

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT AND  
ORANGE COUNTY HEALTH CARE  
AGENCY.

OAH CASE NO. 2009110429

DECISION

On March 29 and 30, 2010, and April 1 and 29, 2010, Judith L. Pasewark, Administrative Law Judge, Office of Administrative Hearings, State of California, presided at the due process hearing in this matter.

Kathleen M. Loyer, Esq., represented Student (Student). Both Student's mother (Mother) and father (Father) attended each day of the hearing.

Michelle L. Palmer, Esq., represented Orange County Health Care Agency (OCHCA). Manuel Robles, the County's AB3632 Coordinator, attended each day on behalf of OCHCA.

Student filed her request for due process hearing on November 16, 2009. OAH granted a continuance of the matter on December 21, 2009. On March 29, 2010, Student and Irvine Unified School District (District) reached a settlement on all issues pertaining to the District. Hearing on this matter proceeded between Student and OCHCA on March 29 and 30, 2010, and April 1 and 29, 2010. The matter was submitted at close of business on June 7, 2010, upon receipt of closing briefs from each attorney.

Due to unexpected illness of the ALJ, the parties stipulated to an extension of time for the decision until August 9, 2010.

## ISSUE

Upon dismissal of the District from this matter, the remaining issue is as follows:

Did OCHCA deny Student a free appropriate public education (FAPE) in the individualized education program (IEP) offers dated June 5, 2009, July 23, 2009, and July 30, 2009, by failing to offer or provide Student with placement in a residential treatment center (RTC) and appropriate services to address Student's severe emotional disturbance?

Student contends that despite Student's parents' (Parents') provision of a detailed history of social emotional deficits, diagnosis, birth parent's history, and signed consents to confer with all previous service providers, OCHCA made a cursory, biased and incomplete mental health assessment of Student, resulting in an inappropriate recommendation for outpatient therapy and mental health services in a regular high school placement. Parents contend that Student requires an out-of-state RTC, and are requesting reimbursement for Student's placement at several facilities in Utah.

OCHCA contends that its recommendation of outpatient therapy was appropriately based upon the information and documents provided at the time of the mental health assessment. Further, information provided after the assessment, did not change OCHCA's recommendations.

## FINDINGS OF FACT

1. Student is a 16-year-old girl who resides with her parents within the Irvine Unified School District. Student's early assessments indicated problems resulting from poorly developed language skills and ADHD. As a result, in December 2000, Student initially qualified for special education with the eligibility of Specific Learning Disability

(SLD). Shortly thereafter, Student's IEP team added Other Health Impairment (OHI) due to Student's ADHD, which remained her eligibility category until 2009.

2. Student has not attended a public school since the first grade in 2001. In March 2001, the District placed Student at the University of California, Irvine-Child Development Center (UCI-CDC).

3. In 2004, the District recommended non-public school (NPS) placement at Prentice School, where she remained until graduating from the eighth grade in 2008.

4. Mother indicated that Student has been in treatment with psychologists, psychiatrists, and behaviorists since pre-school. Student began treatment with a clinical psychologist in 2000. In 2003, Parents obtained psychiatric services from Ihab Soliman, M.D. In 2005, Dr. Soliman diagnosed Student with a borderline personality disorder, which was based upon behaviors described by Mother. Further, in December 2006, the District referred Student for an AB 3632 mental health assessment.<sup>1</sup>

5. While the IEP team did not find Student eligible for special education under the criteria of Emotional Disturbance (ED) in 2006, OCHCA did approve her for outpatient mental health services for 40 minutes, once a month. Parents declined this offer, and continued with their already established, private mental health program.

6. Upon graduating from Prentice School in 2008, Parents enrolled Student in the Brehm Preparatory School (Brehm), a California-approved NPS located in

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<sup>1</sup> California has established a statutory scheme that provides for interagency responsibility in regards to the provision of special education related services. (Gov. Code, §§ 7570 – 7588.) The statutory scheme is known as AB3632 after the Assembly Bill that created the law.

Carbondale, Illinois.<sup>2</sup> Brehm is designed for students with complex learning disabilities; however, it does not have a counseling component.

7. Student arrived at Brehm in late August 2008. Mother accompanied Student to help her acclimate to the residential program. Student's transition to a residential environment was difficult, resulting in Mother remaining in a nearby hotel. For a period of time, Student stayed with Mother in the hotel and attended Brehm during the day. When Mother finally returned to California, Student's mental health deteriorated. It is suspected that as Student's difficulty adjusting to living away from home increased, the stress it created resulted in worsening problems. An allergic reaction to corticosteroid medication<sup>3</sup> also exacerbated Student's underlying emotional problems. As the result of what is described as a rather trivial conflict with her dorm parent, Student began to rage, threatened to commit suicide, and eventually ran from the facility. As the school was ill-equipped to service Student's emotional issues, Brehm requested that Student be removed from its program until her medical and emotional problems could be resolved. On November 25, 2008, Parents removed Student from Brehm, and transferred her to the residential psychiatric ward of Rogers Memorial Hospital (Rogers Memorial) in Milwaukee, Wisconsin.

8. Student did not do well at Rogers Memorial and experienced many problems. She appeared overwhelmed by the increased stimuli associated with the inpatient unit, such as cramped quarters and contact with other children exhibiting behavioral problems. A larger problem resulted from unsuccessful changes in her

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<sup>2</sup> Funding of Parents' private placement of Student in the residential program at Brehm was pursuant to a confidential settlement agreement.

<sup>3</sup> Student had an exaggerated allergic response to wild turkey mites while on a camping trip with peers from Brehm.

psychotropic medications which caused emotional deregulation and included the emergence of pharmacologically induced manic/mixed manic symptoms when prescribed sertraline. This resulted in more volatile behavior, such as yelling and banging her head against the wall. On two visits with her parents, Student became violently disturbed, kicking at the locked doors of her unit, as her parents departed the facility. Student required physical restraints on these occasions. On January 2, 2009, Rogers Memorial transferred Student to their acute psychiatric unit, where she remained until February 2, 2009, when she was discharged at the request of her parents.

9. The Discharge Summary from Rogers Memorial (Rogers Report), dated February 2, 2009, was prepared by Dr. Peter M. Lake. Dr. Lake did not testify at hearing; however, the parties submitted the Rogers Report into evidence. The Rogers Report indicates that Student presented with a very severe, longstanding, and complicated child psychiatry history with significant difficulties with disruptive behavior and emotional regulation dating to early childhood. As of the date of her admission to Rogers Memorial, there had been no overt episodes of psychosis, thought disorder or hallucinations. Dr. Lake noted that Student's prior psychoeducational testing indicated that Student showed general low-average delays in all academic areas, and continued to receive speech and language therapy for expressive language issues and social skills support. He indicated, "clearly at times her emotional outbursts and poor frustration tolerance has been related to language delays." Further, he reported that Student has required extensive child psychiatry and special education interventions to obtain some stability, with special education in small, structured placement environments.

10. Upon admittance to the Child Adolescent Center at Rogers Memorial, Student's treatment team identified the following problems: (1) depression as evidenced by depressed mood, hopelessness regarding the future, anxiety, erratic sleep, tearfulness and temper outbursts; (2) anxiety disorder with episodes of generalized anxiety, fears

regarding perceived danger, anxiety regarding school and friends; (3) social skills issues with need for frustration tolerance and guidance regarding processing difficulties; (4) academic issues with needs to coordinate with therapeutic boarding school; and (5) parent-child relationship issues due to behavioral difficulties, adoption, psychological and academic vulnerabilities, and current adolescent development. As indicated above in Paragraph 8, Student did not adjust well to the therapeutic milieu, primarily acting out with nightly temper outbursts best described as 15 to 20 minutes of screaming episodes. Student also experienced a significant amount of loneliness, separation anxiety, and perceived fears of the world.

11. The Rogers Report indicated that Student made some progress in her therapy and participation in activities. However, on January 2, 2009, she became very frustrated, and her aggressive behavior escalated to the point of requiring physical restraints. As a result, Student was transferred to the inpatient Child and Adolescent Unit. While in this acute inpatient unit, Student continued to have significant erratic episodic difficulties with minimal triggers. Her treatment required very specific and detailed behavioral management protocols to assist with daily activities of living and to complete a daily schedule. Ultimately, within the structure of the treatment environment of the inpatient unit, Student showed a gradual trend of improvement regarding her independence and activities of daily living as outlined in her behavior management program.

12. The Rogers Report noted that in preparation for discharge, Parents were adamant that they preferred that Student not return home, and they continued an aggressive search for therapeutic boarding schools. Several RTCs were contacted; however, upon review, each responded that Student's emotional and psychiatric issues were outside their program's ability to successfully manage Student.

13. The Rogers Report concluded by stating that in preparation for further educational planning, Student would most likely require a supportive structured treatment environment, and her educational placement would have to be highly skilled in her complex biopsychosocial issues, including pervasive developmental disorder features, sensory integration issues, depressive disorder, and generalized anxiety which result in her periodic and emotional outbursts and recent trend of increasing aggression in the last year. Due to her sensory integration, Student has severe difficulties in large groups, and is very sensitive to environments that are not quiet, controlled and less stimulating.

14. Upon release from Rogers Memorial, Student returned home. Based upon information and recommendations from Dr. Soliman, Student completed the 2008-2009 school year in home/hospital studies supervised by the District and Brehm. Student also participated in outpatient therapy with Dr. Soliman.

15. On March 31, 2009, the District held an IEP meeting, at which the IEP team recommended continuing the home/hospital study, a reassessment of Student for Emotional Disturbance eligibility, and a concurrent mental health referral to OCHCA. Parents signed releases for medical, psychological, and educational information.

16. Dr. Forouz Farzan carried out the AB3632 assessment on behalf of OCHCA. Dr. Farzan has a master's degree in social work and a Psy.D. in psychology. She is a licensed clinical psychologist and has worked for Orange County for 19 years. She has 15-to-16 years of experience working with adolescents. As part of the assessment, Dr. Farzan met with Student twice, and also spoke with her mother, as well as Brian Brown, Ph.D., from Brehm. In preparing her recommendations, Dr. Farzan reviewed Student's triennial Psychoeducational Assessment completed in May 2009, a Psychoeducational

Assessment administered by Dr. Robert Peterson<sup>4</sup> from 2007, as well as Student's old AB3632 assessment report prepared by OCHCA in 2006. Although Dr. Farzan was aware of Student's 10-week psychiatric hospitalization in November 2008, and testified that she had read the Roger's Report, her written assessment report does not reflect that she reviewed the document as part of her assessment. Instead, Dr. Farzan merely indicated in her report, "for history of presenting problems and strengths see AB3632 assessment report dated December 27, 2006." This is unfortunate, as the 2006 AB3632 report did not include any history from Dr. Soliman regarding Student's outpatient psychiatric treatment. Further, subsequent to 2006, Student's medications had been significantly changed or modified, and Student had reached puberty, which added additional hormonal and emotional facets to her behavior. According to the reports from Rogers Memorial, all of these new events contributed to Student's current mental and educational predicament. Further, Dr. Farzan's reliance on the 2006 AB3632 report, excluded her reporting of the more recent and more relevant information contained in the Rogers Report.

17. In reviewing Student's May 2009 Triennial Psychoeducational Assessment, Dr. Farzan noted that the Behavior Assessment System for Children-Second Edition (BASC-2) had been administered to assess Student's behavior and self-perceptions. Student rated herself "at risk" in atypicality, attention problems, relations with parents, self-reliance, and personal adjustment. Parents, who also took the BASC-2, rated Student's hyperactivity, attention problems and activities of daily living as "clinically

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<sup>4</sup> Dr. Paterson is a highly qualified Educational Psychologist in Southern California whose assessments and recommendations are thorough, well reasoned, and well respected by both parents and school districts.



significant.” They further rated Student’s behaviors “at risk” in the areas of externalizing problems, the Behavioral Symptoms Index, and leadership.<sup>5</sup>

18. Of greater note, Dr. Brown, who had observed Student at Brehm, also completed the BASC-2. Dr. Brown rated Student’s behaviors in the classroom as “clinically significant” in the areas of hyperactivity, aggression, internalizing and externalizing problems, depression, somatization, withdrawal, and Behavioral Symptoms Index. Dr. Farzan concluded that overall, the BASC-2 ratings suggest that Student has a moderate to significant level of difficulty functioning successfully at home and at school.

19. Parents and Dr. Brown also rated Student’s behavior on the Scale for Assessing Emotional Disturbance (SAED). The SAED is a rating scale that evaluates the emotional and behavioral problems of students in educational settings. Father did not indicate an extreme number of emotional and behavioral problems in the home. Mother, on the other hand, rated Student’s behavioral problems at home as extreme or “significantly deviant.” Dr. Brown’s ratings of Student’s behaviors in the classroom also fell within the “significantly deviant” range, indicating the presence of an extreme number of emotional and behavioral problems.

20. Dr. Farzan’s Progress Notes (Notes) maintained as part of Student’s mental health file, indicate that she spoke to Dr. Brown by telephone on May 26, 2009. The Notes reflect that Dr. Brown stated that “Student is not able to benefit from Brehm’s program due to her inability to control/regulate her emotions, i.e., shuts down, regresses to earlier stages of development or becomes aggressive by throwing/breaking objects.” Student was able to become friends with a couple of girls, but was unable to

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<sup>5</sup> A score in the “clinically significant” range suggests a high level of maladjustment. Scores in the “at risk” range may identify the potential of a developing problem that needs careful monitoring.

maintain a healthy relationship. The Notes further reported that Dr. Brown believed that Student needed a small facility with emphasis on Student's inability to regulate emotions, naïveté, and lack of self-control strategies, problem-solving, and ineffective communication. Oddly, this information was not included in Dr. Farzan's written report.

21. Dr. Farzan reported that Dr. Soliman was treating Student for intermittent explosive disorder, mood disorder, and pervasive developmental disorder, and that he prescribed psychotropic medications to Student. As stated in Paragraph 16, Dr. Farzan relied on the 2006 AB3632 assessment to determine Student's mental health status in 2009. No information in the 2006 report indicates that Dr. Soliman was ever contacted or that Student's records from him were ever obtained or considered. Although Dr. Farzan offered to refer Student for a psychiatric evaluation as part of her AB3632 assessment, due to time constraints, Parents declined. Instead, Parents indicated that they would rely on Dr. Soliman's opinion. Regardless, Dr. Farzan did not contact Dr. Soliman or request Student's records from him. Instead, she merely relied on Mother's reporting of Student's medical and psychiatric conditions.

22. Dr. Farzan concluded in the Clinical Summary of her AB3632 assessment that Student presents with academic, behavioral and emotional problems in the form of depressed mood, anxiety, mood swings, irritability, and anger outbursts when under stress. She attributed Student's removal from Brehm to her inability to separate from her parents, which resulted in Student shutting down and becoming aggressive at times. She also concluded that Student's explosive temper, lack of remorse, and self-centered behaviors were possibly due to her biological family's history and exposure to alcohol prenatally. As a result, Dr. Farzan recommended AB3632 outpatient mental health services to reduce Student's angry outbursts and irritability, and to improve Student's emotional regulation and coping skills in order to assist her to benefit from special education. Dr. Farzan did not recommend placement in a RTC.

23. In her testimony, Dr. Farzan expanded on her rationale for recommending outpatient therapy. It is noted, however, that Dr. Farzan did not present as a straightforward witness. In responding to questions, she had difficulty with recall, and was prone to making assumptions. Dr. Farzan pointed out that she could not observe Student in school, as Student was then in home/hospital study. She indicated, however, that Student was interested in going to school, and wanted to return to Brehm. Given Parents' unshakeable demand for a RTC, she opined that Mother did not want Student to return home. Additionally, between 2000 and 2009, Student had successfully completed her studies at both UCI-CDC and Prentice with the assistance of outpatient therapy. Student had not availed herself of the outpatient therapy offered by OCHCA in 2006, and therefore she concluded there was no information to suggest that OCHCA outpatient assistance could not be successful in 2009. Most importantly, Student's behaviors only escalated once she was placed in a residential program. Dr. Farzan determined that because Student had behaviors in RTC placement, but not at home, it meant that she needed to be home. Dr. Farzan also insinuated that her lack of current psychiatric information was in part due to Parents' refusal to accept her referral for a

psychiatric evaluation, even though she was aware that Student was under the long-time care of Dr. Soliman, her private psychiatrist.<sup>6</sup>

24. Dr. Farzan knew that Parents had requested RTC placement, and testified that no information provided to her supported a conclusion that Student required residential placement. This is puzzling, as she also testified she had reviewed the Rogers Report, and the findings of Dr. Lake. While testifying, Dr. Farzan chided that her recommendations were based on Student's needs, not her parents' desires. Further, under applicable law, she was required to consider the least restrictive environment (LRE) for Student, and not all lesser restrictive placements had been considered.

25. The District completed its triennial assessment of Student in May 2009, and on June 5, 2009, held an IEP meeting to review the assessment. Although Student had stabilized, and was doing much better, the IEP team changed Student's primary eligibility category to ED based upon the information contained in the triennial assessment report. Since the AB3632 report had not yet been completed, the District

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<sup>6</sup> Dr. Farzan's Notes also include an entry from Victor Cota, Ph.D., Dr. Farzan's supervisor, which indicated he spoke with Mother regarding her inability to immediately connect with the MD for the psychiatric evaluation. The note indicated that Dr. Cota explained that the psychiatric evaluation as part of the AB evaluation was not absolutely necessary as long as the evaluating team has sufficient information to complete the report and make recommendations. Further, Student already had a private M.D., Dr. Soliman. Dr. Cota goes on to report that if Dr. Farzan found it absolutely necessary to have a psychiatric evaluation, then OCHCA would assign an M.D.

and OCHCA made no offer of placement at this IEP meeting;<sup>7</sup> however, Parents notified the District of their intent to privately place Student.

26. The problems evident at the time Student left Rogers Memorial dissipated at home. Student had successfully completed her home/hospital assignments, and by June 2010, Student and her family felt she was ready to transition back to a residential school. As a first step to returning to Brehm, Parents unilaterally enrolled Student at Maple Lake Academy (Maple Lake), a RTC located in Payson, Utah.

27. Student was unable to transition into Maple Lake. Immediately upon her arrival at Maple Lake on June 11, 2009, Student again began to deteriorate mentally, and she ultimately became assaultive and destructive. The longer Student remained at Maple Lake, the more severe her behavioral issues became. Student developed a new psychiatric crisis, which included hallucinations, and hearing voices, which she had never previously experienced. Within less than three weeks of her arrival, Maple Lake requested that Student be removed from their program. Parents placed Student in a "safe house"<sup>8</sup> until arrangements could be made to admit her to the Aspen Institute for Behavioral Assessment (Aspen) in Syracuse, Utah, on July 8, 2009. It should be noted that Aspen is a psychiatric hospital and diagnostic center which makes recommendations for long-term care. It is not an educational facility. While at Aspen, various staff members conducted a multidisciplinary assessment of Student, and prepared a written report of their findings (Aspen Report).

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<sup>7</sup> Dr. Farzan's written report indicates that the assessment itself was completed in April and May 2009; however, the written report apparently was not completed until June 23, 2009.

<sup>8</sup> A "safe house" is an interim placement by a private company which provides one-on-one supervision, 24 hours a day.

28. David Ericson, Ph.D., a licensed psychologist, administered cognitive and academic assessments to Student. Dr. Ericson did not testify at hearing; however, the parties submitted his portion of the Aspen Report into evidence. Student's test scores in these assessments, did not significantly differ from her previous scores. Dr. Ericson administered the Weschler Intelligence Scale for Children-Fourth Edition (WISC-IV), an intelligence test designed to measure intellectual ability across a variety of tasks. Student's IQ scores were extremely varied. Of note was her remarkably low score on the Processing Speed Index, which indicates extremely low information processing. To evaluate Student's level of academic achievement across a variety of subjects, Student was administered the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III). Student's WJ-III scores displayed a similar degree of variability as that observed in her WISC-IV scores. Student obtained an overall (averaged) score of 95, which placed her at a grade equivalent of 8.4. The score, however, is misleading. Her Academic Fluency score, with a grade equivalence of 3.4, suggests that Student is at a very significant disadvantage when speed of processing information is crucial on academic tasks. Dr. Ericson's report concluded that both Student's WISC-IV scores are commensurate with her WJ-III scores, placing Student as Borderline in both IQ and academic achievement. More importantly, both scores suggest Student would have a difficult time competing with most of her peers in a regular classroom setting.

29. Dr. Richard Davidson prepared the psychiatric component of the Aspen Report and also testified at hearing.<sup>9</sup> Although Dr. Davidson, a psychiatrist, acted as Student's attending physician during her stay at Aspen, he indicated that he primarily provided Aspen with medical and pharmaceutical information. He did not act as

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<sup>9</sup> Dr. Davidson was not in possession of the evidence books, and therefore could not refer to other assessments.

Student's therapist. He described Student's medical problems as complex and peculiar, and noted that Student continues to develop new problems as she ages. Many of her medical problems remain unsolved and, as Dr. Davidson described Student, "she remains unique among the unique."

30. Dr. Davidson reported that Student has sensory integration problems. She has an inherent propensity to have difficulty with stress in her environment. In turn, how she manages stress and anxiety impacts on her mental health. He also commented that Student's cognitive and communication deficits act as stressors for Student and further impact her mental health. Dr. Davidson noted that sometimes Student's symptoms overlapped and it was his opinion that Student may have a brain dysfunction which masquerades as ADHD. He also noted that Student was taking too much Ritalin<sup>10</sup> when she arrived at Aspen.

31. Based upon Student's stay at Aspen, Dr. Davidson believes that Student needs a RTC. He opined that Student's problems are so complex that Student requires a therapeutic environment. He believes that Student is too fragile to handle outpatient therapy. It is also noted that Dr. Davidson believes that Student left Aspen too soon. When released, Student was still unraveling at the end of the day. Dr. Davidson suggested that Student may have been "sundowning," a term used to describe a change in behavior and an increase in anxiety resulting at the end of the day as medication wears off and daily structure lessens.

32. While Dr. Davidson is not an educator and is unfamiliar with California education law, he nonetheless opined that Student requires an educational environment which is highly structured and provides a seriously individualized program. He does not

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<sup>10</sup> Ritalin is a drug used for ADHD.

believe that Student's home environment or public school can provide enough structure to handle Student's needs or deal with her outbursts.

33. Dr. Davidson's portion of the Aspen Report differs somewhat from his testimony. In the Aspen Report, Dr. Davidson noted that Student's psychiatric and behavioral problems failed to stabilize during the period of time she was at Rogers. Further, once Student returned home, she continued to work with Dr. Soliman, who adjusted her psychotropic medications. While at home, Student also received the additional assistance of the Pfeifer Clinic, which recommended homeopathic preparations, and her pediatrician, who resolved medical issues. Dr. Davidson concluded that these interventions appeared to work well. He also concluded, however, that based upon Student's extensive medical and psychiatric history, attempts to obtain help for Student on an aggressive outpatient basis, placement in an inpatient psychiatric unit, as well as two residential treatment settings, have failed to address Student's significant problems in any significant fashion.

34. Russell Pryor, the Director of Admissions and Clinical Director/Supervisor at Aspen, testified regarding Student's therapy while at Aspen. Mr. Pryor holds a B.A. in psychology, and a master's degree in social work. He is a licensed Clinical Social Worker in Utah. Mr. Pryor acted as Student's primary therapist during her stay at Aspen, and wrote the Therapy component of the Aspen Report.

35. Mr. Pryor's individual therapy sessions focused on several areas of Student's behavior, specifically, social skills, the ability to receive and accept feedback, emotional regulation, and family interaction.

36. In individual therapy, Mr. Pryor noted that Student had a difficult time expressing how she felt emotionally. Initially, Student had difficulty making eye contact or answering any type of question. During her stay at Aspen, Student increased her eye contact, and made some improvement on expressing herself in social situations. Mr.



Pryor noted that Student also made some progress in briefly talking about her feelings, as evidenced by her statements that "I am not happy here (Aspen), I would rather be at home."

37. Mr. Pryor noted that Student had difficulties staying focused and completing assignments. He found these behaviors to be caused by issues with ADHD and Student's cognitive ability to understand what was expected of her. In therapy, he worked on identifying ways to keep Student on task. Student responded best to a token economy/reward system<sup>11</sup> and positive feedback. Mr. Pryor reported that Student required a lot of feedback or she would have a difficult time sitting still or staying focused for more than five to 10 minutes. As a result, Mr. Pryor found that by shortening Student's therapy sessions from 40 minutes, to smaller sessions of 15 to 20 minutes, Student could stay focused and remain on task.

38. Mr. Pryor also found that due to her processing disorders, Student has a difficult time hearing messages and comprehending the meaning of the messages. As a result, it takes Student time to digest what is being communicated, and transitions are difficult for her. Mr. Pryor compares this to a classroom situation. If the subject taught changes too quickly, Student will get lost, look distracted, and give up due to her difficulty with hearing and transitioning at a rapid pace. He concludes by stating that if one can manage Student's learning and hearing comprehension, Student will have better social skills in class and be better able to interact with her peers.

39. Mr. Pryor also worked on Student's emotional regulation. Mr. Pryor observed that Student presented as highly anxious and struggled with a labile affect. When she felt confused, agitated, and unsure, Student would manifest symptoms of

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<sup>11</sup> A token economy system involves a child receiving a token or reward for compliance with instructions or remaining on task.

anxiety and depression, which included sadness, anger, sleep disturbance, hitting, isolation, and nervousness. In order to cope with Student's emotional distress, Student remained medicated. Mr. Pryor added cognitive behavioral therapy to teach self-soothing techniques. Student, however, struggled to learn new coping skills, and when challenged, would shut down for days.

40. Mr. Pryor's final goal with Student dealt with family interactions.<sup>12</sup> He reported that when Student arrived at Aspen, she was very upset at her family, and felt like they were abandoning her at Aspen. Mr. Pryor worked with the entire family to improve Student's relationship with her parents. Generally, Student responded well and was able to work through her anger and identify that she loved her family and only wanted to be with them. She did, however, experience several difficult times where she felt that being in therapy was a negative consequence for her intellectual challenges; that her parents were punishing her by sending her to Aspen. Mr. Pryor repeated that continued family therapy will be important for Student because, at times, she feels as if she is being left behind by her family. Family therapy remains important for Student to reassure her that her family is there for her, and is not trying to punish her, but rather, will support her.

41. Although Student participated in group therapy, Mr. Pryor reported that it was not beneficial for Student at this time.

42. Mr. Pryor provided additional information regarding Student's struggles in the therapeutic milieu. When Student first arrived at Aspen, she was shy, introverted,

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<sup>12</sup> Mr. Pryor also noted that Student is adopted and has not worked on any specific abandonment or adoption issues. Although Student is not ready to start directly working on her attachment and adoption issues, the therapist working with her needs to be aware of her adoption and how it can affect the adoptive parents and family.

and had a very difficult time interacting with her peers. She was given a private room due to her struggles with adapting to new environments and prior history of poor interactions with roommates. Mr. Pryor noted that most of Student's behavioral issues occurred early in the morning or after 8:00 p.m. When Student became tired and overwhelmed, she had a difficult time communicating verbally. Most physical aggression occurred in the evening, when Student would become fatigued and frustrated, and bang her head against the wall. By her fourth week at Aspen, however, Mr. Pryor reported that Student began to feel more comfortable and she responded well to the structure and consistency of Aspen. Mr. Pryor opined that a continued structured milieu in a RTC would be very beneficial for Student as she requires the structure to keep her on task and help her with her executive functioning capabilities.

43. The Aspen Discharge report presented several recommendations. First, due to her emotional dysregulation, sensory problems, and processing speed deficits, Student would benefit from a small classroom setting (4-7 students), and should be seated away from noise, windows, and doors to minimize distraction. Second, due to Student's impairment in processing speed, and in order to avoid emotional episodes and frustration, it is important that material be presented to Student in small "chunks" to allow for adequate processing. Third, Student requires continued social skills development.

44. The Aspen Discharge report also recommended that Student go to a RTC, in a very small setting, which provides a highly supervised program with 24-hour nursing care and medical support. The report further stated that Student would do best with peers with similar issues in the type of program that focuses on learning disabilities, adoption/attachment issues, cognitive/executive functioning and emotional regulation. Both Dr. Davidson and Mr. Pryor concurred with the recommendations of the Aspen Discharge report.

45. While the educational recommendations provide Aspen's insights into Student's post-discharge needs, it must be remembered that Aspen is not an educational facility and Student did not participate in any classroom or other educational activities there. Neither Dr. Davidson nor Mr. Pryor has any educational credentials or reported educational experience to qualify as an expert on Student's educational needs. There was no testimony or evidence presented, however, to suggest that the information provided by Aspen and its witnesses was faulty. Additionally, however, it remains unclear as to when OCHCA became aware of the discharge portion of the Aspen Report, as Student left Aspen on September 5, 2009, a full month after the last IEP meeting.

46. Dr. Farzan's Notes for July 23, 2009, indicate that she presented her AB3632 findings at the IEP meeting scheduled for that day. The Notes indicate that she recommended outpatient therapy due to Student's good progress at Prentice and the past failed RTC placement away from home. Parents informed the IEP team that Student had been sent to Maple Lake; presented the same behaviors she had presented at Brehm; and had been transferred to Aspen. Dr. Farzan's Notes further indicate that she explained that Student had presented the same behavior at Brehm, and may do well if other alternatives of less restrictive placement are considered.

47. Given the new information, Parents requested another IEP meeting to reconsider placement in a RTC. The July 23, 2009 IEP notes indicate that on June 11, 2009, Student became increasingly aggressive at Maple Lake and was discharged due to safety issues. In addition, Maple Lake indicated that Student may have been having an emerging thought disorder. The IEP notes continue, "the OCHCA recommendations were made prior to having knowledge about new information regarding Student's recent residential placements. (The) OCHCA therapist will take into consideration the

recent placements and emotional disposition of Student to amend her assessment results.”

48. No amended written report was prepared. Dr. Farzan’s Notes document that on July 27, 2009, she contacted both Maple Lake and Aspen, and faxinated a signed release to each requesting further information. She also requested that Logan Valentine, Student’s therapist at Maple Lake, and Mr. Pryor at Aspen return her call to discuss Student.

49. Dr. Farzan explained that Student was only at Maple Lake a short time. As a result, she received little information. On July 29, 2009, Dr. Farzan, spoke with Mr. Valentine and in her Notes reported that Student was presenting with aggressive behaviors; was noncompliant; defiant; physically assaultive (kicking and biting); and threatening the staff. Mr. Valentine concluded that Maple Lake was not an appropriate fit for Student.

50. Dr. Farzan’s Notes for July 27, and 30, 2009, indicated that she received an Admission Summary from Aspen. This appears to be the Aspen Report, as Dr. Farzan references Dr. Ericson’s psychological assessment. The Notes further reference Dr. Davidson’s portion of the report, which indicated that Student behaviors at Maple Lake, such as her inability to adjust to Maple Lake, resulted in her becoming very aggressive. The Notes also report that Dr. Davidson recommended further assessment in order to stabilize Student on medications during her stay at Aspen.

51. Dr. Farzan’s Notes also indicate that she spoke with Mr. Pryor on July 27, 2009. Mr. Pryor reported that Student’s greatest difficulty was her lack of social skills and her inability to regulate emotions. He e-mailed Student’s latest test results and reported plans for further testing.

52. The Notes for July 30, 2009, indicate that Dr. Farzan and Dr. Cota attended the July 30, 2009 IEP meeting. The Notes indicate that Student remained at Aspen and

continued to show poor social skills, impulsivity and noncompliant behaviors. Further, both Dr. Farzan and Children and Youth Services (CYS)<sup>13</sup> reaffirmed the recommendation of outpatient treatment. The Notes reflect that at the IEP meeting, Dr. Cota commented that the District had informed OCHCA that it had an appropriate placement for Student in the LRE at Irvine High School in their ED class. Further, he explained that CYS had not provided any mental health services to Student; and that OCHCA had an appropriate level of services for Student. Thus, OCHCA had not yet exhausted its services.

53. Dr. Farzan's Notes concur with Dr. Cota and reported that all attempts to intervene at residential or inpatient psychiatric placements have failed, and Student has not exhausted outpatient treatment at this time. She concluded that outpatient services remain the least restrictive setting. As a result of OCHCA's recommendation of outpatient services, the IEP team offered Student outpatient therapy 40 minutes, four times per month; 30 minutes of case management per month; and collateral family therapy 60 minutes, twice a month. The District also offered placement in the ED program at Irvine High School, a general education facility within the District.

54. Mike Tincup testified on behalf of OCHCA. Dr. Tincup holds degrees in psychology, clinical psychology, and has a Ph.D. in school psychology. He is currently a Program Specialist in the Irvine Unified School District, and manages the District's special education programs for the sixth to twelfth grades. Dr. Tincup attended all of Student's 2009 IEP meetings on behalf of the District. According to Dr. Tincup, the District has an ED program within its Behavioral Services and Learning Center (BSLC). He describes the BSLC as flexible, yet indicates that it can also provide more structure and

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<sup>13</sup> CYS is the department within OCHCA which would provide mental health services to Student.

less stimuli for a student. At the time of hearing, there were 17 students in the BSLC. Not all of these students are in the classroom at the same time; generally there are eight or less students in the classroom at one time. Dr. Tincup reported that the BSLC provides a continuum of services based on a student's individual needs. This can involve participation in general education, if appropriate. He did not expound on what was available for a student who is unable to function in general education venue, except to say that, depending on individual needs, a student can spend from 90 minutes to all day at the BSLC.

55. In support of their recommendation of outpatient therapy, Dr. Farzan recommended an initial service plan (CSP) which contained two social/emotional goals which are contained in Student's IEP. The first goal was intended to reduce Student's incidents of anger outbursts to one time per month at home and at school. The second goal was to reduce Student's incidents of somatization to one time per month at home and at school. Student's mental health services would be provided at the BSLC. From all of the information gleaned from all sources considered by the IEP team, the recommended goals were to be generalized by Student maintaining a day planner and brainstorming about her stressors. Dr. Tincup agreed that the IEP provided little information regarding the proposed ED program. He acknowledged that programs are typically driven by IEP goals, but in this case, once Student began attending Irvine High School, her transition and behavior would be monitored. The goals could be adjusted once Student entered the ED program. Further, additional goals could be created to address Student's needs as they arose.

56. After her discharge from Aspen on September 5, 2009, Student remained at home until her parents unilaterally placed her at the Waterfall Academy (Waterfall) on November 10, 2009. Waterfall is located in Ogden, Utah.

57. Laura Kemper, the Admissions Director of Waterfall, provided a description of the facility and program. Waterfall is a residential treatment facility, which is operated for profit. The typical student presents as complex in all domains, and has usually failed in other programs. The focus at Waterfall is on social skills and daily living skills. The program contains a clinical component, and all therapists are licensed and credentialed. The educational component is operated by the Oak Grove School (Oak Grove), which is associated with Waterfall. Classes are held from 9:00 a.m. to 3:00 p.m. each day. Oak Grove is accredited and teaches core curriculum. As of the date of hearing, Oak Grove had a conditional certification with California as a NPS. Ms. Kemper indicated that Oak Grove was in the process of obtaining full NPS status. While Oak Grove is operated as non-profit, the Waterfall treatment and residential facility is not.

58. Much of the testimony of other Waterfall witnesses provided information beyond the scope of this hearing. Suffice it to say that Parents' unilateral placement at Waterfall provides Student with individual and family therapy in a clinical setting as well as therapy at school. The educational program provides Student with a learning environment and accommodations similar to those recommended by Aspen. Although Student continues to act out, she appears to have made some progress in this placement.

59. Father testified as to the financial expenditures made by the family in order to privately place Student. Parents are requesting reimbursement for their out-of-pocket expenditures from July 1, 2009, through the present date.

60. Records indicate that Parents paid \$4,800.00 for the "safe house" services provided by Safeguard Adolescence Services for the period of July 1 through July 8, 2009. This 24-hour-per-day supervision in an interim home (hotel) was provided at a cost of \$500.00 per day, plus transportation costs, and holiday pay for the Fourth of July.



Father indicated that this expense was necessary after Student was removed from Maple Lake and awaited an opening at Aspen.

61. There is no doubt that Parents paid the uninsured portion of Student's expense at Aspen for the period of July 8 through September 5, 2009. The records submitted are redacted and somewhat difficult to read. Based upon what can be deciphered, after deducting insurance payments, credits, and adjustments, Parents' out-of-pocket payments to Aspen totaled \$29,500.00. Further, Aspen is a residential psychiatric facility, and did not provide Student with an educational component.

62. Parents have incurred out-of-pocket expenses from Waterfall beginning November 11, 2009, and continuing through the present date. As of the hearing date, Parents have paid a \$2,500.00 admission fee, and \$8,250.00 in monthly tuition, and airport fees of \$450.00, for a total of \$35,950.00 as of March 2, 2010. The breakdown of monthly tuition is \$275.00 per day, of which \$158.00 per day is delegated to Educational Services, \$87.00 per day is delegated to Residential Services, and \$30.00 per day is delegated to Clinical Services.

## LEGAL CONCLUSIONS

1. Student, as the party seeking relief, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the state's educational standards, and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the

unique needs of a child with a disability that are needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include in pertinent part developmental, corrective, and supportive services, such as mental health counseling services, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. In California, these related services are called "designated instruction and services" (DIS). (Ed. Code, § 56363, subd. (a).) The regulation that defines "mental health services" for the purpose of Chapter 26.5 includes psychotherapy. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

4. OCHCA's responsibility is derivative of that of the school district. Government Code section 7576, subdivision (a), states that:

The State Department of Mental Health, or a community mental health service, as described in Section 5602 of the Welfare and Institutions Code, designated by the State Department of Mental Health, is responsible for the provision of mental health services, as defined in regulations by the State Department of Mental Health, developed in consultation with the State Department of Education, if required in the IEP of a pupil. A LEA is not required to place a pupil in a more restrictive educational environment in order for the pupil to receive the mental health services specified in his or her IEP if the mental health services can be appropriately provided in a less restrictive setting. It is the intent of the Legislature that the LEA and the community mental health service vigorously attempt to develop a mutually satisfactory placement that is acceptable to the parent and addresses the educational and mental health treatment needs of the pupil in a manner that is cost effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment . . . .

5. The Government Code sections addressing residential placements are implemented through the California Code of Regulations, title 2, section 60100, which governs a LEA's identification and placement of seriously emotionally disturbed pupils and states the procedures that should be followed when an IEP team member recommends a residential placement for a student who is designated as emotionally disturbed. First, when a request for residential placement is made, an expanded IEP team meeting shall be convened within 30 days with an authorized member of the community mental health service. (Cal. Code Regs., tit. 2, § 60100, subd. (b)(1).) When either the community health service or the LEA determines that additional mental health services are needed, the LEA and the community health service shall proceed in accordance with sections 60040 and 60045.

6. Prior to the determination that a residential placement is necessary for the pupil to receive special education and mental health services, the expanded IEP team shall consider less restrictive alternatives, such as providing a behavioral specialist and full-time behavioral aide in the classroom, home and other community environments, and /or parent training in these environments. The IEP team shall document the alternatives to residential placement that were considered and the reasons why they were rejected. (Cal. Code Regs., tit 2, § 60100, subd. (c).)

7. Another requirement for placement in a residential facility requires that placement be in a residential facility listed in California Code of Regulations, Title 2, section 60025 (Cal. Code Regs., tit. 2, § 60100, subd. (f)), and that out-of-state placements shall be made only in residential programs which meet the requirements of Welfare and Institutions Code, sections 11460, subsections (c)(2) through (c)(3), and are privately operated, non-medical, non-detention schools certified by the California Department of Education. (Cal. Code Regs., tit. 2, § 60100, subd. (h).) Further, State reimbursement shall

only be paid to a residential facility or group home organized and operated on a non-profit basis.

8. The process of obtaining special education mental health services is not designed for an emergency situation. (Gov. Code, § 7576, subd. (f); Cal. Code Regs., tit. 2, § 60040, subd. (e).) If a student requires emergency services, a parent must seek other resources. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040, subd. (e).)

9. There are two parts to the legal analysis of compliance with the IDEA. First, the ALJ must determine whether the district<sup>14</sup> has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) Second, the ALJ must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

10. 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. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: (1) impeded the child'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. (Ed. Code, § 56505, subd. (f).)

11. In considering substantive issues, in determining whether OCHCA offered Student a FAPE, the analysis must focus on the adequacy of OCHCA's proposed

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<sup>14</sup> And by extension OCHCA.

program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)). An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [the IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley*, at p. 207.) Nor does the IDEA require school districts (and by extension, county mental health agencies) to provide special education students with the best education available or to provide instruction or services that maximize a student's potential. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if a student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

12. A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.) A school district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J., supra*, 267 F.3d at p. 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F. 2d 629, 636.) A child's progress must be evaluated in light of the child's disabilities. (*Rowley, supra*, 458 U.S. at p. 202; *Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1996) 103 F.3d 1114, 1121.)

13. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by & through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). "An IEP is a snapshot, not a retrospective." (*Roland*

*M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992; *Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hannover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Roland M., supra*, 910 F.2d at p. 992.)

14. A local educational agency (LEA) also has the right to select the choice of service provider, as long as the provider is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* ( N.D. Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216; *B.F., et al. v. Fulton County Sch. Dist.* (N.D.Ga. Sept. 9, 2008) 2008 WL 4224802, 51 IDELR 76, 108 LRP 57335.)

15. When a District fails to provide a FAPE to a student with a disability, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. Parents may be entitled to appropriate relief including reimbursement for the cost of private placement or services that they have independently procured for their child, when the school district has failed to provide a FAPE and the private placement or services are determined to be proper under the IDEA and are reasonably calculated to provide educational benefit to the child. (*Burlington School Committee v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].)

DID OCHCA DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) IN THE INDIVIDUALIZED EDUCATION PROGRAM (IEP) OFFERS DATED JUNE 5, 2009, JULY 23, 2009, AND JULY 30, 2009, BY FAILING TO OFFER OR PROVIDE STUDENT WITH PLACEMENT IN A RESIDENTIAL TREATMENT CENTER (RTC) AND APPROPRIATE SERVICES TO ADDRESS STUDENT'S SEVERE EMOTIONAL DISTURBANCE?

16. Student raises a procedural concern that the AB3632 assessment presented to the IEP team was cursory, ignored obvious information presented, and resulted in an unsubstantiated determination that Student did not require a RTC. This decision finds Student's contention well-founded.

17. As stated in Legal Conclusion 10, there are two parts to the legal analysis of OCHCA's compliance with the IDEA. First, it must be determined whether OCHCA complied with the procedures set forth in the IDEA, and second, it must be determined if the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit.

18. Parents are essential members of an IEP team; however, that does not require OCHCA or the IEP team to agree with everything presented by the parents or to acquiesce to parental demands for placement and services. This does not mean, however, that OCHCA is free to ignore available information or selectively report to the IEP team. Parents clearly provided OCHCA with extensive information, assessment reports and medical information regarding Student. While this information was not completely ignored, it was selectively considered by Dr. Farzan, who was the single assessor responsible for the AB3632 assessment report.

19. The AB3632 assessment indicates that Dr. Farzan's recommendations primarily relied on the phrase "for history of presenting problems and strengths, see AB3632 assessment report dated December 2006." While the 2009 AB3632 report made quick reference to Mother's reporting, it contained no current information from Student's mental health providers to provide updates on her condition over the last

three years. (Factual Finding 16.) Further, although Dr. Farzan was aware from the 2006 assessment that Student received psychiatric services from Dr. Soliman, the 2006 report contained no information regarding that treatment. Dr. Farzan was also aware that Student continued to receive psychiatric services from Dr. Soliman in 2009; however, she made no attempt to contact him or obtain Student's records. (Factual Findings 16, 21 and 23.)

20. In some instances, Dr. Farzan tended to give Mother's input little weight as many of Student's outbursts and noncompliance occurred primarily in the home. Other times, she relied completely on Mother's information, much of which included second-hand descriptions of complex medical and psychiatric issues, none of which was verified with the original source. (Factual Findings 17 and 23.)

21. Dr. Farzan's testimony was limited and weak. Although she indicated that she had reviewed the Rogers Report, her Progress Reports and written AB3632 assessment report, do not support this conclusion. The AB3632 report does not reference the Rogers Report, nor does she include any information from that report to support her recommendations. While the Rogers Report contains selective information which may support OCHCA's recommendations, it also contains a significant amount of information which supports a contrary conclusion. Further, Dr. Lake's contribution to the Rogers Report indicates that Student has far more significant psychological problems than simply ADHD. Dr. Lake reported that Student showed a gradual trend of improvement; however, he also offered the caveat that Student continued to have erratic episodic difficulties with minimal triggers. Her treatment required very specific and detailed behavioral management protocols to assist with daily activities and to complete a daily schedule. He also indicated that Student's improvement was within the inpatient facility. (Factual Finding 11.) Also of significant note, the Rogers Report ultimately concluded that in preparation for further educational planning, Student will



most likely require a supportive structured treatment environment, and her educational placement would need to be highly skilled to deal with her complex issues, including her recent trend of increasing aggression. (Factual Finding 13.) None of this information was mentioned in the AB3632 report.

22. Pursuant to Legal Conclusions 12 and 13, a child's unique educational needs are to be *broadly* construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. Further, an IEP must be evaluated in light of information available at the time it was developed. For the purposes of the initial AB3632 assessment report presented on July 23, 2009, Dr. Farzan relied on a review of the 2006 AB3632 assessment report and Dr. Paterson's Psychoeducational Assessment Report from 2007. While these sources may have provided some historical information, they clearly did not convey Student's current condition and needs.

23. The only current information regarding Student was that which was marginally referenced in the District's own triennial assessment of May 2009. (Factual Finding 16.) In reviewing the District's assessment, Dr. Farzan also appears to have minimized the results of the BASC-2 and SAED as reported by Mother and Dr. Brown. Further, she did not report Dr. Brown's interview comments which opined that Student needed a small facility with significant supports. (Factual Findings 19 and 20.)

24. When directed by the IEP team to prepare an amended report to consider the events at Maple Lake and Aspen, no additional written information was provided to Parents or the IEP team. While Dr. Farzan did speak with Dr. Davidson and Mr. Pryor at Aspen, and did obtain their written reports, no mention of Student's progress or their treatment plans are contained in the Progress Notes or July 30, 2009 IEP notes. Again, Dr. Farzan selectively emphasized statements in the reports which supported her prior conclusions. As an example, quite correctly, Dr. Farzan indicated that Dr. Davidson had

acknowledged that two RTC placements had not been successful. In that same portion of his report, however, he also noted that aggressive outpatient therapy had also not been successful. (Factual Finding 33.) The information contained in the Aspen Report as written by Dr. Davidson and Mr. Pryor was extensive, complex, and interwoven between disciplines. Each man recommended RTC, and each man reaffirmed his opinion in testimony. (Factual Findings 29, 31-33, 35-39, and 42-44.)

25. Again, as stated in Legal Conclusion 10, a student is entitled to the procedural protections of the IDEA; however, mere technical violations do not constitute a denial of FAPE. In order to constitute a denial of FAPE, the procedural violation must have also (1) impeded the child'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.

26. Dr. Farzan's conclusions regarding Student's desire to return home, and her abandonment issues are valid, and were confirmed by other sources. These conclusions, however, are simplistic and represent only one facet of Student's mental health problems. When considering the entire wealth of information provided or available to OCHCA, as contained in the Factual Findings, it is clear that Student presented with many more complex problems and significant concerns which were not considered or reported in the AB3632 assessment report. Without consideration of the information provided by Parents and serious consideration of information and recommendations available from Dr. Soliman, Rogers Memorial, and Aspen, OCHCA could not, and did not adequately report Student's unique needs to the IEP team. As a result of these omissions, the IEP team could not formulate an IEP which would thoroughly and appropriately address Student's unique needs, including consideration of placement in a RTC. OCHCA's overwhelming failure to present a complete and current report of Student's unique needs met all three criteria for a denial of FAPE.

27. The finding that OCHCA's AB3632 assessment constitutes a denial of FAPE negates the need to further discuss OCHCA's legal arguments regarding least restrictive environment and State limitations regarding residential placements. The questions become moot when the information presented to the IEP team is faulty.

28. When a student is denied a FAPE, her parents may be entitled to appropriate relief including reimbursement for the cost of private placement or services that they have independently procured for their child. Such private placement, however, must be determined to be proper under the IDEA and reasonably calculated to provide educational benefit to the child. The ALJ is further provided the equitable power to provide a remedy which is just and proper. (Legal Conclusion 15.) In this matter, Parents have requested prospective placement at Waterfall Academy and reimbursement for out-of-pocket expenditures commencing July 1, 2009, through the present date. (Factual Findings 59-62.)

29. The request for reimbursement includes the costs of Student's "safe house" expenses as well as the uninsured expenses incurred while at Aspen. (Factual Findings 60 and 61.) Each of these expenses was incurred prior to the presentation of the AB3632 assessment report and before the IEP team's offer of placement/outpatient therapy on July 30, 2009. (Factual Findings 27, 47, and 52.) Therefore, Student's expenses for both the safe home and Aspen were not in response to the AB3632 assessment report's denial of FAPE. Further, as indicated in Legal Conclusion 8, special education mental health services are not designed for emergency situations. If a student requires emergency services, a parent must seek other resources. Neither expenditure provided any educational benefit to Student, and each expenditure was obtained as an emergency response to Student's crisis behaviors at Maple Lake. (Factual Finding 27.) Parents are not entitled to reimbursement for Safeguard Adolescence Services or Aspen Institute for Behavioral Assessment.

30. Student was placed at Waterfall Academy in December 2009, in response to OCHCA's recommendation of outpatient therapy, and the IEP team's conforming offer of placement and services on July 30, 2009. (Factual Finding 56.) Further, although Waterfall Academy may not offer Student a perfect placement, the educational program offered by Oak Glen, in conjunction with the residential services provided by Waterfall Academy, are appropriate and are reasonably calculated to provide educational benefit to Student. (Factual Finding 57.)

31. Based upon California law as described in Legal Conclusion 7, an out-of-state residential placement shall only be made in residential facilities which are operated on a non-profit basis. Waterfall Academy is admittedly operated for-profit. (Factual Finding 57.) Additionally, while this Decision has determined that the AB3632 assessment report denied Student a FAPE, the IEP team has yet to consider or reconsider appropriate prospective placement for Student. Further, should RTC be deemed appropriate, the IEP team faces additional State requirements that residential placement in California be considered first. Given these considerations, the ALJ will not take the place of the IEP team in determining prospective placement for Student. Parents' request for prospective placement is denied.

32. The decision to avoid prospective placement, however, does not preclude the award of compensatory education. As stated above, Student has been denied a FAPE which denied Student educational benefit. Parents responded by privately placing Student in an out-of-state residential program which is designed to bestow sufficient educational benefit on Student. The fact that OCHCA is estopped by State law from procuring placement at a for-profit facility, does negate its denial of FAPE.

33. An award of compensatory education reimbursement is appropriate in this matter. Parents have requested reimbursement for the entire amount of monthly tuition at Waterfall Academy. Monthly tuition is \$8,250.00, based upon a 30-day month. The

expense of residential placement, however, is generally divided between the school district and the mental health agency. Waterfall Academy's breakdown of daily tuition indicates that educational services cost \$158.00 per day, and residential and clinical services, for which OCHCA would normally be responsible, cost \$117.00 per day. It is noted that Student withdrew her complaint against the District on the first day of hearing, thereby forgoing any claims she may have had in this matter regarding the District's obligation to reimburse for educational service expenditures incurred by Parents. As a matter of equity, OCMHA will not be required to reimburse more than what would normally be their share of Student's placement had a RTC been recommended. Therefore, OCHCA shall reimburse Parents for the daily cost (calculated on a monthly basis) of Student's residential and clinical services incurred at Waterfall Academy for the 2009-2010 school year and the 2010 extended school year (ESY). OCHCA shall further reimburse Parents for the \$2,500.00 admission fee, as well as all airport fees incurred by Student from December 1, 2009, through the end of the 2009-2010 year and the 2010 ESY.

## ORDER

1. Orange County Health Care Agency has denied Student a free appropriate public education by failing to provide an appropriate AB3632 mental health assessment which adequately reported Student's unique needs.

2. Student's requested relief is granted, in part, and as OCHCA is ordered to reimburse Parents for their out-of-pocket expenses, deemed compensatory education, as follows:

- a. OCHCA shall reimburse Parents the sum of \$2,500.00 for the Waterfall Academy admission fee;
- b. OCHCA shall reimburse Parents for the daily cost of Student's residential and clinical services incurred at Waterfall Academy commencing December 1,

2009, and continuing through the end of the District's 2009-2010 school year. Said calculation of daily expenses may be presented in a monthly tuition billing from Waterfall Academy, and apportioned between educational services of \$158.00 per day and \$117.00 per day for residential and clinical services. Said reimbursement for residential and clinical services shall be paid to Parents upon presentation of proof of payment to OCHCA. Reimbursement shall continue to the end of the 2009-2010 school year and the 2010 extended school year.

- c. OCHCA shall further reimburse Parents for all airport fees incurred by Student from December 1, 2009, through the end of the 2009-2010 year and ESY.

3. Student's request for prospective placement at Waterfall Academy is denied.

4. Student's request for reimbursement of the educational service portion of Student's tuition at Waterfall Academy 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.

1. Student prevailed on the issue presented in this matter.

## 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 90 days of receipt of this Decision. (Ed. Code, §56505, subd. (k).)

Dated: August 9, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
JUDITH PASEWARK  
Administrative Law Judge  
Office of Administrative Hearings