

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

HANFORD ELEMENTARY SCHOOL
DISTRICT.

OAH Case No. 2018100372

DECISION

On October 8, 2018, Student filed a due process hearing request with the Office of Administrative Hearings naming Hanford Elementary School District. Administrative Law Judge Theresa Ravandi heard this matter in Hanford, California, on January 22 and 23, 2019.

Student's Mother represented herself and Student. Lay advocate Alfonso Padron assisted Parent at hearing. Student did not attend.

Deborah Ettinger, Attorney at Law, represented Hanford. Karen McConnell, Assistant Superintendent for Special Services, appeared as Hanford's representative.

At the conclusion of the hearing, the matter was continued at the parties' request to February 11, 2019, to afford them an opportunity to file written closing briefs. The record closed with the parties' timely submission of closing briefs, and the matter was submitted for decision.¹

¹ Student's closing brief references information that was not introduced into

ISSUES

Issue 1: Did Hanford fail to comply with its child find obligations as to Student from October 8, 2016, to the time of hearing?²

Issue 2: Beginning October 8, 2016, to the time of hearing, did Hanford fail to assess Student in all areas of known and suspected disabilities, specifically by failing to conduct a functional behavior assessment and failing to assess in the area of other health impairment?

Issue 3: Did Hanford deny Student a free appropriate public education from October 8, 2016, to the time of hearing, by failing to find him eligible under the category of other health impairment?

SUMMARY OF DECISION

Hanford assessed Student for special education eligibility in February and March of 2016, and determined that he did not qualify pursuant to the categories of specific learning disability, other health impairment (based on his diagnosis of attention deficit hyperactivity disorder), or emotional disturbance. Student did not establish that Hanford violated its child find responsibility. Following its ineligibility determination, Hanford

evidence at hearing. This information was not considered in this Decision.

² The ALJ has reworded this issue to clarify that Student was not contending a global child find violation regarding Hanford's general policies and procedures. Such clarification is allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].)

continued to provide Student a Section 504 Plan³ and the support of a behavior intervention plan. Within seven months of his initial assessment, Student's presentation changed despite these general education interventions. He was distracted, had a hard time focusing on academics, and showed limited stamina. He disengaged from learning and exhibited increasingly dysregulated behavior which resulted in his removal to a community day school.⁴ Student's changed circumstances and presentation warranted reassessment in the area of other health impairment beginning March 31, 2017. Hanford staff's informal observations and subjective views that Student's presentation was consistent with his conduct and oppositional defiant disorders, as opposed to his diagnosis of attention deficit hyperactivity disorder, did not discharge its duty to reassess. Student did not prove that Hanford was required to conduct a functional behavior assessment.

Hanford's failure to reassess Student constitutes a procedural violation which continued until October 8, 2018, when it provided Parent a comprehensive assessment plan. However, Student did not meet his burden of proving that he qualified for special education and related services pursuant to the eligibility category of other health impairment, the only category alleged. Hanford's procedural violation did not deny

³ A "Section 504 plan" is an educational program created pursuant to the federal anti-discrimination law commonly known as 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.

⁴ A community day school is an alternative general education setting for students with severe behavioral challenges who have violated a code of student conduct.

Student a FAPE as only eligible students are entitled to receive a FAPE. As such, this Decision awards no remedy.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 13-year-old eighth grader who resides with Parent within Hanford's jurisdictional boundaries. By all accounts, Student is charismatic and intelligent, and a talented athlete, although he displays defiant, disruptive, and aggressive behaviors. In March 2017, Hanford removed Student from Hamilton Elementary School and administratively placed him at its community day school. Student last attended in September 2018. As of the time of hearing, he was not eligible for special education and related services and had not returned to Hanford's educational programming.

2. Student first attended community day school during the 2010-2011 school year after Hanford expelled him from kindergarten because of his behavior. The community day school focuses on remediating maladaptive behaviors with the goal of successfully reintegrating students back to their comprehensive campus. In spring of 2011, the Sullivan Center for Children in Fresno evaluated Student and diagnosed him with attention deficit hyperactivity disorder, predominantly hyperactive type; oppositional-defiant disorder; and adjustment disorder with mixed disturbance of emotions and conduct. The evaluator recommended that Student receive a medication assessment; a Section 504 Plan to mitigate his attention and hyperactivity deficits; a behavioral plan that would reinforce positive behaviors; and behavioral therapy to curb his impulsive responses.

3. During the 2011-2012 school year, Student returned to a comprehensive campus for first grade and Hanford provided him a Section 504 Plan. Throughout his

enrollment in Hanford, he remained on a Section 504 Plan, and his 504 team met at least annually to review and revise his accommodations and services, including a behavior intervention plan. The appropriateness and implementation of Student's Section 504 Plan and behavior plan were not at issue in this hearing, nor within the jurisdiction of this tribunal. Due to Student's continuing behavioral struggles, Hanford administratively transferred him back to community day school for fourth grade, the 2014-2015 school year. Thereafter, Student attended school in a neighboring school district for a period of time.

STUDENT'S FIFTH GRADE YEAR, THE 2015-2016 SCHOOL YEAR

4. At the start of the 2015-2016 school year, Student attended fifth grade at Hanford's community day school, and received counseling from Kings View Counseling Services. In August 2015, Kings View diagnosed Student with attention deficit hyperactivity disorder, as well as conduct disorder. In November 2015, he began attending Hamilton Elementary School. Hanford convened a Section 504 team meeting for Student in December 2015, and continued his Section 504 Plan which included counseling with a school counselor; an updated behavior plan; guided reading instruction and small group instruction as needed; and therapeutic behavioral services by an outside agency in the home setting. In December 2015, Parent asked Hanford to assess Student for special education eligibility, informing them in writing of her concerns that Student's mental health symptoms led to behavioral issues that affected his ability to benefit from his education.

Hanford's Spring 2016 Initial Multidisciplinary Assessment

5. Pursuant to Parent's request, Hanford completed a multidisciplinary psychoeducational evaluation of Student, including a health assessment, and evaluated him in the areas of emotional disturbance, other health impairment (due to his attention

deficit hyperactivity diagnosis), and specific learning disability. Based on a record review which included the 2011 Sullivan report; interviews of Student, Parent, and teacher; testing and classroom observations; the school nurse report; and testing data, school psychologist Leslie Marain concluded that Student did not appear to meet eligibility criteria for special education services under any of the three suspected categories.⁵ The appropriateness of this initial assessment and report were not at issue in this matter.⁶

6. The school nurse concluded that Student was adapting well with the supportive services of his Section 504 Plan and behavior plan, and did not have a health condition impeding his ability to attend school and learn. Ms. Marain concluded in her report that Student did not qualify as other health impaired because he did not demonstrate limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that resulted in a limited alertness with respect to his education, that was due to his attention deficit disorder, and that adversely affected his educational performance. Student did not display hyperactivity, impulsivity, or inattention in class. Teacher behavior scales rated him as average in the areas of attention and hyperactivity, and he demonstrated average to above average academic achievement. Overall, Student's attendance and behavior at Hamilton were good, with only a few medical absences and one behavior citation for hitting another student during a mutual altercation.

7. Ms. Marain testified at hearing. She acknowledged that Student's fifth

⁵ Ms. Marain is a licensed educational psychologist and has worked as a school psychologist for 15 years.

⁶ The April 2016 initial evaluation is beyond the two-year statute of limitations, and Parent did not challenge its procedural or substantive validity.

grade year, while at Hamilton, was his most successful educational period. Given this observation, and Hanford's position that a reassessment of Student was not warranted as there was no "new" information pointing to potential eligibility under other health impairment, the information considered by Hanford's assessment team is detailed below.

STUDENT'S PRESENTATION AND PERFORMANCE, SPRING 2016

8. At the time of his initial assessment in February and March 2016, Student was receiving psychiatric services from Kaiser Permanente and taking the prescribed medications Vyvanse for attention deficit hyperactivity disorder and Seroquel for aggression and mood disturbance. Since starting the Seroquel, Parent reported that Student seemed less angry in the mornings, though he needed help dealing with stress and expressing his emotions, instead of reacting in anger. She shared her experience that Student could do well in school for periods of time, depending on his mood. At the time of the assessment, Student was enjoying school at Hamilton.

9. The report of Student's fifth grade teacher was glowing. She informed Ms. Marain that Student had transitioned well into her class and easily adapted to routines and expectations. He quickly formed friendships and was well-liked by his peers. She described Student as a model for good classroom behavior. He followed classroom rules, respected peers and adults, and did not display any behavioral concerns. Academically, Student was able to follow directions for assignments, though he required these to be repeated at times. He participated in class discussions and group work; did well on his school work; timely completed assignments; showed interest in independent reading; continued to build his reading stamina; followed teacher guidance for organizing materials; and completed homework. Student won the spelling bee and scored the highest on the second trimester math facts with a score of 99/100. One

criticism was that Student often shouted out the teacher's name, instead of patiently waiting with his hand raised.

10. During an interview, Student easily engaged with Ms. Marain and reported he had a group of friends, loved sports, and enjoyed math class. During classroom observations, Student was engaged and on task; willingly participated and took turns in small group activities; sat quietly and attended to instruction; and followed directions. He did not demonstrate signs of hyperactivity, impulsivity, frustration, or other negative behaviors in class or during the testing sessions.

11. Ms. Marain assessed Student over multiple dates in February 2016, with one final test session on March 31, 2016. She recorded Student's testing results in her written report. Based on cognitive testing, Ms. Marain determined that Student showed average intellectual functioning with evenly developed skills. On a standardized academic measure, Student's reading scores were at the fourth to fifth grade level, with written expression at the fifth grade level and a broad math score at the eighth grade level. Ms. Marain concluded his academic scores were commensurate with his abilities. She also found that Student did not have a processing disorder, given his overall average functioning on processing measures.

12. On social-emotional and behavior rating scales, Student's teacher generally rated him in the average range of functioning. Overall, Parent rated Student in the clinically significant range of functioning, indicating a high level of maladjustment in the home setting. Ms. Marain had Parent and Student's teacher complete rating scales from the Connors, Third Edition, an assessment of attention deficit hyperactivity disorder, and the most common comorbid difficulties of learning problems; executive functioning; defiance or aggression; and peer relationships. Student's teacher identified him as functioning overall in the average range, with oppositional defiant symptoms in the high average range. Parent rated Student in the very elevated range for inattention,

hyperactivity/impulsivity, and conduct and oppositional defiant disorders.

IEP Team's Ineligibility Determination

13. On April 1, 2016, Hanford convened an individualized education program team meeting to review the results of Student's initial eligibility evaluation. At the start of the meeting, the principal updated the team regarding a behavioral incident that occurred earlier that day. As recorded in the IEP team meeting notes, Student shared with the principal that another student had made him mad, so he hit him. Student was calm and receptive to the principal's discussion about non-violent ways of coping when upset. Ms. Marain informed the team that Student's behavioral history showed that most incidents happened when he was embarrassed, or if he perceived others were making fun of him. Hanford team members believed Student's behavior had improved, and his behavior plan was working. For instance, Student had written an apology letter to his teacher for one behavior incident.

14. The IEP team reviewed Student's academic present levels of performance. Overall, Student was successful at school and enjoyed it. Although he showed some frustration with the structure of writing, his teacher found this typical for fifth graders. There were no concerns with his academic ability or performance.

15. Ms. Marain presented the results of her assessment as contained in her report. Despite Student's presentation at home, Student was functioning well at school. He was able to learn; do his work; focus; and access the curriculum. Student's IEP team determined that he did not have a specific learning disability. Hanford team members acknowledged that Student showed some anger management issues at school, but concluded this did not qualify him as having an emotional disturbance, and that he also did not qualify under the category of other health impairment. Hanford team members determined that Student was not eligible for special education, and that his Section 504 Plan and behavior support plan were meeting his educational needs. At the conclusion

of the IEP team meeting, Parent signed consent to the IEP, acknowledging that Student was not eligible for special education.

16. On the May 2016 California testing of common core standards, Student met standards for English Language Arts and nearly met standards for Math. Although the principal at Hamilton worked closely with Student on monitoring his angry impulses, near the end of fifth grade, Student received a third behavior citation. What started out as a mutual dispute during dodge ball, escalated to a shoving match, and ended with Student punching the other student in the face.

STUDENT'S CHANGED PRESENTATION AND PLACEMENT, THE 2016-2017 SCHOOL YEAR

17. Student advanced to sixth grade at Hamilton for the 2016-2017 school year. He continued to receive the supports of a Section 504 Plan and behavior intervention plan. Karen Alvarado was Student's sixth grade teacher for the first month of school and then from January through March 2017. Ms. Alvarado recalled Student excelling academically with one-on-one assessments. Academics came easy for him. It was her impression that Student was able to access the curriculum, though he often chose not to work. Ms. Alvarado testified that there was no basis to refer Student for a special education assessment during the 2016-2017 school year. This testimony was not persuasive in light of her belief that a referral was not warranted, unless a student was two years behind academically.

18. During her testimony, Ms. Alvarado did not recall Student being any more distracted or inattentive than his peers, and had no recollection of the nature of Student's behavioral challenges. Her testimony was at odds with the recorded meeting notes from Student's Section 504 team meetings in the fall of 2016 and spring 2017. Ms. Alvarado signed in attendance as Student's teacher at the February 2017 Section 504 meeting. While the meeting notes recorded detailed teacher input discussed below, it is

unclear whether she was the teacher who reported Student's difficulties and disengagement as captured therein. Given the limited amount of time Ms. Alvarado worked with Student, the passage of time, and the lack of detail in her testimony, the October 2016 and February 2017 meeting notes detailing Student's emerging struggles, are accorded greater weight than her testimony.

October 2016 And February 2017 Section 504 Review Meetings

19. On October 7, 2016, Student's Section 504 team met for an annual review of his performance, educational needs, and continuing eligibility for a Section 504 Plan and behavior supports. The team reconvened four months later on February 8, 2017. Hanford prepared a Section 504 Team Assessment Report that included meeting notes from both dates. The meeting notes recorded Student's then-present levels of performance in academics; attendance; social and emotional behaviors; and health.

20. In October 2016, Student was reading at a late fifth grade level; by February 2017, he was able to read sixth grade level text. Student's reading levels had increased since the time of his April 2016 IEP team meeting. However, as recorded in the October 2016 Section 504 team meeting notes, Student often struggled with reading directions and informative texts thoroughly and needed to have written directions broken down and read to him multiple times to understand. These challenges reflected Student's difficulty in managing sequential tasks, remaining focused, and giving close attention to detail, all of which pointed to an increase in Student's attention deficit hyperactivity symptoms since his initial assessment.

21. The juxtaposition of the October 2016 and February 2017 meeting notes revealed a decline in Student's school functioning and engagement. Student had previously enjoyed writing on topics of interest. However, by October 2016, he was struggling with writing stamina and usually did not complete his writing assignments in class, though he had the ability to write when he "puts his mind to it." By February 2017,

the teacher reported it was a daily struggle to get Student to write even with high interest writing prompts, despite his academic ability to do so. Math, his favorite subject, remained an area of strength for Student at the time of the October 2016 meeting. However, four months later, he did not have any interest in solving math problems. He stopped participating in math group work and copied from others. While Student had the ability to complete his math assignments, he had lost all interest in doing so. Based on these descriptions, Hanford was on notice that Student was showing signs of limited stamina, vitality, and alertness to the learning process.

22. At the October 2016 Section 504 meeting, Student's teacher reported that Student struggled with listening to directions and staying on task. He rarely turned in homework and had a hard time completing assignments in class. Four months later, the teacher reported to the team that Student will work in class when she "asks and pulls and probes for him to do so." Despite the struggle, when he did complete an assignment, he did well. As reported in the February 2017 meeting notes, Student was easily distracted in class. When given a quiet place to work with few students and distractions, he could focus better and was capable of doing very well in class. Even so, Student had trouble focusing and declined to go to a quiet place to work, as he did not want to stand out.

23. As recorded in the February 2017 Section 504 team meeting notes, the teacher provided an example of Student's academic struggles. Student was expected to read three books and complete a project in a four-week period. He spent a week reading the same page of one book. When encouraged to select a different book, he picked a second grade level book and spent two weeks on it. By February 2017, Student was no longer motivated to engage in class or the learning process.

24. At the time of the October 7, 2016 Section 504 meeting, Student did not have any behavior citations for sixth grade, and responded well to praise. Parent

informed the team that Student was defiant at home and reacted in anger and with aggression, as he had difficulty communicating his feelings. She was learning strategies from in-home therapeutic behavioral services to address Student's maladaptive behaviors. Student had not demonstrated such behavior challenges at Hamilton. However, three days after the October 2016 Section 504 meeting, Student refused to follow staff directives and received a behavioral citation for profanity and disruption to school activities.

25. In the four-month period following the October 2016 Section 504 meeting, Student was suspended five times and received 12 behavior citations for profanity, defiance, disruption, and physical aggression. Classmates shared they were scared of Student. Student's teacher reported that praise was no longer effective as it brought him unwanted attention, and Student was no longer motivated by the behavior reward system. The February 2017 meeting notes indicated that Student cared excessively about what others thought of him and would constantly look around the room to see if anyone was watching, rather than listen to one-on-one re-direction from staff. At hearing, Ms. Marain acknowledged that Student's sensitivity and reaction to embarrassment, or feelings of inadequacy, exceeded the normal range of functioning for someone his age.⁷ Student's display of hyper-vigilance to the reactions of his peers, and heightened alertness to avoiding embarrassment, resulted in limited attention to learning and teacher instructions.

26. By the time of the February 2017 reconvened Section 504 meeting, Student had some difficulty getting to school on time. Parent reported changes in Student's psychiatric medications, and informed the school attendance clerk that

⁷ Whether Student should have been reassessed for an emotional disturbance was not at issue in this hearing and no determinations are made herein.

Student was late because he had a hard time waking up and getting ready in the morning. Parent informed the team that Student did not listen to her and behavioral strategies were not effective.

27. By February 2017, Student presented as a capable but under-performing student with increased attention deficit hyperactivity symptoms, disengagement, and dysregulated behavior. While no individual behavior or symptom alone was sufficient to warrant a reassessment, the cumulative portrait of Student's class presentation, in contrast with his level of educational engagement and functioning at the time of his March 2016 assessment, pointed to a need to reassess. Student's circumstances had changed such that Hanford was on notice that his attention deficit hyperactivity disorder may be adversely impacting his education. School psychologist Jami Jenkins worked with seventh and eighth graders at the community day school.⁸ She did not know Student prior to the 2017-2018 school year. At hearing, Ms. Jenkins acknowledged that if Student had displayed an increase in behaviors associated with attention deficit hyperactivity disorder in the classroom following his initial assessment, then that would warrant a reassessment. This opinion is consistent with the law regarding reassessments and is given great weight.

DETERMINATION THAT STUDENT WOULD NOT BE REASSESSED

28. The February 2017 Section 504 meeting ended early after Student joined the meeting, became upset, and began to yell and hit Parent. Parent did not believe Student's actions stemmed from his oppositional defiant disorder. During her testimony, she explained that Student would get embarrassed when others talked about his disability or when he felt he was different from others. At such times, he impulsively

⁸ Ms. Jenkins has been a school psychologist for 10 years. Prior to that, she was a probation department counselor.

acted out without thinking. Parent did not justify or minimize Student's behavior, and her testimony was persuasive. Parent's love and dedication to Student was clear; and her advocacy on his behalf, admirable.

29. Student's Section 504 team agreed that Student continued to qualify for a 504 Plan as a result of his attention deficit hyperactivity disorder and oppositional defiant disorder both of which substantially affected his learning; working; concentration; thinking; and communication. However, the team determined it would not refer Student for a special education assessment. Following its initial spring 2016 assessment, Hanford did not reassess Student to obtain objective evidence regarding his changed presentation. Rather, two years later at hearing, Hanford attributed Student's continuing disengagement from his educational program to work refusal and defiance, stereotypical of a student with oppositional defiant disorder, which is not a qualifying disability for special education.

30. At hearing, Hanford witnesses generally agreed that the threshold for determining whether Student should be referred for reassessment was very low. Hanford witnesses acknowledged that it was their responsibility to refer Student if they had any suspicion that circumstances had changed or if there was any new information that his attention deficit hyperactivity disorder adversely impacted his education. The results of the 2016 initial assessment that Student did not present with limited alertness, distractibility, or vitality in terms of having the stamina to attend to instruction, access learning, and participate in class, stood in sharp contrast to the reports of Student's class presentation by February 2017. Ms. Marain attended Student's February 2017 Section 504 meeting. At hearing, she explained that a reassessment was not warranted at that time as she had just assessed him the year prior.

31. Ms. Marain's testimony established that if a standardized assessment tool is re-administered to a student within a one-year period, the results will not be valid due

to the “practice effect” or “test/re-test effect.” A student is likely to test higher if he is familiar with the test instrument, leaving it impossible to determine if the results are a true measure of aptitude. However, all but one of Student’s testing sessions had been completed by the end of February 2016, nearly one year prior to the February 2017 meeting. Had Hanford referred Student for a reassessment at the February 2017 Section 504 team meeting, by the time it prepared an assessment plan and obtained Parent consent, it could have scheduled testing sessions to occur at least one year beyond the prior testing. Furthermore, based on the 2016 assessment, a reevaluation of Student for other health impairment would consist predominantly of parent and teacher rating scales as well as observations. To the extent traditional test taking measures were required, Ms. Marain established that different tools could be used to address any concern with the practice effect.

DEVELOPING STUDENT’S SECTION 504 BEHAVIOR INTERVENTION PLAN

32. Student’s Section 504 Plan included a behavior intervention plan which Ms. Marian revised for the February 2017 meeting. She informally assessed Student’s behavior, but did not conduct a functional behavior assessment. Ms. Marain’s testimony established that a functional behavior assessment is warranted for students with a pervasive pattern of maladaptive behavior. The assessment is the foundation for developing a behavior intervention plan to help extinguish undesirable behaviors by teaching socially appropriate replacement behaviors. A functional behavior assessment consists of studying a student’s maladaptive behaviors to determine if there is a pattern; developing a hypothesis as to why the student engages in the targeted behavior(s); and then developing a plan for teaching and supporting the student to use replacement behaviors that serve the same function. Over time, the hypothesis may change and a new plan may be needed to effectuate behavioral change.

33. Hanford did not conduct a formal functional behavior assessment of

Student as the function of his behaviors was not in question. Ms. Marain analyzed Student's behavior and developed a revised behavior plan to target his physical aggression, defiance, and profanity. She determined the function of these behaviors was to gain peer attention and avoid work, and proposed replacement behaviors that would serve the same functions. Ms. Marain developed strategies to teach and support Student to use the replacement behaviors.

Student's Removal To Community Day School

34. By March 2017, Student accrued in excess of 10 school days of suspension for the 2016-2017 school year. Hanford convened a Section 504 manifestation determination review meeting to determine whether Student's disciplinary conduct was a manifestation of his Section 504 disabilities. The manifestation determination review team determined that several of Student's behavior incidents were caused by his attention deficit hyperactivity and oppositional defiant disorders. Based on the remaining citations that documented behaviors the team determined were not a manifestation of his disabilities, the principal administratively placed Student at community day school effective March 31, 2017.

35. The community day school follows the state common core academic curriculum. There are three classrooms with a total student body ranging from approximately 8-30 students. The student population is ever changing as students come and go. For each classroom there is one teacher and at least one aide, and typically no more than 16 students. The Kings County Probation Department contracts with Kings View to provide behavioral counseling services and social skills training for the students.

36. Little evidence was presented about Student's transition to community school or the remainder of his sixth grade year. Over the course of the 2016-2017 school year, through March 2017, Student was tardy or truant a total of 12 times. Following his transfer to community day school, Student's attendance declined. He was tardy or truant

an additional 11 times; suspended 3 days; and failed to attend the last two weeks of sixth grade.

37. As of February 7, 2017, Hanford knew that Student had decreased alertness and writing stamina, and increased distractibility and disengagement from learning. This was new information not previously reported to or identified by the assessment team the year prior, or considered by Student's IEP team. While all of Student's behaviors could not reasonably be attributed to his attention deficit hyperactivity disorder, it was equally erroneous to attribute them solely to his behavior disorders. Hanford focused on Student's maladaptive behavior to the exclusion of his increased attention deficit symptoms displayed in October 2016 and February 2017. At hearing, Hanford espoused the position that there was no need to reassess Student as he was the same conduct-disordered student that he had been in kindergarten. However, Student's educational functioning had changed, warranting a reassessment for special education eligibility in the area of other health impairment. By the end of March 2017, Hanford was additionally aware that Student's Section 504 Plan and behavior supports were no longer effective in ensuring his access to his education, placing it on notice that special education and related services might be needed to address his disability-related symptoms.

38. By March 31, 2017, at the time of its decision to remove Student to an alternative program for behavior-disordered youth, Hanford had sufficient notice to suspect that Student might have a qualifying disability which triggered its duty to look anew and reassess him in the area of other health impairment. While Student's disciplinary conduct painted the picture of a troubling pattern of behavior interfering with his education, this Decision does not address whether Hanford had a duty to reassess for any other qualifying disability as Parent limited her assessment claim to other health impairment.

SEVENTH AND EIGHTH GRADE, THE 2017-2018 AND 2018-2019 SCHOOL YEARS

Student's School Functioning

39. From the start of seventh grade in August 2017, until the time of hearing, Hanford continued to offer Student the supports of a Section 504 Plan and behavior intervention plan. Despite these general education supports, coupled with the low student to staff ratio and behavior-focused programming of the community school, Student remained disengaged from the learning process. During the limited time he attended Hanford programming, he continued to defy adult directives; use profanity; disrupt school activities; and engage in aggressive behaviors. Ms. Marain's testimony established that aggressive and defiant behaviors are not characteristic of attention deficit hyperactivity disorder. Student did not establish that he exhibited inattentive, distracted, or hyperactive behaviors in class during seventh and eighth grade. Student did not introduce evidence of his academic achievement levels or any academic decline.

40. Oswaldo Vasquez was Student's seventh and eighth grade teacher at Hanford's community day school. His goals as a teacher were to help his students gain control of their behaviors, become invested in school, and keep up academically, so they could successfully re-integrate into the regular school setting. Mr. Vasquez was a caring and involved teacher. He connected with Student over their shared athleticism. He taught sportsmanship to try to help Student regulate his behaviors and re-engage in academics. Mr. Vasquez shared Ms. Alvarado's opinion that Student was able to complete his school work, but chose not to. Student did not have difficulty understanding the academic lessons or accessing the curriculum. Rather, he was defiant and did what he wanted to do, when he wanted to do it. Mr. Vasquez awarded credit for effort as opposed to work production. He did not observe Student display any inattentive, distracted, or hyperactive behaviors.

41. Ms. Jenkins informally observed Student in class and on campus one to

two times per week. She, too, did not observe Student display any behaviors typically associated with attention deficit hyperactivity disorder. Ms. Jenkins persuasively testified that the transition to middle school is a difficult time for students. New behaviors emerge as they enter puberty and experience hormonal changes, and as peers assume greater importance than parents.

42. Student often arrived late to school because he had been unable to sleep during the night and could not get out of bed, or otherwise had a difficult morning. He often complained about stomachaches. Parent attributed these difficulties to his psychiatric medication regimen. Student did not like how Vyvanse, the medication prescribed for his attention deficit hyperactivity symptoms, made him feel. As Parent described at hearing, Student liked his normal high energy self and resisted his medication as it made him feel like a "zombie." As such, Parent had a hard time getting him to take his medication in the morning which created further delays. At some point during the 2017-2018 school year, the principal adjusted Student's school start time to counteract the number of tardies he accrued. Ms. McConnell, as assistant superintendent of student services, offered the services of a school nurse to help with medication administration at school.⁹ Parent did not provide Hanford with a doctor's authorization for this offered service.

43. At the start of the 2017-2018 school year, there were only two students in Mr. Vasquez' class. Beginning in October 2017, as more students attended, Student's behavior incidents increased. Student resisted being told what to do and would get upset. Two to three times a week for periods of 10-15 minutes, he would leave class to avoid work or re-direction. While in class, Student did what he wanted, more often than

⁹ Ms. McConnell has been employed by Hanford for 26 years, serving as an administrator in various capacities since 1998.

not, as opposed to completing his work. Two to three times during the school day, he would not complete his work. He often had his head down on his desk or drew and was disengaged from learning. These behaviors and presentation continued through the start of eighth grade.

44. Mr. Vasquez' testimony that there was no reason to refer Student for a reassessment was not persuasive, as it was at odds with his own acknowledgement that a decline in work production would point to a need to consider a special education assessment. Since the time of his initial assessment in March 2016, Student had stopped completing his class assignments and homework. In relying on the subjective opinions of its staff that Student was simply acting in accord with his oppositional defiant disorder and that his presentation, therefore, did not reflect a possible qualifying disability under the IDEA, Hanford assumed the risk of not taking a second look and conducting a reassessment.

45. Community day school focused primarily on teaching behavior, which Hanford witnesses established was just as important as teaching academics, and indeed a prerequisite to learning. Mr. Vasquez' testimony that Student's work refusal did not interfere with his education, because Student showed that he was still learning, was not persuasive. Even so, there was no evidence that Student's academic performance had declined.

STUDENT'S CONTINUING BEHAVIORAL CHALLENGES

46. Ms. Jenkins was familiar with Student from a review of records and informal observations, though she had not assessed him or worked with him. She prepared a revised behavior intervention plan for Student dated October 3, 2017. The revised plan continued to target Student's defiance and profanity, and identified the function of his behaviors as avoiding non-preferred tasks. At hearing, Ms. Jenkins

agreed with Ms. Marain's conclusion that Student's behavior also served the function of gaining peer attention. The behavior plan included functionally equivalent replacement behaviors and strategies to assist Student to display desired behaviors. Parent signed the behavior plan on October 3, 2017. At hearing, Parent did not agree that Hanford appropriately addressed Student's behavioral challenges at Hamilton or community day school.

47. Despite Student's Section 504 Plan and behavior intervention supports, he accumulated more than 10 days of suspension due to his behavior, leading to a manifestation determination review meeting in November 2017. The manifestation determination review concluded that Student's disciplinary conduct was not the result of Hanford's failure to implement his Section 504 Plan, including his behavior plan. The review team determined that some of Student's disciplinary conduct was a manifestation of his oppositional defiant disorder. The review team further determined the remaining behavior incidents were not a manifestation of Student's disabilities, and that a functional behavior assessment was not required to determine the function of his behavior. Parent agreed with the manifestation determination findings. She shared that Student had a doctor appointment to re-fill and possibly change his psychiatric medications. The principal did not refer Student for expulsion.

48. Parent testified that Student acted out impulsively, without thinking, and that his maladaptive behaviors stemmed from his attention deficit hyperactivity disorder. Hanford witnesses agreed that Student had difficulties with impulse control, but opined that these were attributable to his behavioral disorders. The nature of Student's disciplinary conduct, and whether it was related to his oppositional defiant and conduct disorders, and constituted a social maladjustment to the exclusion of an emotional disturbance, were not at issue in this hearing and no determinations are made herein.

49. As of January 19, 2018, Student dis-enrolled from Hanford and went to live with his uncle through April 2018. During this time, he enrolled in and attended school in Fresno Unified School District. From the start of the 2017-2018 school year until his disenrollment, Student was suspended 16 times; tardy 19 times; truant 6 times; and had 6 unexcused absences.

50. Student returned home to Parent by May 2018, and re-enrolled with Hanford. Parent informed Ms. McConnell that Student was adjusting to mood-stabilizing medications and requested home hospital instruction. Ms. McConnell agreed to provide Student with home instruction from May 1, 2018, through the end of the 2018-2019 school year.

51. At the beginning of the 2018-2019 school year, Student returned to Hanford's community day school for eighth grade. During a behavior incident at school on September 11, 2018, Student struck Parent and Mr. Vasquez and attempted to hit the principal. He was suspended and initially recommended for expulsion. After determining that Student's behavior was not a manifestation of his listed Section 504 disabilities, Hanford agreed to conduct a second manifestation determination review to consider Student's additional disabilities of conduct disorder and mood disorder with depressive features, pursuant to a Kaiser diagnosis that Parent provided.

52. At the second Section 504 manifestation determination review team meeting on September 27, 2018, Hanford team members determined that Student's disciplinary conduct was not a result of its failure to implement his Section 504 Plan. Parent disagreed. All team members agreed that Student's behavior was a manifestation of his conduct disorder. As such, Hanford did not pursue expulsion. The review team, including Parent, further agreed that a functional behavior assessment was not warranted, as the function of Student's behavior was not in question.

53. Ms. Jenkins' testimony that the March 2016 assessment of Student was

“spot on” with Student’s presentation since his enrollment at community day school was not supported by the evidence. Rather, the assessment captured a snapshot of Student when he was not exhibiting behavioral challenges and was engaged in and attentive to learning. Indeed, Student’s fifth grade teacher’s input to the assessment team, and her description of Student at the time of the initial assessment, was far different from Mr. Vasquez’ descriptions of Student.

54. Parent did not agree with Hanford’s determination to keep Student at the community day school. She did not believe the staff were able to appropriately address Student’s behaviors, and therefore could not keep Student safe, or others safe from Student. Hanford allowed Student to continue with a program of home instruction through October 5, 2018, but thereafter, his placement remained community day school. As of the time of hearing, Student had not returned to a Hanford school.

HANFORD’S OCTOBER 2018 ASSESSMENT PLAN

55. On September 25, 2018, Hanford received Parent’s written request to assess Student for special education eligibility. Hanford provided Parent a comprehensive assessment plan dated October 10, 2018, proposing to assess Student in the areas of academic achievement; health; intellectual development; and social/emotional and adaptive behavior, including a functional behavior assessment and an educationally related mental health assessment. The assessment plan noted Student’s areas of suspected disability to be specific learning disability, other health impairment based on attention deficit hyperactivity disorder, and emotional disturbance. At hearing, Parent acknowledged receiving the assessment plan, but had not consented.

56. From October 30, 2018, until December 7, 2018, Student enrolled in an independent study program at Crossroads Charter Academy, part of the Armona Union Elementary School District. Shortly before winter break in December 2018, Parent

enrolled Student in West Park Charter School which is affiliated with Fresno Unified School District. He began attending the week of January 14, 2019.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT¹⁰

1. This due process hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);¹¹ 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 students 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 to prepare them for further education, employment, and independent living; and 2) to ensure that the rights of students with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); 34 C.F.R. § 300.1; See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible student at no charge to the parent, meet state educational standards, and conform to the student'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 student with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031, subd. (a).) "Related services"

¹⁰ Unless otherwise stated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

¹¹ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

are transportation and other developmental, corrective, and supportive services that are required to assist the student to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. §300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of 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 student 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 student “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 student receives access to an education that is reasonably calculated to “confer some educational benefit” upon the student. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified its holding in *Rowley*. In *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. [137 S.Ct. 988, 997-1002; 197 L.Ed.2d 335], the Court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an individualized education program, and that the IEP is required to be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances.

5. 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 student, or the provision of a FAPE. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 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).) At 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] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this matter, Student bears the burden of proving his three issues.

ISSUE 1: HANFORD CARRIED OUT ITS CHILD FIND RESPONSIBILITIES AS TO STUDENT

6. Student generally contends that Hanford failed to timely identify him as a child with a disability and that it had a basis of knowledge, pre-dating the statutory period, such that it should have located him and served him pursuant to its child find duty.¹² Hanford asserts that it did not violate child find as it had already found Student; served him under a Section 504 Plan; and appropriately assessed him for special education eligibility in early 2016.

Child Find Responsibility

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

¹² Whether Hanford had a “basis of knowledge” as defined in title 34 of the Code of Federal Regulations, section 300.534, such that Student was entitled to the disciplinary protections of the IDEA was not at issue in this matter. Similarly, although Student cites extensively to Section 504 regulations in his closing brief, matters of compliance with Section 504 are not within the jurisdiction of this tribunal.

56301, subdivisions (a) and (b). "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) This 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.) Pursuant to this standard, the appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Depart. of Educ., State of Hawaii v. Cari Rae S.*, (D. Hawaii 2001) 158 F.Supp.2d 1190, 1195 (*Cari Rae*).

8. A 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.) Further, the fact that a student has 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 1190, 1196-1197.) In other words, "[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." (*Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities* 71 Fed. Reg. 46540, 46580 (Aug. 14, 2006).)

9. Child find does not guarantee eligibility for special education and related services under the IDEA. Rather, it is a locating and screening process to identify those children who are potentially in need of special education and related services. 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)(C); 34 C.F.R § 300.301(c); Ed. Code, § 56302.1, subd. (a).)

10. In February and March 2016, Hanford assessed Student for special education eligibility. As such, regardless of its determination of ineligibility at the April 1,

2016 initial IEP team meeting, Hanford had already “found” Student pursuant to its child find duty by the start of the statutory period in October 2016. As such, Student did not establish a child find violation.

ISSUE TWO: HANFORD WAS REQUIRED TO REASSESS STUDENT IN THE AREA OF OTHER HEALTH IMPAIRMENT BUT WAS NOT REQUIRED TO CONDUCT A FUNCTIONAL BEHAVIOR ASSESSMENT

Reassessing For Other Health Impairment

11. Student asserts that his disciplinary conduct consisted of impulsive behaviors resulting from his attention deficit hyperactivity disorder, and that these behaviors adversely impacted his education. Student contends Hanford was on notice of his behaviors and that its Section 504 Plan was not effective, such that it should have suspected that he may qualify for special education. Therefore, Student maintains that by October 8, 2016, Hanford was required to assess him to determine if he met the eligibility criteria for other health impairment.¹³

12. Hanford argues that it comprehensively assessed Student in March 2016 and determined that his attention deficit hyperactivity disorder did not qualify him for special education. Hanford further alleges there was no new information since the time of his initial ineligibility determination sufficient to create a suspicion that Student may have a qualifying health condition. Rather, Hanford maintains Student’s presentation and behavioral challenges have remained constant over time, and resulted from his oppositional defiant and conduct disorders.

13. While Hanford fulfilled its child find responsibilities as to Student, its

¹³ In his closing brief, Student asserts that Hanford failed to conduct a mental health assessment. This was not identified as an issue for hearing and no determinations are made herein.

continuing duty to assess in a suspected area of disability, should new circumstances warrant, survived its initial ineligibility determination. (*J.G. v. Oakland Unified School District* (N.D. Cal., Sept. 19, 2014, No. C -14-00366 EDL) 2014 WL 12576617, at p. 9 [upholding ALJ's analysis that, "A district may in appropriate circumstances be required to reassess a student previously found ineligible for special education." (*Parent on Behalf of Student v. Oakland Unified School District* (OAH, Oct. 28, 2013, No. 2013050644)].)

Duty To Reassess

14. In order to meet the continuing duty to develop or maintain an appropriate educational program, the school district must assess and reassess the educational needs of a student with a disability. (20 U.S.C. § 1414(a) & (b); 34 C.F.R. § 300.305; Ed. Code, §§ 56320, 56321.) A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer, supra*, 546 U.S. 49, 56-58.) For purposes of evaluating special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.) These terms are used interchangeably in this Decision.

15. In analyzing a failure to assess claim, 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.* (3rd Cir. 1993)

993 F.2d 1031, 1041.)

WHEN A DISABILITY IS SUSPECTED

16. Students who may be eligible for special education must be evaluated and assessed for all suspected disabilities. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1110, cert. den. (Apr. 17, 2017, No. 16-672) 137 S.Ct. 1578[2017 WL 1366731] (*Timothy O.*.) A disability is “suspected,” and a student must be assessed, when the district is on notice that the student has shown symptoms of that particular disability or disorder. (*Id.* at p. 1119.) Notice may come in the form of concerns expressed by parents about the student’s symptoms, opinions expressed by informed outside experts, or other less formal indicators, such as the student’s behavior. (*Id.* at pp. 1120-1121 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202.]

17. Here, Hanford was on notice Student may have a suspected disability, specifically other health impairment, based on Student’s behaviors and school functioning as reported by his teacher at the October 2016 and February 2017 Section 504 meetings. At these meetings, Student’s Section 504 team discussed his increased distractibility; struggle with writing stamina; difficulty staying on task and listening to instruction; lack of engagement; and decreased work production; as well as his increasingly dysregulated behavior. The fact that these communications occurred at a Section 504 plan meeting, does not strip them of their effect under the IDEA. (*Anaheim Union High School Dist. v. J.E.* (C.D. Cal., May 21, 2013, No. CV 12-6588- MWF JCX) 2013 WL 2359651, at p.5.) During her testimony, Ms. Alvarado’s general recollections of Student during the 2016-2017 school year lacked detail and were at odds with the recorded meeting notes. Given the passage of time and the natural waning of memory, her testimony was not persuasive to the extent it was inconsistent with the written meeting notes.

REQUIREMENT OF FORMAL ASSESSMENT

18. Once a district is on notice that a student may have a qualifying disability, it must formally assess the student in all areas of the disability "using the thorough and reliable procedures specified in the [IDEA]." (*Timothy O., supra*, 822 F.3d 1105, 1119.) "A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation." (*Id.* at p.1121.)

ASSESSMENT FOLLOWING INELIGIBILITY DETERMINATION

19. When a district has conducted a comprehensive evaluation and found a student ineligible for special education, "the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required." (*D.K., supra*, 696 F.3d 233, 251-252, citing *Ridley School Dist. v. M.R.* (3rd Cir. 2012) 680 F.3d 260, 272-273 [district was not required to re-assess student three months after its initial assessment determined she did not qualify.]) However, an unreasonable delay in identifying and evaluating students with disabilities may result in a legal violation. (*Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig* (9th Cir.1992) 976 F.2d 487, 491-492 (*Hacienda*).)

20. As of March 2017, Student's presentation and educational functioning had substantially changed from the time of his 2016 initial assessment. As Hanford established, the threshold for suspecting a qualifying disability and need for special education is low. Further, the inquiry is not whether Student actually was eligible for special education, but whether there were indications that he *might be* eligible.

21. There was no individual report or description standing alone that conclusively established a need to reassess. Rather, the cumulative effect of the many teacher reports from the Section 504 meetings, and Student's continued struggles despite his 504 Plan accommodations and behavior intervention plan, portrayed a

student in need of a special education assessment at the time of his removal to an alternative setting for behavioral-disordered youth in spring 2017. Based on the information exchanged at Student's Section 504 meetings in fall 2016 and spring 2017, and his subsequent removal from the traditional general education setting as of March 31, 2017, Hanford had sufficient notice that Student's general education supports were not successfully addressing his educational struggles, such that he might have required services not available outside of special education. This notice triggered Hanford's duty to reassess.

22. Following his removal to community day school, Mr. Vasquez and Ms. Jenkins did not observe Student displaying symptoms consistent with attention deficit hyperactivity disorder. However, he had been placed in a small class setting, ranging from a low of two classmates, to a total of no more than 16 students with 2 adults. Further, there were fewer academic demands, as Mr. Vasquez rewarded Student for effort as opposed to work completion. These subsequent observations did not negate Hanford's duty to reassess as of the time of Student's transfer to community day school.

23. Hanford viewed Student's continued educational disengagement through a behavior lens and attributed his presentation to his oppositional defiant and conduct disorders. Hanford determined it was not required to reassess Student because its staff opined that Student's lack of class participation and work completion resulted from defiance. Based on informal observations, staff further considered his behavior outbursts a reflection of poor impulse control associated with his conduct disorder, rather than the impulsivity and hyperactivity related to attention deficit hyperactivity disorder. Pursuant to the reasoning of *Timothy O.*, Hanford was required to reassess Student regardless of the subjective view of its staff that Student did not have a qualifying disability under the IDEA, or their impressions that his presentation was consistent with that of a stereotypically conduct-disordered youth.

24. Hanford conflated the manifestation determination review process (not at issue here) and the eligibility determination (discussed below) with its duty to refer Student for a reassessment. Student's changed presentation in the spring 2017 was sufficient to raise a suspicion of possible other health impairment due to his attention deficit hyperactivity disorder, and thereby triggered Hanford's duty to reassess in this area.

25. Evaluations broadly encompass "the procedures used ... to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." (34 C.F.R. § 300.15.) As such, Hanford could have referred Student for a reassessment that consisted of observation, record review, interviews, and rating scales, rather than formal testing measures to meet its concern regarding the practice effect. Regardless, Student's final testing session for his initial assessment occurred on March 31, 2016, so a reassessment would not have occurred within a one-year period.

26. Student established that as of March 31, 2017, Hanford had a duty to reassess him in the area of other health impairment, and was required to offer an assessment plan at that time. Hanford did not offer Parent an assessment plan until October 2018, in response to her written request. Hanford's failure to reassess Student resulted in a procedural violation. The next question is whether this violation denied Student a FAPE.

Analyzing A Procedural Violation

27. A district's failure to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032-1033; *Timothy O., supra*, 822 F.3d 1105, 1118.) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding

that a student was denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute (*Target Range*)). A procedural error results in a denial of a FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, at p. 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910; *Doug. C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043.)

28. The Ninth Circuit held that a district's procedural violation "cannot qualify an otherwise ineligible student for IDEA relief" and constituted harmless error where a student was substantively ineligible for IDEA relief. (*R.B. v. Napa Valley Unified Sch. Dist.*, (9th Cir. 2007) 496 F.3d 932, 942 ["A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place."]; *D.G. v. Flour Bluff Independent School District* (5th Cir. June 1, 2012, No. 11-40727) 481 Fed. Appx. 887, 893; 2012 WL 1992302, p.7 [nonpub. opn.]["The IDEA does not penalize school districts for not timely evaluating students who do not need special education;" referencing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009) (noting child find requires states to identify and evaluate children with disabilities "to ensure that they receive *needed* special-education services" (emphasis added)).]

29. Whether Hanford's failure to reassess Student in the area of other health impairment resulted in a substantive denial of FAPE, hinges on whether Student was eligible for special education and related services. As determined below, Student did not meet his burden of proof that he was eligible for special education services pursuant to

the eligibility category of other health impairment.¹⁴ Therefore, Student did not prove a substantive denial of a FAPE and is not entitled to a remedy.

Functional Behavior Assessment

30. Student argues that his behavior intervention plan was not appropriate, and that Hanford did not implement his plan and otherwise triggered his maladaptive behaviors. As such, Student argues Hanford was required to conduct a functional behavior assessment. Hanford maintains it assessed Student in the area of behavior as part of its initial assessment; the function of his behaviors was not in question; and there are no legal requirements that a district conduct a functional behavior assessment aside from the disciplinary provisions with regard to eligible students.

BEHAVIORAL NEEDS

31. It is the intent of the California Legislature that those students who are eligible for special education and who exhibit serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) When a student's behavior impedes his learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) In response to comments on the 2006 federal regulations, the United States Department of Education declined to add a requirement that positive behavioral interventions and supports be based on a functional behavioral assessment. The Department highlighted that the IDEA focuses on behavior strategies

¹⁴ Student solely alleged eligibility under the category of other health impairment. No findings are made as to whether Student may be eligible pursuant to another qualifying condition.

and interventions, not assessments, while acknowledging, “a functional behavioral assessment typically precedes developing positive behavioral intervention strategies.” (*Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46540, 46683 (Aug.14, 2006) 2006 WL 2332118.)

32. A district must ensure that an evaluation is sufficiently comprehensive to identify all of the student’s needs for special education and related services, and is required to use those assessment tools necessary to gather relevant functional and developmental information about the student. (20 U.S.C. §1414(b)(3); 34 C.F.R. § 300.304(b)(1)(ii) &(c)(6).) The IDEA and its implementing regulations do not require nor preclude use of a functional behavioral assessment when initially testing students for suspected disabilities. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 251 (*D.K.*.) The court in *D.K.* noted that the IDEA’s only mention of the functional behavioral assessment method is in the disciplinary provisions in title 20 of the United States Code, section 1415(k), which requires this specific assessment when an eligible student continues to exhibit behavioral problems. “As with all evaluations, the component testing mechanisms must be determined on a case-by-case basis depending on the suspected disability and the student’s needs.” (*Id.* at p. 251, fn. 7.)

33. Parent did not agree that Hanford appropriately addressed Student’s behavioral challenges. This disagreement with Student’s behavior intervention plan, and its implementation or non-implementation, did not establish that Hanford was required to conduct a functional behavior assessment. Student failed to meet his burden of proof that Hanford was legally required to conduct a functional behavior assessment, separate and apart from its duty to reassess his behaviors as they relate to the area of other health impairment. The law requires Hanford to use testing methods and instruments necessary to obtain relevant information about Student’s needs in his suspected area of

disability, other health impairment. It is up to the assessor to determine the appropriate instruments and methodology. Student did not prove that Hanford was required to conduct a functional behavior assessment.

ISSUE THREE: STUDENT FAILED TO ESTABLISH ELIGIBILITY FOR SPECIAL EDUCATION

34. Student alleges his attention deficit hyperactivity disorder qualifies him for special education and related services under the eligibility category of other health impairment, and that Hanford has denied him a FAPE for the past two years. Hanford maintains that Student did not establish that he meets the criteria of other health impairment, or that he requires specially designed instruction to meet his educational needs related to this disability.

Eligibility Requirements

35. It is the duty of the IEP team to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(1) & (2); 300.306(a)(1); Ed. Code, § 56026, subd. (a).) Further, an ALJ has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda, supra*, 976 F.2d 487, 492-493.)

36. Not every student with a disability qualifies for special education. A student is eligible for special education and related services if he is a "child with a disability" such as a specific learning disability, other health impairment, or emotional disturbance, and who, by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); See Ed. Code, § 56026, subds. (a) & (b) [uses term "individual with exception needs"].) California law further specifies that the student must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b).) A student shall not be determined to be a child with a disability 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)(2); Ed. Code, § 56329, subd. (a)(2)(D).) A student whose educational needs are primarily the result of a social maladjustment, is not an individual with exceptional needs. (Ed. Code, § 56026, subd. (e).)

Other Health Impairment

37. A student meets eligibility criteria pursuant to the category of other health impairment if he has limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to a chronic or acute health problem such as attention deficit hyperactivity disorder, and which adversely affect his educational performance. (20 U.S.C. § 1401(3)(a)(i); 34 C.F.R. § 300.8(c)(9); Cal. Code Regs., tit. 5, § 3030, subd. (b)(9); Ed. Code, § 56339, subds. (a) [attention deficit hyperactivity disorder may be a qualifying health condition for other health impairment, but all other requirements of the definition still must be met].) Special education eligibility criteria also require that the student, as a result of his disability, requires special education instruction and services to receive a FAPE. (20 U.S.C. § 1401(3)(A)(ii); Ed. Code § 56026, subd. (b).)

Need For Special Education

38. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine if the student can receive educational benefit with modifications to the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337]; *S.B. v. San Mateo Foster City School District* (N.D. Cal., Apr. 11, 2017, No. 16-CV-01789-EDL) 2017 WL 4856868, at p. 20, aff'd sub nom. *Burnett v. San Mateo Foster City School District* (9th Cir. 2018) 739 Fed. Appx. 870.) More recently, in the unpublished case of

C.M. v. Department of Educ., State of Hawaii (9th Cir. Mar. 1, 2012, No. 10-16240) 2012 WL 662197, p.1), the Ninth Circuit used the *Rowley* standard to determine that a student did not need special education as she was able to benefit from her general education classes with the supports of a Section 504 plan. (*Id.* at p. 2.)

39. Attention deficit hyperactivity disorder is not, by itself, a specified disability that qualifies a student for special education. Student had the burden of proving: (1) that he had limited strength, vitality, or alertness at school due to his attention deficit hyperactivity disorder; and (2) that these symptoms adversely affected his educational performance; and (3) that he required specially designed instruction and services in order to receive educational benefit. Student failed to meet his burden of proof.

40. The level of proof required to establish that Hanford had a duty to reassess Student based on a suspicion that he may qualify under the category of other health impairment, is lower than that required to prove eligibility. Student did not prove that his educational performance was negatively impacted by his attention deficit hyperactivity disorder. Student failed to introduce any evidence that he required specialized instruction and services that could not be provided with modification to the general education program in order to benefit from and access the curriculum. There was no evidence as to Student's academic performance or whether he was meeting expected standards, and limited evidence as to his academic abilities.

41. As a sixth grader, Student showed signs of distractibility, difficulty staying on task, and a decreased interest in completing his work. He also engaged in increasingly defiant, disruptive, and aggressive behaviors leading to his transfer to the community school. Similarly, during the short periods of time that Student attended community day school for seventh and eighth grade, he was disengaged from learning; more often than not he failed to complete his work; and he continued to display defiant, disruptive, aggressive, and dysregulated behavior. Student did not establish that his

disengagement from his educational program was indicative of limited vitality, strength or alertness; or that it resulted from his attention deficit hyperactivity disorder, as opposed to his adolescence; change in schools; changing peer group; parent-child strife; or any other non-disability related rationale. As such, Student did not discharge his burden of proving that he was eligible for special education under the category of other health impairment.

ORDER

All relief sought by Student is denied.

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, in part, as to Issue Two. Hanford prevailed as to Issue 1 and Issue 3, and prevailed, in part, as to Issue Two.

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).)

DATE: March 8, 2019

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings