a homebound student because science classes required lab periods, which required the student to physically attend a high school lab class. However, Student had originally been on track to attend college after high school and the admission requirements for both California State Universities and the University of California require more than just two math courses and two science courses, which is why she had requested additional math and science courses.

83. In order to get a high school diploma from Lowell, a student is also required to take 10 semesters of five unit elective classes, which results in 50 units of credit. However, Student was told that elective classes were generally not available to homebound students, again because qualified teachers could not be found to teach such courses. Ms. Allen was able to teach art, but there was no evidence this was ever discussed with Student. Prior to beginning homebound studies, Student had earned 20 elective credits. During the fall semester of 2014, Student had earned five units with a grade of A in Study Skills. In the spring semester of 2015, Student also had a grade of P[assing] in two five-unit courses of Skills Strategies, according to an August 25, 2015 transcript. There was no evidence that there was any substantive coursework in any of these elective classes, and for some semesters, Student was not aware that she had been awarded credits for these classes, or that they were on her transcript.

84. At the beginning of the 2015-2016 school year, Student still needed to earn 15 additional elective credits to graduate, and she needed to complete two one-semester English elective courses to complete her English requirements so that she could earn a high school diploma. At some point during the fall semester, Ms. Peterson,

Ms. Ho and Dr. Joseph began discussing the possibility of graduating Student from Lowell with a diploma at the end of the fall semester, December 18, 2015. For this to happen, they needed to find 15 additional elective credits that could be placed in her transcript, as well as another English course for her to take and complete by the end of the fall semester. Therefore, five credits for Skills Strategies with a grade of A was added to her transcript for the spring semester of 2014, when she completed the second semester of U.S. History via homebound instruction by Ms. Mimnaugh. The grades of P for the 10 additional credits for Skills Strategies in the spring semester of 2015 were changed to A's. In addition, another 10 credits of Skills Strategies with a grade of A were ultimately added to Student's transcript for the fall 2015 semester. Lowell staff justified the addition of Skill Strategies and Study Skills credits by claiming that she had to work harder than other students to complete the work in her academic classes due to her physical disability that impeded her ability to write and type. However, it is found that these credits were added to her transcript merely to satisfy the requirement that a student needed 50 elective credits to graduate.

85. At some point in mid or late November 2015, Ms. Ho contacted Ms. Allen and questioned her about how much of the European Literature course Student had completed. Ms. Allen told Ms. Ho that Student was going to be able to complete the course by the end of the semester. Ms. Ho then told Ms. Allen that European Gothic Literature was being added to Student's schedule for the fall semester. Ms. Allen then asked Student to read the novel, Jane Eyre. There was no evidence that Student completed any other assignments that would have been included in a Gothic Literature course.<sup>11</sup> Ms. Allen gave Student an A in both courses for the 2015 fall semester.

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<sup>11</sup> Student's assignments for English Language Arts for the fall semester of the 2015-2016 school year were included as an exhibit and admitted.

86. In mid-December 2015, Ms. Ho informed Student that she now had sufficient credits to receive her high school diploma. On December 17, 2015, Ms. Ho and Ms. Peterson came to Student's home and gave her a Lowell High School diploma and a certified transcript. The certified transcript indicated that there were 10 units of Skills Strategies that needed to be completed ("work in progress"). The transcript was finalized in January 2016 to reflect Student earned A's in two Skills Strategies classes during the fall semester.

87. The documentary evidence that was admitted included several versions of Student's high school transcript as it appeared at various times during the time period at issue. Adjustments to the transcripts can be seen, resulting in Student's cumulative grade point rising with each adjustment by either giving her an A for a class that had previously been graded as "pass/fail," or expunging classes from the 2013-2014 school year that she had failed.

#### STUDENT'S CURRENT STATUS

88. Student attended each day of the hearing. She wears a brace on her right wrist, and did not seem able to use her right hand at all. Aunt and Mother often assisted her when she sat down or rose from her chair. She walks very slowly, and often uses a crutch on her left side to assist her in walking although she did not use a crutch during the hearing. She tires easily, but credibly testified that she has good days and bad days. Student rarely leaves her home, and it is unclear whether she has any social relationships with peers. However, there was no evidence that she could not access post-secondary education if given appropriate accommodations. When she took the Scholastic Aptitude Test in December 15, 2015, with accommodations, Student obtained a score of 680 in reading, placing her in the 94th percentile nationally and 93rd percentile statewide for college-bound seniors. Her math score was 570, placing her in the 68th percentile nationally, and the 70th percentile statewide. Student's writing score was 530,

placing her in the 65th percentile both nationally and statewide. Although Student complained about the quality of accommodations she was given, such as the skills of the scribe she was provided, these scores indicate that Student should be able to succeed in college, especially if given appropriate accommodations.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>12</sup>

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. §

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<sup>12</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these

phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student bore the burden of persuasion.

#### ISSUE 1: CHILD FIND VIOLATION

5. Student contends that San Francisco should have assessed her for special education and was therefore denied a FAPE between May 19, 2014 and January 14, 2015. Student argues that San Francisco was notified by Dr. Hwang in January 2014 that it was likely Student would be diagnosed with complex regional pain syndrome, and at that time knew that her family believed she was unable to attend school. Student points out that she was removed from AP and Honors courses for the spring semester of the 2013-2014 school year because San Francisco believed her medical condition limited her ability to complete the work. Student also argues that her falling grades at the end of the fall semester of the 2013-2014 school year should have alerted San Francisco that

she needed to be assessed for special education.

6. San Francisco argues that it did not have reason to suspect her disability was one that would qualify her for special education, and her previous academic success supported its position. Further, San Francisco contends that Student's doctors, family, and Student herself did not believe she required special education. San Francisco also claims that Student's failure to attend school does not establish a need for special education.

#### Assessments for Suspected Disabilities

7. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivisions (a) and (b).

8. A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d. 1105, 1119-1123; *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp. 2d 1190, 1194 (*Cari Rae S.*)). The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

9. A school district's child find duty extends to all children "suspected" of having a qualifying disability and a need for special education. (34 C.F.R. § 300.311 (c)(1); *N.G. v. Dist. of Columbia* (D.D.C. 2008) 556 F. Supp.2d 11, 26 .) "[A] child should not have

to fail a course or be retained in a grade in order to be considered for special education and related services.” (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46580 (Aug. 14, 2006).) That a student made adequate educational progress is not a valid reason not to assess if there is reason to believe that student may qualify for and require special education. (34 C.F.R. § 300.111(c)(1); *Cari Rae, supra* 158 F.Supp.2d at p. 1196-1197.) A school district’s child find duty is not dependent on any request by the parent for special education testing. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301; *Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518 .)

10. In analyzing a child find violation, the actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

11. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child’s eligibility for special education. (20 U.S.C. § 1414(a)(1); 34 C.F.R § 300.301; Ed. Code, § 56302.1; (*N.G. v. Dist. of Columbia* (D.D.C. 2008). 556 F.Supp. 2d 11, 26-27).)<sup>13</sup>

#### Procedural Violations

12. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae, supra*, 158 F.Supp.

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<sup>13</sup> In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code, § 56302.5.)

2d at p. 1196; *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025 F.3d 1025, 1031.) A procedural violation denies a child a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 [superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 939].)

#### Homebound Instruction

13. In California any child between the ages of six and 18 must attend school, unless s/he is exempt. (Ed. Code § 48200.) If a general education student is unable to attend school due to a "temporary disability," s/he may be eligible for individual instruction, which may occur in the home. (Ed. Code § 48206.3, subd. (a).) A temporary disability is a "physical, mental, or emotional" condition, from which the student is expected to recover and resume regular school attendance. (Ed. Code § 48206.3, subd. (b)(2).)

#### Educational Placement for Special Education Students

14. A specific educational placement means that unique combination of facilities, personnel, location, or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one, or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042.) The continuum of placements includes specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; special instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication

instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

#### HOME/HOSPITAL PLACEMENT

15. A student with a disability who has been found eligible for special education as described in Education Code section 56026, is subject to rules in order to obtain home/hospital placement. Title 5, California Code of Regulations, section 3051.4 describes the circumstances under which such a child should be offered home/hospital instruction by a school district. Generally, home/hospital instruction is limited to pupils with exceptional needs resulting from a medical condition related to surgery, accidents, short-term illness, or medical treatment required for a chronic illness. (*Ibid.*)

16. The IEP team must have a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. (Cal. Code Regs., tit. 5, §3051.4 (d).) The report must include a projected calendar date for the pupil's return to school. The IEP team must meet to reconsider the IEP prior to the projected calendar date for the pupil's return to school. (*Ibid.*)

#### Analysis

17. Student's grades had fallen after her injury in November 2012, and her 2013 fall semester grades were even lower, in part due to absences caused by her physical condition, in part due to the fact that she was unable to take her final exams because of her physical condition, even if accommodations had been in place, and because Parents did not want her going to school due to her physical condition. San Francisco was aware of her absences and that her inability to take exams was directly caused by her physical condition. Therefore, it was evident that she was having difficulty being able to access the curriculum due to her physical condition, a factor that should

have led San Francisco to assess Student to see if she was eligible for special education.

18. San Francisco was also aware that Student had frequent medical appointments and was taking medication. She had physical therapy appointments weekly, as well as weekly acupuncture appointments. Several members of the Lowell staff thought Student was depressed, and they were also told that by her family. Lowell staff recommended counseling, but Student refused. The counseling recommended was on the Lowell campus, an hour-long bus ride from her home, and she was unable to attend school. Again, this should have alerted San Francisco that a special education assessment was necessary.

19. Student should have been offered homebound instruction by the time of the 504 meeting on January 24, 2014. However, Lowell staff mistakenly believed that this was not an option because she was able to leave home for doctor appointments and physical therapy. Further, after the initial 504 meeting in December 2013, Student discovered that although accommodations were offered, they were not implemented. The evidence also established that even with accommodations including transportation, Student would not have been able to attend school for a full day, and take a full load of six classes. A reduced course load and partial day attendance was not offered to Student until the 504 meeting in January 2014, and even then there were no specifics as to what part of the day Student would attend school, and what courses she would take. Further, although San Francisco staff subsequent to the January 2014 meeting, discovered that Student could be provided with transportation as part of a 504 plan, that information was never conveyed to her or anyone in her family.

20. When Student was first approved for homebound instruction in April 2014, the physician certifying the need for such instruction stated that it was anticipated she could return to school in six weeks. However, San Francisco was very much aware that Student had not attended school since December 13, 2013, and her condition had

worsened since then. There had been three 504 meetings up to that point, but the accommodations recommended were created with the thought that Student would be returning to Lowell, or some other school. Yet Lowell staff did not see this as a sign that she should be assessed for special education because in their minds she was a capable student who did not need specialized academic instruction to access the educational curriculum. It is also noted that many of the San Francisco witnesses who testified referred to Student's homebound instruction as "home/hospital instruction." Accordingly, it is found that San Francisco failed to meet its child find obligation as of May 19, 2014, and beyond, by failing to assess Student for special education.

21. In her closing argument Student argued that it should be found that she was denied a FAPE because she should have been assessed and found eligible for special education as early as May 19, 2014, if not sooner, and provided with services. However, the issues as stated in this Decision are those discussed with the parties at the prehearing conference on August 8, 2016, and contained, word for word, in the order following the PHC that was issued on August 9, 2016. At that time Student did not claim that she was eligible for special education between May 19, 2014, and January 14, 2015, nor did she request or establish that during the hearing. A violation of child find is a procedural violation, but unless the child was eligible for special education at the time of the procedural violation, there cannot be a finding of a denial of a FAPE. (*R.B. v. Napa Valley Unified School District*, (9th Cir. 2007) 496 F.3d 932, 942.) Student did not establish that she was eligible for special education between May 19, 2014, and January 14, 2015. There was no expert testimony to this effect, independent educational evaluations, or any other evidence of eligibility presented at hearing. Accordingly, Student did not show that this child find violation resulted in a denial of FAPE.

## ISSUE 2: ELIGIBILITY FOR SPECIAL EDUCATION

22. Student contends that San Francisco should have found her eligible for

special education under the category of other health impaired from January 14, 2015, through her graduation in December 2015, because she had limited vitality and alertness due to her medical condition, and therefore could not access her education. She also argues that San Francisco did not evaluate Student in all areas of suspected disability, since it did not do a health assessment, and only evaluated her in the areas of cognitive functioning, academic achievement, and social/emotional needs. San Francisco contends that since Student was making good grades and had good academic test scores, she did not require special education and related services, and therefore did not meet the eligibility criteria. San Francisco contends that Student failed to establish that she required specialized academic instruction in order to access the curriculum.

#### Eligibility Criteria

23. Although a student may be obtaining satisfactory grades, and have the knowledge and skills typical of a student of his age and in his grade at school, he may still qualify for special education services as a student with other health impairment. (*M.P. v. Santa Monica Malibu Unified School Dist.*, (C.D. Cal. 2008) 633 F.Supp. 2d 1089; *W.H. v. Clovis Unified School Dist.*, (E.D.Cal.) 2009 WL 1605356; *Student v. Brea Olinda Unified School District* (2009), Cal.Ofc.Admin. Hrngs. Case No. 2009050815.)

24. In *County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458, 1467, the court specified that “educational benefit” is not limited to academic needs, but instead includes the social and emotional needs that affect academic progress, school behavior, and socialization.

25. A student is eligible for special education and related services if he is a “child with a disability” such as an emotional disturbance, other health impairment, or specific learning disability and, as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b) [uses term

"individual with exceptional needs"1.) A student shall not be determined to be a child with a disability if the prevailing factor for the determination is a lack of appropriate instruction in reading or mathematics or if the student does not otherwise meet the eligibility criteria under federal and California law. (20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b); Ed. Code, § 56329, subd. (a)(2).) California further specifies that a student whose educational needs are primarily the result of a temporary physical disability, social maladjustment, or environmental, cultural, or economic factors, is not an individual with exceptional needs. (Ed. Code, § 56026, subd. (e).)

26. California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a child as an individual with exceptional needs and thereby entitle the child to special education if required by the degree of the child's impairment. However, there are many students who have varying levels of deficits, areas of need, and disabilities, who do not qualify for special education because they do not fall within one of the narrow categories specified by law.

27. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine whether the student can receive some educational benefit from the general education classroom. In a recent case, the Ninth Circuit found that if a child was receiving services that appeared to be special education there is a strong probability that the child is eligible for special education, even if he is making educational progress. (*L.J. v. Pittsburg Unified School District* (9th Cir. Sept. 1, 2016), --- F.3d--- [2016 WL 4547360] (*L.J. v. Pittsburg*)). Some of the services described by the court included accommodations such as "persistent teacher oversight, additional time to complete classwork or tests, shortened assignments, discretion to leave the classroom at will, or the option to complete classwork or tests in other rooms, or with one-on-one support." In addition, the court considered that the student was taught by a teacher who had special education experience for one year. (*Ibid*, pp. 7-8)

28. An administrative law judge has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda La Puente Unified School Dist. v. Honig* (9th Cir. 1992) 976 F.2d 487, 492-493.) If a district has failed to properly identify a student as eligible for special education, and therefore failed to develop an appropriate IEP for the student, the district has denied the student a FAPE. (*Cari Rae S., supra*, 158 F.Supp.2d at 1196.)

#### Other Health Impairment

29. A student may meet the eligibility criteria for other health impaired if he has "limited strength, vitality or alertness" in the educational environment due to a chronic or acute health problem such as asthma, attention deficit hyperactivity disorder, diabetes, for example. This limited strength, vitality or alertness must affect the student's ability to access the educational environment and adversely affect educational performance. (Cal.Code Regs., tit. 5, § 3030, subd. (b)(9).) To be eligible for special education as a student with other health impairment, the student must be unable to access the curriculum without special education instruction and related services. (20 U.S.C. § 1401(3)(A)(ii); Ed. Code § 56026, subd. (b).)

#### Assessment Standards

30. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) By this standard, the assessment prepared by Dr. Joseph was an initial assessment of Student.

31. In conducting an assessment, a school district must follow statutory

guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials in the student's native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable, and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.)

32. If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a) ; 56321, subd, (a).) The plan must explain, in language easily understood, the types of assessments to be conducted. (Ed. Code, § 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).)

33. In performing an assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child's special education program are needed. (20

U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) In performing an assessment, an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).) Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. (Ed. Code, § 56327.) A student with a chronic health condition may be referred for a health assessment by the school district. (5 Cal. Code Reg. § 3021.1.) A health assessment shall be conducted by a credentialed school nurse, or a physician. (Ed. Code §56324, subd. (b).)

34. Upon completion of the assessment, the determination of whether the child is a child with a disability must be made by a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) The IEP team, or other qualified professionals must review the existing data regarding the student and determine, with parental input, what additional data is needed to determine questions regarding whether a student is a "child with a disability," the present level of achievement and related developmental needs of the student, and whether the student needs special education and related services. (20 U.S.C. §§ 1414(c)(1)(A)&(B).)

#### IEP Development

35. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement

of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

36. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

#### Analysis

37. It has already been determined that San Francisco should have suspected that Student needed to be assessed for special education long before May 19, 2014. However, an assessment plan was not offered to Mother until the fall of 2014, after Mother requested that Student be assessed.

38. When Dr. Joseph conducted her special education assessment of Student, she used multiple instruments conducted in English, a language in which Student had been found to be proficient, and the tests were not culturally, racially or sexually discriminatory. They were valid and reliable, and Dr. Joseph was qualified as a school psychologist to conduct the psychoeducational assessment. However, the evidence showed that the assessment did not correctly determine whether Student met the eligibility criteria in both other health impaired and emotional disturbance. Further, in September 2014, Mother had asked that Student be assessed for special education under the categories of other health impaired, emotional disturbance, and orthopedic impairment. Under these circumstances, a complete health evaluation should have been conducted by a credentialed school nurse or physician and presented to the IEP team,

along with Dr. Joseph's psychoeducational evaluation. Failure to do a formal health assessment meant that the IEP team did not have sufficient information to make an informed decision about Student's eligibility for special education, and what services she might need. In addition, rather than an occupational therapy screening, given Student's limited ability to write and type, San Francisco should have conducted a full occupational therapy assessment.

39. In *L. J. v Pittsburg, supra.*, at page 10, the court found a procedural violation was committed because a health assessment was not completed, although Pittsburg knew that the child was on medication for attention deficit hyperactivity disorder. The court determined that failure to conduct a health assessment meant the IEP team did not have sufficient information and thus deprived the child a FAPE. The same thing is true in this case; more information was needed by the team in order to make the determination of whether Student met the eligibility criteria for other health impairment. The San Francisco members of the IEP team ignored the fact that Student had not attended school for over a year, and by the time of the January 15, 2014 IEP team meeting, Student's disability was a chronic medical condition that did not seem to be improving, and she was still receiving medical treatment and counseling for it. Further, they knew that Student was having great difficulty writing and typing, two critical requirements for a high school student. For all these reasons, San Francisco's assessment of Student was deficient.

40. San Francisco members of the IEP team believed that Student was not eligible for special education under the other health impaired category because she was getting A's and B's in her homebound program and thus making educational progress. Further, her scores on the Woodcock-Johnson showed her to be at or above the expected level academically for a student her age, and she had received good scores on standardized testing administered before the end of the 2011-2012 and 2012-2013

school years. The San Francisco team members ignored Student's year-long absence from school and her fallen grades during the 2012-2013 school year. Her grades fell even more during the 2013 fall semester. Her grades improved once she was receiving homebound instruction from teachers with special education credentials. San Francisco staff also ignored the fact that Student was unable to take the required courses for high school graduation as a homebound Student, which was later confirmed by San Francisco's awarding of elective and English credits for courses which were not completed.

41. San Francisco team members also believed that although the testing revealed Student was suffering from depression and anxiety, her good grades and academic testing showed she did not need special education. This ignored the fact that Student was only taking a class or two each semester on homebound instruction, and could not attend school. Also importantly, this ignored the fact that because she was not attending Lowell, Student was socially isolated and missing all of the activities enjoyed by students in a large public high school such as athletic events, proms, and an active social life. Had Student been found eligible for special education, goals could have been developed to transition her back to the school setting, particularly if the team was willing to work with her doctors, and transportation was arranged to get her to and from school.

42. Looking at Student's circumstances in light of *L. J. v Pittsburg*, it should be noted that her homebound teachers had special education credentials and provided her with specialized individualized instruction in light of Student's very limited ability to write and type. Further, the forms completed to authorize homebound instruction had multiple references to special education law, and the assistive technology specialist worked for Special Education Services. In addition, many of the accommodations on her 504 plans prior to homebound instruction beginning were the same as those mentioned

in *L. J.* as being special education accommodations such as additional time for assignments and tests, tests administered orally, and taking tests in a separate room from other students.

43. At the time of the IEP team meeting January 14, 2015, Student had limited strength, vitality, and alertness due to her chronic regional pain syndrome. As a result of her chronic pain, she was unable to attend school, and had great difficulty completing assignments due to her limited ability to use her right hand for writing and typing. Sometimes the pain made it difficult for her to concentrate. Student was receiving homebound instruction from teachers who had special education credentials, and modified instruction by limiting assignments that required typing or writing, allowing her to take tests orally, and providing her with additional time for testing and completion of assignments, among other things. Student established that she required special education to access the curriculum.

44. Student met her burden of proof that she should have been found eligible for special education under the category of other health impaired at the IEP team meeting of January 14, 2015, and that she should have been eligible from January 14, 2015 through December 2015.<sup>14</sup>

### ISSUE 3: DENIAL OF A FAPE

45. Student contends that she was denied a FAPE from January 14, 2015, through at least December of 2015, because she was not found eligible for special education at the IEP team meeting of January 14, 2015, and thus not provided with specialized instruction and related services. San Francisco argues that Student was not

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<sup>14</sup> Student only put at issue whether she was eligible for special education under other health impairment.

eligible for special education, and therefore was not denied a FAPE.

46. As discussed above, Student did not establish that she was eligible for special education prior to January 14, 2015. However, she should have been found eligible at the IEP team meeting on January 14, 2015, and been offered appropriate goals to meet her areas of need, transition planning, specialized instruction and related services, as will be discussed below. Thus, Student was denied a FAPE from January 14, 2015, to December 17, 2015.

#### Additional IEP Requirements

##### EXTRACURRICULAR AND NONACADEMIC ACTIVITIES

47. An IEP shall include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

##### TRANSITION PLANNING

48. For each student, beginning with the first IEP to be in effect when the student is 16, the IEP must include a statement of the transition service needs of the student. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII).) Transition services are defined as a coordinated set of activities that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation. It is based on the student's needs, taking into consideration the student's strengths, preferences and interests; and includes instruction, related services community experiences, the development of employment and other post-school adult living objectives, and if

appropriate, acquisition of daily living skills and a functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

### Analysis

49. Because it has been determined that Student should have been eligible as of January 14, 2015, she should have been given an IEP, and this did not happen. As previously discussed, an IEP could have addressed a transition back into school, at least part time and could have contained a goal in that regard. Further, an IEP could have contained goals to address her depression and anxiety, as well as containing an offer of counseling related to returning to school. The IEP team could have required San Francisco to arrange transportation for Student to and from Lowell. The IEP team would have been required to consider what would happen to Student after high school, and then Student would have been given appropriate transition goals and counseling regarding post-secondary education. The IEP team would have been able to address Student's isolation from her peers by considering what kind of extra-curricular activities she could participate in. Instead, under the auspices of a 504 plan, San Francisco gave her only the homebound instruction she needed to get a high school diploma, and nothing more. Thus, it is determined that Student was denied a FAPE from January 14, 2015, to the date of her graduation from high school.

### ISSUE 4: HIGH SCHOOL GRADUATION

50. Student claims that OAH has jurisdiction to rescind Student's high school diploma under the IDEA and cites cases from several jurisdictions, but none of these cases are from the Ninth Circuit. San Francisco correctly contends that OAH is without authority to rescind Student's high school diploma.

## Student's High School Diploma

51. The issue of whether an individual with exceptional needs will receive a regular high school diploma when s/he graduates from high school is not addressed by the IDEA. (Letter to Anonymous, 22 IDELR 456 (OSEP 1994).) Nor does the IDEA establish standards for graduation as a general matter. (Letter to Richards, 17 IDELR 29.) The establishment of appropriate, substantive standards for graduation is entirely a matter of state law for both disabled and nondisabled students. (71 Fed. Reg. 46577 (2006); Letter to Anonymous, *supra*.)

52. In California, no diploma, certificate, or other document, except transcripts and letters of recommendation, shall be conferred on a pupil as evidence of completion of a prescribed course of study or training, or of satisfactory attendance, unless the pupil has met the standards of proficiency in basic skills prescribed by the governing board of the high school district or equivalent thereof. (Ed. Code, § 51412.)

## Analysis

53. OAH does not have jurisdiction over Student's Issue 4. OAH does not have jurisdiction to determine the validity of Student's high school diploma because she was not a special education student at the time San Francisco awarded Student her diploma. All of the cases cited by Student in her closing brief concern students who already had IEP's when they filed their complaints. Here, Student was awarded 30 elective credits for Skills Strategies and Study Skills because other electives were purportedly unavailable to her as a homebound student, and Ms. Ho and Ms. Peterson appear to have been reluctant to have her continue as a fifth year senior at Lowell. It is questionable whether Student actually completed a second semester of senior English, which was a five-credit course. Although OAH does not have jurisdiction over Student's Issue 4, the fact that Student could not take elective courses of her choice, and was given credit for a semester of senior English that she did not take, has been taken into consideration in

crafting the award of compensatory education.

## REMEDIES

1. Student has asked that San Francisco be ordered to fund 40 units of college credit, transportation and transportation support for Student to attend college, and provide her with assistive technology, including speech-to-text software that can be used to take classes in mathematics, social studies, English, and science. San Francisco asks that her requests for relief be denied.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia, supra*, 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

3. Staff training can be an appropriate remedy for a Student who was denied a FAPE; the IDEA does not require compensatory education services to be awarded directly to a student. (*Park v. Anaheim Union High School Dist., supra*, 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil

involved, or to remedy procedural violations that may benefit other pupils. (*Ibid; Student v. Reed Union School District*, (Cal. SEA 2008) 52 IDELR 240 [109 LRP 22923] [requiring training on predetermination and parental participation in IEP's].)

4. Student prevailed on portions of two of the four issues decided in this matter and fully prevailed on a third. San Francisco deprived Student a FAPE from January 14, 2015, because it did not find her eligible for special education under the category of other health impaired. She was prevented from taking 30 units of elective courses of her choosing, and instead was given 30 units of credit for Study Skills and Skills Strategies, courses she did not, in fact, take or choose. Although five of those units were earned during the fall semester of 2014, prior to IEP team meeting in January 2015, it is likely that this award of empty elective credits could have been remedied by way of an IEP. Further, she was given credit for an English course that she did not complete. Therefore, Student did not in fact earn 35 semester units of credit that are reflected in her transcript.

5. Because Student already has a high school diploma, returning her to Lowell is not feasible. However, she is entitled to compensatory education. The evidence established that Student is intellectually able, and desirous of going to college and obtaining a degree, although she missed out on foundational courses which would have prepared her for college and was given credits for classes not taken. However, she will need various accommodations to attend college based on her physical disability. While colleges and universities that receive federal funding have offices that assess students with disabilities to determine what accommodations they might need in order to access a college education, Students with IEP's often are assessed shortly before graduation so that a detailed list of recommendations can be provided to the college or university they will attend. This should have been a part of Student's transition plan, which was not provided to Student due to San Francisco's flawed determination that she was not

eligible for special education. Therefore, San Francisco shall fund an independent transition evaluation by a psychologist trained in assessing students with disabilities to determine what they might require in terms of accommodations to attend a college or university and other considerations to ensure Student's access and to help her succeed in college. Student shall choose the assessor, who must meet San Francisco's criteria for such assessments. San Francisco shall also fund an independent assistive technology assessment to determine what assistive technology Student requires to attend college, and shall also pay for assistive technology that Student may require for her first 35 units of college. Student shall choose the assistive technology assessor who must meet San Francisco's criteria for such assessments.

6. In addition to funding the above assessments, and funding assistive technology required by Student, San Francisco shall pay for the tuition, books, fees and costs, for the equivalent of up to 35 semester units of college credit at any public college or university in California where Student can be or has been admitted. San Francisco shall also pay for round-trip transportation (up to 50 miles one-way) from any place Student is residing to where she is attending school. Because it may not be feasible for Student to complete 35 semester units of college credit in one year due to her health limitations, and the time it takes to be admitted and enroll in a college, she shall have access to this funding until June 30, 2020.

7. To increase the special education knowledge of Lowell staff, all teachers and administrators shall be required to attend a 90-minute training on child find and special education accommodations and modifications. Lowell's special education personnel shall be required to attend that training, as well as an additional training of three hours to address proper assessment and special education eligibility. The trainings shall not be conducted by San Francisco employees, but by qualified outside professionals, such as experienced special education attorneys.

## ORDER

1. San Francisco shall fund a transition evaluation by a psychologist of Student's choice who meets San Francisco's assessment criteria so that it can be determined what accommodations and transition services she will need to attend a college or university to which she has been admitted.

2. San Francisco shall fund an independent assistive technology assessment by a qualified assessor of Student's choice to determine what assistive technology she requires to attend college, and shall pay for the recommended assistive technology for 35 semester units.

3. San Francisco shall pay for the tuition, books, fees and costs, for the equivalent of up to 35 semester units of college credit at any public college or university in California where Student can be or has been admitted. San Francisco shall also pay for round-trip transportation (up to 50 miles one-way) from any place Student is residing to where she is attending school. Nothing in this order requires Student to continue living in the family residence. Student shall have access to this funding until June 30, 2020.

4. All teachers and administrators at Lowell shall be required to attend a 90-minute training on child find, and special education accommodations and modifications. Lowell's special education personnel shall be required to attend that training, as well as an additional training of three hours to address proper assessment and eligibility. The trainings shall not be conducted by San Francisco employees, but by qualified outside professionals, such as experienced special education attorneys.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue 2, and partially prevailed on Issues 1 and

3. San Francisco prevailed on Issue 4 and partially prevailed on Issues 1 and 3.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: November 7, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
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REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings