BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matters of: PARENT ON BEHALF OF STUDENT, v. LONG BEACH UNIFIED SCHOOL DISTRICT.	OAH CASE NOS. 2008090863 & 2008110712 (consolidated)

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Long Beach, California, on February 18, 19, 20, 26, and 27, 2009, and March 2 and 5, 2009.

Tania L. Whiteleather, Attorney at Law, represented Student. Student's Mother (Mother) attended the hearing on all days.

Debra K. Ferdman, Attorney at Law, represented Respondent, Long Beach Unified School District (District). District representative Phyllis Arkus attended the hearing on all days.

Student filed a Request for Due Process Hearing (complaint) in OAH case number 2008090863 (Case One) on September 24, 2008. On November 21, 2008, Student filed a new complaint in OAH case number 2008110712 (Case Two). The matters were consolidated on Student's motion on November 25, 2008. The decision timeline applicable to Case Two was ordered to apply to the consolidated matters. On December 18, 2008, the parties' joint request for a continuance was granted for good cause. At the hearing, the parties were granted permission to file written closing arguments. Upon receipt of written closing arguments on March 20, 2009, the matter was submitted and the record was

closed.

ISSUES[1]

1. Whether the two-year statue of limitations bars Student's claims that he was denied a free and appropriate public education (FAPE) from the 2003-2004 school year, through September 24, 2006 (two years prior to the filing of Case One), because Student's parents should have been provided with a notice of procedural safeguards.

2. Whether Student was denied a FAPE from the 2003-2004 school year, through September 24, 2006 (two years prior to the filing of Case One), because he was not provided with a notice of procedural safeguards.

3. Whether Student was denied a FAPE from the 2003-2004 school year, through September 24, 2006 (two years prior to the filing of Case One), because the District should have assessed him and found him eligible pursuant to its "child find"

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[1] All issues arise under the Individuals with Disabilities Education Act (IDEA) found at title 20, United States Code, section 1400 et seq. and related state statutes. Case One alleged issues relating to "child find" and the provision of a notice of procedural safeguards going back two years from September 24, 2008, the date it was filed. Case Two alleged issues relating to "child find" and the provision of a notice of procedural safeguards going back to the 2003-2004 school year until November 21, 2008, the date it was filed. Although a statute of limitations issue was not expressly identified in Student's Case Two complaint, it is implicit in Student's allegations, which facially exceed the statute of limitations. Accordingly, Issue One, regarding the statute of limitations, has been added. Because Case One and Case Two have an overlap of issues and relevant time periods, the ALJ has combined and rephrased the issues from Case One and Case Two for clarity and chronological order.

obligation.

4. Whether Student was denied a FAPE from September 24, 2006 (two years prior to the date of filing Case One) through November 24, 2008 (the date of filing of Case Two), because he was not provided with a notice of procedural safeguards.

5. Whether Student was denied a FAPE from September 24, 2006 (two years prior to the date of filing Case One) through November 24, 2008 (the date of filing of Case Two), because the district should have assessed him and found him eligible for special education pursuant to its "child find" obligation.

FACTUAL FINDINGS

1. Student was born on September 25, 1986, and was 22 years old at the time of hearing. Beginning September 8, 2008, Student's Mother had been appointed as his conservator for one year. As conservator, Mother had the right to make medical and psychiatric treatment decisions for Student and to require Student to have treatment.

2. At all relevant times, Student's Mother and Father resided within the boundaries of the District.

3. On February 28, 1995, when Student was in second grade at a private religious school, he was found eligible for special education services to address speech articulation. Student was offered twice weekly speech therapy. Student's Mother signed an individualized education program (IEP) document accepting the services and acknowledging that she had received a copy of "Parent Rights and Procedural Safeguards." IEP team meeting notes from an annual IEP held on May 4, 1996 show that Mother agreed that Student should be dismissed from special education, and that Mother again acknowledged having received a copy of "Parent Rights and Procedural Safeguards." At hearing, Mother verified that Student's articulation difficulties were resolved in 1996.

4. During his childhood, Student injured his back falling down a stairs. In another incident during childhood, Student was in a car accident while not wearing a

seatbelt. Mother did not believe either incident resulted in a head injury.

5. In the fall of 2001, Student passed out after a collision in a school football game. Around the same time, Student reported being unconscious after falling doing a bicycle stunt. Mother noticed that after this incident Student became more alienated, lost interest in activities and had a more "flat" affect.

6. In January of 2002, Student had a snowboarding accident while he was not wearing a helmet. Mother and Father were not with Student at the time, and believed from reports by Student and others that after the accident, Student acted strangely and violently because he could not find his snowboard. Student did not receive medical treatment after this incident.

7. Student attended private religious schools until he completed the ninth grade in the spring of 2002. Mother and Father described that prior to 2002, Student generally got good grades and participated in team sports and music. Student's ninth grade transcript showed that he had achieved a mixture of grades from A to F over two semesters in his ninth grade year.

8. In the spring of 2002, Mother noted that Student would rearrange his personal belongings and later would be unable to find them, and that Student did not seem interested in activities. Student was taken to a psychologist but no treatment resulted. Father described that during the summer of 2002 Student appeared to have problems focusing, had mood swings, was restless and awake at night, and sometimes had trouble explaining himself. During this time, Student would wake his Mother to go running in the middle of the night.

9. Student enrolled at a District high school for the 2002-2003 school year. Student's physician completed a District "Physical Examination Report" form on June 11, 2002, to allow Student to participate in sports. The report noted that Student had a history of unconsciousness after a snowboarding accident and a bike accident, but did not note

any hospitalization or treatment. Student's physician checked boxes to indicate that Student could participate in the following activities without restriction: football, golf, soccer, tennis, track/field, water polo, weight lifting and surfing.

10. In the summer of 2002, Student went on a trip to Costa Rica with the District high school surf team. Mother testified that while there, Student used a friend's hat for toilet paper and got lost by himself in Panama. Mother's account was not corroborated. At hearing, surf coach Steve Marion (Marion) had no memory of Mother's version of events, and at most remembered an incident where a small group of students, including Student, were left alone for a few minutes because they had not returned to a van at the appointed time. A family friend, James Eastman, told Marion at some point while Student was on the surf team that Student was not the same kid that he used to be.

11. On Labor Day weekend of 2002, Student was asked to clean the family backyard while Mother and Father were out. When Mother and Father returned, they saw that Student had dug up plants and thrown out parts of the barbecue. Student was found at a neighbor's house in a rigid and incoherent state. Student was taken to a hospital where he was given the anti-psychotic drug haldol. Student became agitated, ripped off his clothes and could not be contained. Student was in the intensive care unit for 24 hours. Student tested negative for street drugs. The only recommended follow-up care was for Student to see a psychiatrist.

12. On September 7, 2002, Student was taken to the school nurse's office after acting strangely and eating bark from a tree at school. Mother picked up Student from the nurse's office and took him to Las Encinas Hospital. School security guard Jack Pletka and school nurse Judith Barron (Barron) had no memory of this incident when they testified at hearing.

13. After the September 7, 2002, incident, Student was treated at Las Encinas Hospital by Dr. Joseph Haraszti (Dr. Haraszti). Dr. Haraszti was board certified in psychiatry,

neurology, forensic psychology, adolescent psychiatry, and addiction medicine. Dr. Haraszti diagnosed Student with bipolar disorder, without ruling out organic mood disorder because the bark eating incident was not typical of bipolar disorder. Bipolar disorder was an "episodic" disorder characterized by periods of mania or depression. Once treated, bipolar disorder patients are generally indistinguishable from other people. Dr. Haraszti prescribed medication for Student. Dr. Haraszti ordered MRI and EEG testing, which did not show anything.

14. After the September 7, 2002 incident, licensed clinical social worker Paul Royer (LCSW Royer) provided counseling to Student and his family at Dr. Haraszti's direction. The goal of counseling was to stabilize Student's mental health and improve his functionality. Student displayed symptoms of paranoia, religious preoccupation and agitation that were more acute when treatment began. LCSW Royer never communicated with anyone from the District regarding Student.

15. On September 24, 2002, Dr. Haraszti completed a District "Home/Hospital Instruction Request" form. Dr. Haraszti noted that Student's diagnosis was "mood disorder" that would be treated with medication and continued psychotherapy. Dr. Haraszti noted that Student could return to school without any restrictions after October 28, 2002. Pursuant to Dr. Haraszti's recommendation, Student received home instruction from the District for four weeks while he was receiving outpatient psychiatric care at Las Encinas Hospital. Student was given credit for Spanish, English, History and Biology. At hearing, District home instruction teacher Carol Walker had no memory of Student or her provision of home instruction to him.

16. Mother noticed that Student was having difficulty with reading during the fall of 2002. Mother tried to mitigate Student's reading difficulty by buying books on tape. Father noticed that Student's personal hygiene declined, that Student would lose focus during team sports, that Student would sporadically participate in the surf team and would

not compete, and that Student appeared to not always understand what Father was talking about. Mother and Father were aware that Student would not always turn in his homework, even if it had been completed. Mother and Father gave Student over-the-counter tests for illegal drugs, which were negative.

17. Student completed the fall of 2002 semester with grades of "C" in all academic classes and grades of "A" in surfing and soccer.

18. On February 26, 2003, a student study team meeting was held at the District high school because of Mother's concern that Student's grades were slipping. The meeting resulted in a "Section 504 Accommodation Plan" being drafted.[2] Mother brought a magazine article to the meeting entitled "Young and Bipolar" and gave a book on bipolar disorder to school counselor Lucinda Mast (Mast). At hearing, Mast had no independent recollection of this meeting. The book Mother gave to counselor Mast included an extensive chapter on obtaining special education services under the IDEA. Mother recalled discussing ways to improve Student's grades, that Student was frequently late for class because he could not figure out where to go, and that Student was dressing in an unmatched way. At the time of the meeting, Student was seeing Dr. Haraszti and LCSW Royer, however, Mother did not provide any information from either professional at the meeting. The section 504 plan noted that Student had bipolar disorder and set forth the

[2] "Section 504" is commonly used to refer to Section 504 of the Rehabilitation Act of 1973. Under section 504, school districts have a duty to provide "regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." (34 C.F.R. § 104.33.) Although section 504 and IDEA eligibility may overlap, the eligibility criteria, services and procedures under the IDEA are distinct.

following accommodations: 1) recognize symptoms and call the counselor or nurse if Student needed help; 2) keep a daily homework plan; 3) call home if Student was having class difficulties; and 4) Student may need more time on class work.

19. During the spring semester of 2003, Mother talked to, or emailed Student's teachers about his bipolar disorder and whether there was something Parents could do to help Student's grades.

20. During the first week of March in 2003, Student took the California High School Exit Exam (CAHSEE). Student passed the mathematics section, and achieved a score of 305 on the English-Language Arts section, which required a score of 350 to pass. Mother and Father received the results of the CAHSEE in October of 2003. The California Standardized Testing and Reporting (STAR) test of California Standards showed that in the spring of 2003 Student scored "below basic" in English-Language Arts, History and Biology. Student completed the spring of 2003 semester with the following grades: "C" in Art and English; "D" in History and Algebra, "A" in Soccer; "B minus" in Surfing; and "F" in Biology. Student attended summer school in 2003, where he received grades of "C" in Algebra and "D" in Biology. Biology teacher Deborah Fox had no recollection of Student at hearing. Keri McBride, Student's art teacher during this semester, recalled Student, but had not noticed anything indicating that bipolar disorder effected Student's work in her class.

21. On June 20, 2003, Student's psychiatrist, Dr. Haraszti, completed a District "Physical Examination Report" form to allow Student to participate in sports at the District high school. Dr. Haraszti checked "No" for history of unconsciousness. Dr. Haraszti reported that Student was being treated for a "mood disorder" with medication and that Student could participate in all sports, including basketball, football, gymnastics, soccer, softball, swimming, track/field, water polo, weightlifting, and wrestling. The only restriction noted was to maintain adequate hydration and watch for signs of heat exhaustion. Prior to the filing of Student's due process hearing requests, Dr. Haraszti did not provide any other

reports or information about Student to the District other than the "Physical Examination Report."

22. During the fall semester of 2003, Mother noticed that Student had trouble completing his homework and that when he did, he did not always turn it in. Mother discussed this with Student's teachers. Mother also noted that Student's written work was short, did not contain proper sentence structure and was rambling. Mother asked counselor Mast to put Student in smaller classes. Father noticed that Student had trouble explaining himself verbally, appeared withdrawn, and would not compete in surfing even though he showed up for practice.

23. A section 504 Accommodation plan meeting was held on October 2, 2003. According to Mother, there was a discussion about Student being confused on campus, which explained why he was sometimes late to class. Ted Hollister (Hollister), Student's Spanish teacher and basketball coach at the time, recalled that the discussion at the meeting was that Student was having trouble getting to class on time because he was "overwhelmed" by the crowds of students. Hollister had no other memory of Student other than that Student was fine in his class. Counselor Mast recalled a discussion of Student being anxious about crowds in the halls, but had no other memory of the meeting.

24. A section 504 accommodation plan was written on October 2, 3003, which provided Student the following educational accommodations because of his diagnosis of bipolar disorder: 1) inform parents of unusual behavior; 2) inform staff about Student's disorder; 3) allow Student to see the counselor, psychologist or nurse if confused at school; 4) Student and his parents would be consistent with medication; 5) teachers would ensure comprehension through preview or review of assignments; 6) if Student was tardy, he would be sent to the counselor and not disciplined; 7) allow make-up work for classes missed due to the disorder; 8) provide extended time on assignments and tests as needed; 9) assignments would be broken down into smaller parts; and 10) parents would be

notified if Student had problems completing assignments.

25. Sometime after the October 2, 2003 section 504 meeting, Mother and Father received a progress report from the District high school showing that Student was failing English and Geometry, was on track to get a "D" in physical science, and was not getting credit for surfing. The progress report also showed that Student was getting a "B" and considered to be an "excellent student" in Spanish, was getting a "C" in History, and was getting an "A" in soccer. At hearing, Student's English teacher during this semester, Kristen Garcia (formerly Alfano) had no memory of him.

26. Mother discussed her concerns about Student's education with LCSW Royer and Dr. Haraszti, who both recommend that Student be placed in a residential program that included a more structured school environment, daily mental health counseling, group therapy and family therapy. Mother and Father visited three facilities in Utah following this recommendation. Parents enrolled Student at Logan River Academy in Utah (Logan River) on November 4, 2003. Mother and Father paid $1,662 for someone to escort Student to Logan River. Parents did not give the District ten days written notice before enrolling Student there.

27. Around November 10, 2003 Student's English teacher e-mailed Mother to ask about the status of Student's make-up work. Mother replied by e-mail that Student had been enrolled at Logan River because "he was not getting the appropriate education he was entitled to" and that his new school would have classrooms with a maximum of ten children.

28. While enrolled at Logan River, Student's grades ranged between "A" and "F," with most grades falling in the "B", "C" or "D" range. Student left Logan River in August of 2004, a month prior to his eighteenth birthday, because the program only enrolled students up to the age of 18. Student did not have sufficient credits to graduate with a diploma. Mother and Father paid $52,090.58 for Logan River tuition and incurred travel

expenses to visit Student.

29. In September of 2004, Student attended a private religious high school outside of the District boundaries. On November 3, 2004, LCSW Royer provided a letter to the private religious high school saying that Student had been hospitalized at Los Encinas and would need to make up work or have independent study. There was no evidence that this letter was ever provided to the District prior to Student's due process hearing requests. In the two quarters Student attended the private religious high school, he achieved grades of "F" in Environmental Science, Religion, and English, but got a "B minus" in Oceanography, and an "A" in "Informal Geom." Student did not receive sufficient credit to obtain a high school diploma.

30. In February of 2005, Student was beaten at a skate park and hit on the head with a skateboard. Student was taken to a doctor and no subdural hematoma was found. According to Mother, Student was paranoid after this incident and did not want to return to the private religious high school.

31. On April 29, 2005, Student enrolled in the Long Beach School for Adults, a District program for returning Students over the age of 18. The Long Beach School for Adults offered all classed needed for a diploma. Students generally learned independently with teacher guidance and self-study assignments. On the registration form under "Student type," Student and Mother did not check boxes for "handicapped" or "special needs," but instead checked the boxes for "High School Diploma" and "Regular Adult." District personnel directed Student to enroll there because he was over the age of 18 and could not enroll in a District high school. Mother received information about the program from a relative who worked there. To be eligible for the adult school high school diploma program, Student needed to score at the ninth grade level on the Test of Adult Basic Education. Student received a grade equivalent score of 6.3 on April 29, 2005, but received a score of 9.9 when he retook the test on May 10, 2005. Student's mother paid

approximately $40 for each semester Student was enrolled.

32. Long Beach School for Adults head counselor Nancy Megli was not aware that Student had a diagnosis of bipolar disorder and a history of head injuries. Long Beach School for Adults English teacher Lee Anne Moore (Moore) talked to Student twice after he walked out of her class. Student seemed detached, cited personal reasons, and said he had to go. Student focused on Moore when he needed to, did not exhibit any unusual behaviors in class and was occasionally social with other students.

33. Student turned 19 years old on September 25, 2005.

34. In October of 2005, Student was mugged on the street. He was beaten, burned with cigarettes, and his backpack was stolen. Mother did not think Student suffered a head injury during this incident.

35. In December of 2006, Student hurt his head while skateboarding at a skate park. He was hospitalized for a few days for tests.

36. In 2007, Mother and Father tried to help Student live independently with a girlfriend who also required psychiatric treatment. Mother bought food, paid the rent, and helped clean. The arrangement was not a success.

37. Between the time of enrollment and the time of hearing, Student completed two classes at the Long Beach School for Adults, General Economics (for which he received an extension) and Expository Reasoning. Student received grades of "C" and five credits for each class. Student's attendance was sporadic, sometimes due to hospitalizations. According to Mother, Student's girlfriend sometimes accompanied him to the Long Beach School for Adults to help him, despite this being against the rules. Head teacher Gregory Spooner saw Student with a girlfriend one time when Student was checking out materials. Student took the mathematics section of the CAHSEE again in March of 2007, raising his score to 331 of the 350 needed to pass. Student did not have sufficient credits to obtain a high school diploma, nor had he passed the mathematics portion of the CAHSEE by the

time of hearing.

38. At hearing, Student presented expert testimony from Rochelle Medici, Ph.D. (Dr. Medici). The District had not received information from Dr. Medici before Student's due process hearing requests had been filed. Dr. Medici was an experienced psychologist specializing in neuropsychology and was on the medical staff at Las Encinas. Consistent with Dr. Haraszti, Dr. Medici confirmed that with treatment a person with bipolar disorder can live a typical life. Dr. Medici had evaluated Student when he was hospitalized in December of 2006 and again in 2008, and produced a report dated January 26, 2009. Student's history was obtained from his family. When Dr. Medici first saw Student in 2006, Student was not responding to the typical treatment for bipolar disorder of medication and psychotherapy. As of 2006, Student had acceptable daily living skills but was having difficulty with school and independence. Dr. Medici told parents that any school Student attended should be made aware that Student's difficulties may impact his school performance, however, there was no evidence at hearing that this was done at the Long Beach School for Adults. Dr. Medici noted that between 2006 and her assessment in 2008, Student's abilities on the Wisconsin Card Sort had decreased, he scored lower on the digit span memory test, and his arithmetic score decreased to "borderline."

39. Dr. Medici concluded in her January of 2009 report that Student demonstrated losses in memory, attention, visual-spatial skills and executive functioning consistent with a traumatic brain injury. Dr. Medici described Student's deficits as an organic mood disorder with bipolar symptoms arising from Student's 2001 and 2002 head injuries. A positron emission topography (PET) scan result obtained during the hearing confirmed Dr. Medici's conclusions of brain injury. In particular, the PET scanned showed that Student had lower levels of brain functioning in the following areas: temporal lobe (language and memory); parietal lobe (association); cerebellum (coordination); and frontal lobe (planning and decision-making). The 2009 PET scan result was the first time that brain

injury had been confirmed by medical imaging. Dr. Haraszti also acknowledged at hearing that Student's learning difficulties from brain damage had eluded his doctors until near the time of hearing, and that only near the time of hearing had Student received proper medication.

40. Dr. Medici recommended that for Student to complete high school, he would require continued treatment in a residential rehabilitation center for people with brain injury, like the one where Student was being treated at the time of hearing.

41. At no time between the 2003-2004 school year and the time that Student filed Case One and Case Two, did District personnel recommend Student for a special education assessment, provide a special education assessment plan, or provide parents with a notice of their rights under the IDEA. During the same time period, Mother and Father did not request that the District provide a notice of procedural safeguards or a special education assessment, or file a request for a due process hearing.

CONCLUSIONS OF LAW

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUES ONE, TWO AND THREE, THE 2003-2004 SCHOOL YEAR THROUGH SEPTEMBER 24, 2006

2. Student contends that he was denied a FAPE from the 2003-2004 school year through September 24, 2006 (two years prior to the date of filing Case One) because the District failed to provide Student's parents with a notice of procedural safeguards and because the District should have assessed Student and found him eligible for special education pursuant to its "child find" obligation. Student contends that the two-year statute of limitations applicable to IDEA cases does not apply because Student's parents

should have been provided with a notice of procedural safeguards by the school district. The District disagrees and contends that all of Student's claims prior to September 24, 2006 are time-barred. As discussed below, the two-year statute of limitations bars Student's claims prior to September 24, 2006, because Student has failed to prove an exception to the statute of limitations.

3. Under the IDEA, eligible children with disabilities are entitled to FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.)

4. Prior to July 1, 2005, the IDEA provided that a notice of procedural safeguards must be given by a school district to a particular parent of a child with a disability at a minimum: 1) upon initial referral for assessment; 2) upon notice of an IEP meeting or reassessment of the child; or 3) when a request for due process was filed. (Former 20 U.S.C. § 1415(d)(1).) From September of 2003 through October 5, 2007, the Education Code provided that a notice of procedural safeguards must be given by a school district to a particular parent of a child with a disability at a minimum: 1) upon initial referral for assessment; 2) upon notice of an IEP meeting or reassessment of the child; or 3) when a request for due process was filed. (Former Ed. Code, § 56301.) After July 1, 2005, the IDEA provided that a notice of procedural safeguards must be given by a school district to a particular parent of a child with a disability a minimum of once a year and/or: 1) upon initial referral for assessment or parent request for assessment; 2) upon filing a request for a due process hearing; or 3) upon parent request. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a) (adding that a notice must also be given when an eligible student's placement is changed for violating a code of conduct).) From October 7, 2005 through October 9, 2007, the Education Code provided that a notice of procedural safeguards must

be given by a school district to a particular parent of a child with a disability a minimum of once a year and/or: 1) upon initial referral for assessment or parent request for assessment; 2) upon filing a request for a due process hearing; or 3) upon parent request. (Former Ed. Code, § 56301, subd. (d)(2).) In general, where a child was never identified as being eligible for special education and was not referred for special education assessment, a school has no duty to give the parents a notice of procedural safeguards. (See *Firth v. Galeton Area School Dist.* (M.D. Pa. 1995) 900 F.Supp. 706, 714.)

5. A request for a due process hearing "shall 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." (Ed. Code, § 56505, sub. (l).) This time limitation does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: 1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or 2) The withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*P.P. ex rel. Michael P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

6. Here, parents' testimony demonstrated that as of the 2003-2004 school year, they had concluded that the District was not providing an adequate education to Student to meet his needs. Parents took the drastic action of removing Student from the District

high school and enrolling him in a residential school in Utah as of November 4, 2003. Accordingly, the statute of limitations began running, at the latest, at that time. Student failed to meet his burden of demonstrating by a preponderance of the evidence that either exception to the statute of limitations applies. There was no evidence that the District ever made specific misrepresentations to parents that it had solved the problem forming the basis of the due process hearing complaint. Further, to the extent Student relies on the second exception, that the District withheld information from parents that should have been provided under the IDEA, i.e., a notice of procedural safeguards, Student failed to demonstrate that the exception applied. Student's evidence at hearing unequivocally showed that during the relevant time period Student was never referred for a special education assessment, parents never request a special education assessment, parents did not file for due process, nor did parents request a notice of procedural safeguards. Thus, Student failed to demonstrate that an exception to the statute of limitations based on failure to provide a notice of procedural safeguards applied at any time. Student did not present evidence that there was any other information that should have been, but was not, provided by District.

7. Student's claims prior to September 24, 2006, are barred by the statute of limitations. (Factual Findings 1-27, 41; Legal Conclusions 1, 3-6.) Because Student's claims are time-barred, this decision does not address the merits of Student's substantive claims that he was denied a FAPE prior to September 24, 2006.

ISSUES FOUR AND FIVE, SEPTEMBER 24, 2006 THROUGH NOVEMBER 24, 2008

8. Student contends that he was denied a FAPE from September 24, 2006 (two year prior to the filing of Case One) through November 24, 2008 (the date Student filed Case Two) because the District: 1) should have provided a notice of procedural safeguards

to Student and/or his parents; and 2) should have assessed Student and found him eligible for special education pursuant to its "child find" obligation. Student's contentions fail because the District had no duty to provide special education to Student after his 19th birthday.

9. During the relevant time period, Education Code section 56301, subdivision (d)(2) provided that parents of a child with a disability shall be given a notice of procedural safeguards only one time a school year, and: 1) upon initial referral or parental request for assessment; 2) upon the first complaint to the state department of education within a school year; 3) upon receipt of the first due process hearing request in a school year; 4) upon a change of placement for an eligible student because of a violation of a code of conduct; and 5) upon parent request. (See also 20 U.S.C. § 1415(d)(1)(A) & former Ed. Code, § 56301, subd. (d)(2) (prior to October 10, 2007, procedural safeguards notice must be given at least once a year and/or upon initial referral for assessment, parent request for assessment, filing for due process, or parent request).) There is no duty to provide a notice of procedural safeguards to parents if a child was never deemed eligible or referred for special education assessment. (*Firth v. Galeton Area School Dist., supra,* 900 F.Supp. at p. 714.)

10. "Child find" refers to the duty that IDEA imposes upon states to identify, locate and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171 & 56301, subds. (a) & (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.)

11. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded

the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

12. Under the IDEA, there is no obligation to provide FAPE to children between the ages of 18 through 21 to the extent that provision of FAPE is inconsistent with state law. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.102(a)(1).) At all relevant times, "individual with exceptional needs" for purposes of special education eligibility in California was defined as "Between the ages of 19 and 21 years, inclusive; enrolled in or eligible for a program under this part or other special education program prior to his or her 19th birthday; and has not yet completed his or her prescribed course of study or who has not met proficiency standards or has not graduated from high school with a regular high school diploma." (Ed. Code, § 56026, subd. (c)(4).) Thus, a person between the ages of 19 and 21 who was not eligible for special education at the time of his or her 19th birthday is not eligible for special education services in California.

13. Here, Student turned 19 years old on September 25, 2005, one year before the earliest relevant time period for Issues Four and Five under the IDEA's two-year statute of limitations. As discussed elsewhere in this decision, Student's claims that he should have been found eligible for special education prior to the age of 19 are barred by the statute of limitations. Because Student could never be eligible for special education after the age of 19 unless he had been eligible at the time of his 19th birthday, as a matter of law the District would not have had any "child find" obligation to Student, nor could District have deprived him of a FAPE during the relevant time period. Similarly, the District would not have had any duty to provide a notice of procedural safeguards to Student or his family, nor could the District have denied Student a FAPE by not providing a notice of procedural safeguards, at any time after his 19th birthday.

14. In sum, although it is understandable that Mother and Father are seeking resources to help Student with what they now know is a brain injury, Student was not entitled to special education services at any time after his 19th birthday on September 25, 2005. Accordingly, Student's claims that he was denied a FAPE after September 24, 2006 are meritless. (Factual Findings 1-27, 33, 41; Legal Conclusions 1, 3-7, 9-13.)

ORDER

All of Student's requests for relief are 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, the District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: March 26, 2009

/s/

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings