

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

FULLERTON JOINT UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2010040952

DECISION

The due process hearing in this matter convened on June 10, 21 and 22, 2010, before Timothy L. Newlove, Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH), State of California.

Jillian Bonnington, Special Education Advocate, represented Parents and Student. Student's Mother attended the entire hearing. Student's Father attended the first day of the hearing. Student did not attend the hearing.

Karen Gilyard, attorney at law from the office of Atkinson, Andelson, Loya, Ruud & Romo, represented the Fullerton Joint Union High School District (Fullerton or District). Gregory Endelman, Director of Special Education for the District, attended the hearing.

On April 15, 2010, Parents on behalf of Student, through their Advocate, filed with OAH a Request for Due Process. After the first day of hearing on June 10, 2010, the matter continued to June 21, 2010. The continuance tolled the 45-day time period for issuance of a decision in the case.

At the close of the hearing, the parties agreed to a briefing schedule. On July 9, 2010, the Advocate for Parents and counsel for the District submitted closing briefs in

the matter. The ALJ marked Student's brief as Exhibit S-30 and the District brief as Exhibit D-Y, and closed the record.

ISSUES

The issues for hearing and decision in this case are as follows.

1. Did the District deny Student a free appropriate public education (FAPE) during the 2008-2009 and 2009-2010 school years by failing in its child find duties towards Student?
2. Did the District deny Student a FAPE because the assessment performed by the School Psychologist was incomplete and not consistent with the requirements of a comprehensive assessment, in the following manner:
 - a) By not interviewing personnel or obtaining records from Student's private out-of-state placement;
 - b) By not having Student's current teachers and therapists at the private out-of-state placement participate in any of the standardized assessment questionnaires;
 - c) By failing to ask any member of Student's private out-of-state placement to provide written input into Student's present levels;
 - d) By not reviewing any clinical or educational records from Student's private out-of-state placement; and
 - e) By not performing a classroom observation of Student?
3. At the March 31, 2010 individualized education program (IEP) meeting, did the District deny Student a FAPE through the following omissions:
 - a) By not having at the meeting a single party who knew or had worked with Student;
 - b) By not inviting to the meeting Student's teachers from his private out-of-state placement; and

c) By not having Student's present levels of performance?

4. Did the District deny Student a FAPE at the March 31, 2010 IEP meeting by finding that he was not eligible for special education and related services under the disability categories of emotional disturbance and/or other health impairment?

5. Did the District deny Student a FAPE by not providing prior written notice after Parents sent the District a 10-day notice of unilateral placement in January 2010?

6. Did the District deny Student a FAPE by failing to make a requested AB 3632 referral to the Orange County Health Care Agency?

7. Did the District deny Student a FAPE by not supplying all educational records after a request for such records was made on January 25, 2010, and March 31, 2010?

CONTENTIONS

In February 2010, Parents placed Student at a residential treatment center in Utah. Through his Parents and their Advocate, Student contends that he was eligible for special education under the disabling conditions of emotional disturbance and other health impairment. Student further contends that the District failed to identify him as an individual with exceptional needs, performed an improper initial evaluation of him, conducted an improper eligibility determination IEP meeting, and committed other procedural violations of law. For such violations, Student seeks reimbursement of the costs of his private placement. The District denies all charges.

Student is a young man who suffered from lack of motivation and underachievement which are not disability categories for special education. Based upon the following Factual Findings and Conclusions of Law, this Decision finds that the District correctly determined that Student was not an individual with exceptional needs. The Decision further determines that the District performed an appropriate initial

assessment of Student, conducted an appropriate eligibility determination IEP meeting, and otherwise did not commit procedural violations in this case.

FACTUAL FINDINGS

THE STUDENT

1. The Student in this case is a young man who turns 17 in August 2010. He is currently residing and attending school at a residential treatment center called Heritage School which is located in Provo, Utah. In September 2010, he will start his senior year in high school. Student's parents reside in a home that is located within the boundaries of the Fullerton Joint Union High School District.

2. The parties have provided different descriptions of Student. Parents largely viewed Student in negative terms. He was angry, moody, defiant, anxious and depressed. He was also lazy and had a low self-esteem. District personnel portrayed a different young man. To his teachers and administrators, Student was affable, gregarious and respectful. He was capable but unmotivated to do good work. To his primary therapist at Heritage School, Student was goal-oriented, enthusiastic and social. In his own eyes, Student is outgoing, friendly and one cool dude.

ELEMENTARY AND MIDDLE SCHOOL

3. Student attended grades one through eight in schools within the La Habra City School District. At Sierra Vista Elementary School, Student earned "A"s and "B"s in academic subjects, and he received "Outstanding" and "Satisfactory" marks for Citizenship and Work Habits. There are no indications in his elementary school records that Student had a learning problem or difficulty paying attention in class. His third grade teacher reported that "it is a pleasure to have a good natured student like (Student) in class. He is a very bright student, but does not always put forth his best effort." His fourth grade teacher noted that "[o]nce (Student) settles into his work, he

does a good job completing successful assignments." These comments were premonitions of Student's efforts in high school.

4. California has established a Standardized Testing and Reporting Program (STAR Program) which assesses academic achievement. Under the STAR Program, each school district in the state must administer an assessment instrument called the California Standardized Test (CST) to pupils in grades two through 11, inclusive. The CST examinations measure the degree to which a pupil is achieving academic content and performance standards. For grades two through five, Student scored "Proficient" and "Basic" on the CST examinations for English-Language Arts, Mathematics and Science.

5. At Washington Middle School, Student started slipping academically. In sixth grade, he earned "A"s and "B"s in his courses. However, in seventh grade, for the first time, his transcript showed the receipt of "C" grades. This trend continued in eighth grade where Student received a mixture of "A"s, "B"s and "C"s in his classes. In an ominous sign for high school, at the close of eighth grade, for the third semester, Student received a "D+" in Reading.

6. Student's STAR Program scores for middle school remained unremarkable. In spring 2005 during sixth grade, he scored "Basic" in English-Language Arts and "Proficient" in Mathematics. In spring 2006 during seventh grade, Student again scored "Basic" in English-Language Arts and "Proficient" in Mathematics. In spring 2007 during eighth grade, Student scored "Basic" in English-Language Arts, History-Social Sciences and Science, and "Proficient" in Mathematics.

HIGH SCHOOL GRADUATION REQUIREMENTS

7. Student commenced high school in 2007. He attended Sonora High School which is part of the District system of schools. He is a member of the graduation class of 2011.

8. The school year for the District is divided into two semesters which run from late August to mid-June. The District uses grades to assess classroom achievement. Under the grading system, "A" is outstanding, "B" is above-average, "C" is average, "D" is below-average, and "F" is failing. Per semester, each high school class is worth five credits. A pupil completes a class and earns five credits by receiving an "A" through "D" grade. A pupil fails a class and earns zero credits by receiving an "F" grade.

9. Following California law, for the graduation class of 2011, the District required a pupil to complete the following courses in order to earn a high school diploma: (a) four years and 40 credits of English; (b) two years and 20 credits of Mathematics, including one year and 10 credits of Algebra; (c) one year and 10 credits of Physical Science; (d) one year and 10 credits of Life Science; (e) one year and 10 credits of World History; (f) one year and 10 credits of United States History; (g) one semester and five credits of American Government; (h) one semester and five credits of Economics; (i) one semester and two and one-half credits of Health Education; (j) two years and 20 credits of Physical Education; (k) one year and 10 credits of either a course in a foreign language or a class in the visual or performing arts; and (l) elective classes totaling 75 credits. In total, Student required 217.50 credits in order to graduate from Sonora High.

10. In California, a further condition for receiving a diploma of graduation requires a pupil to successfully pass the California High School Exit Examination (CAHSEE). The CAHSEE tests in the areas of English-Language Arts and Mathematics. At Fullerton, like many other high schools in the state, students can take the CAHSEE during their sophomore year in high school.

THE 2007-2008 SCHOOL YEAR – NINTH GRADE

11. For the 2007-2008 school year, Student attended ninth grade at Sonora High. Student got a jump on his high school studies by taking a Health Education class

during the 2007 summer. Student earned a "B" in Health Education and received five credits for completing this class.

12. For the first semester of ninth grade, Student took the following courses: English 1, Spanish 1, Algebra Fundamentals, Physical Education, Integrated Science and AVID 1. "AVID" stands for "Advancement Via Individual Determination." AVID is an elective class that is designed to assist underachieving pupils to prepare for college.

13. For the first semester of ninth grade, Student earned the following grades in his courses: a "C-" in English 1, a "C+" in Spanish 1, a "C-" in Algebra Fundamentals, a "B" in Physical Education, a "C" in Integrated Science, and a "D" in AVID. With these grades, Student passed each course and he earned 30 credits towards graduation.

14. For the second semester of ninth grade, Student took the same courses, except for Physical Education, and earned the following grades: a "D-" in English 1, a "D" in Spanish 1, an "F" in Algebra Fundamentals, an "A" in Sports-Men, a "C" in Integrated Science, and a "D" in AVID. From this rather poor effort, Student passed each class except Algebra Fundamentals and he earned 25 credits towards graduation. During the summer of 2008, Student repeated the Algebra course that he had failed. He received an "A-" in the summer course and thereby earned five credits for completing the class.

15. Under the STAR Program, in spring 2008, Student scored "Proficient" in English-Language Arts, "Basic" in Integrated Science and "Below Basic" in Algebra.

16. Sonora High maintains a record of discipline for pupils attending the school. The Assertive Discipline Record for Student shows four minor incidents which occurred during Student's three years at the high school. The first incident occurred during Student's freshman year. On April 25, 2008, Student turned in a fake note to attendance. As punishment, Student attended Saturday school the following weekend.

17. During the 2007-2008 school year, Mother and Student met with Gary Day who, at the time, was an Assistant Principal of Pupil Services at Sonora High School. Mr.

Day has worked at Sonora for seven years and he has served as an educator for many years in different capacities. Mr. Day testified at the due process hearing. He stated that the meeting concerned Student's poor grades. The teachers at Sonora High issue Progress Reports to the parents of pupils who are receiving grades of "D" or "F." Most likely, Parents had received such Progress Reports from several of Student's freshman year instructors. Mr. Day did not have a clear recollection of the meeting. He did remember that he promised Parents that he would "keep an eye" on Student.

18. Mother testified at the due process hearing. She has been a second grade teacher for 18 years. She stated that, during Student's ninth grade year, she met on several occasions with the instructor of his AVID class. Mother had high hopes that the AVID course would provide direction for her son, and she was disappointed that he performed poorly in the class. Mother also stated that she met with the Algebra teacher to discuss Student's failing grade. She and her husband hired a tutor to help Student with this class.

THE 2008-2009 SCHOOL YEAR – TENTH GRADE

19. For the 2008-2009 school year, Student attended tenth grade at Sonora High. For the first semester of tenth grade, Student took the following courses: English 2, Spanish 1, Geometry A, Sports-Men, Biology and World History. The class in "Sports-Men" was the football team. Student was a running back on the Junior Varsity team.

20. Student entered his sophomore year in high school with a 1.5 grade point average from his second semester of ninth grade. His Parents were understandably very concerned about Student's academics. At some point during his tenth grade year, Parents considered placement of their son in a structured and disciplined academic setting. In particular, Parents considered the Opportunities Program and the Sunburst Academy.

21. The Opportunities Program is offered through an Alternative High School operated by the District. The program assists ninth, tenth and eleventh grade students who cannot function in regular classes and receive failing grades. The program helps pupils earn credits sufficient for graduation and return to their comprehensive high school campus, such as Sonora High School. Pupils in the program meet in a self-contained class for five hours each day and must complete homework contracts.

22. The Sunburst Academy is operated by the California National Guard, in conjunction with the Orange County Department of Education. Sunburst is a military-style academy designed to assist teenagers who have gang associations, behavior problems and truancy issues. Sunburst Academy does not charge tuition, but requires voluntary participation. Mother testified that her family visited the Sunburst campus, attended an open house, but that Student did not agree to attend the academy.

23. On September 12, 2008, Parents met with Stephanie Henry, an Assistant Principal for Pupil Services at Sonora High. Ms. Henry has worked at the District for 17 years in different capacities, including as an English teacher and an Assistant Principal for Student Affairs. Ms. Henry testified at the due process hearing. She stated that, during the meeting, the parties discussed Student's freshman year grades, placement for math classes, high school graduation requirements, including the CAHSEE, and the PSAT and SAT which are standardized tests relating to college admission. Ms. Henry stated that Parents did not express concerns regarding Student's social and emotional status and did not mention that Student was suffering from anxiety or depression.

24. On September 16, 2008, Sonora High held the back-to-school night. Mother testified that she made appointments and met with each of Student's sophomore year instructors in order to discuss her son's academic troubles. Parents also testified that they met with Ms. Henry or Mr. Day to discuss placement of Student in the Opportunities Program or at Sunburst Academy. Neither Ms. Henry nor Mr. Day recalled

such a meeting. Mr. Day testified that, after meeting with Mother and Student, he had many brief encounters with Student on the Sonora High campus. In these encounters, Mr. Day observed a young man who was easygoing, friendly, popular and clearly enjoying the social aspect of high school. Mr. Day knew about the Opportunities Program. He stated that Student was not a fit for this program because he did not disrupt classes with emotional outbursts, and, even with poor grades, Student was on-track to graduate.

25. On December 12, 2008, Student met with Brandy Taege who has been a Guidance Counselor at Sonora High School for the last two years. At this meeting, based upon a recommendation from his Spanish 1 instructor, Ms. Taege changed Student from Spanish 1 to Spanish 2 for the coming semester.

26. For the first semester of tenth grade, Student earned the following grades in his courses: a "C-" in English 2, a "B+" in Spanish 1, a "C+" in Geometry A, a "B" in Sports-Men, a "B+" in Biology, and a "C" in World History. With these grades, Student passed each course and he earned 30 credits towards graduation. In fact, Student's effort during the first semester of his sophomore year was the high watermark for his high school studies.

27. For the second semester of tenth grade, Student took the following courses: English 2, Spanish 2, Geometry B, Biology, World History and Business Technology. At this time, Student decided to quit the football team. Paul Chiotti was the Sonora High football coach. Mr. Chiotti testified at the due process hearing. He stated that his understanding of the reason that Student quit the team was to concentrate on playing ice hockey. Mr. Chiotti stated that quitting the football team is not uncommon.

28. In 2006, the California Legislature passed a law concerning school counselors. The law is known as AB 1802 and requires counselors to meet with high

school pupils and their parents to discuss student records, educational options, coursework, progress and needs relating to the CAHSEE.

29. On February 19, 2009, Parents and Student had an AB 1802 counseling session with Brandy Taege in her office at Sonora High. Ms. Taege testified at the due process hearing. She had a clear memory of this counseling session. She recalled that Student was enthusiastic; that he shared his passion for playing ice hockey; that he expressed an interest in attending a four-year college and mentioned Boston College in this regard; and that he stated that he wanted to become a teacher. During the meeting, Ms. Taege prepared an educational plan that included coursework for Student's junior and senior years at Sonora High. The educational plan also included summer school after tenth grade so that Student could remediate the "D" grade that he had received in English 1 for the second semester of ninth grade.

30. At the AB 1802 counseling session, Parents expressed concerns about the "D" grades that Student had received. Ms. Taege discussed academic support services, including after-school tutoring available in the library at Sonora High. The parties did not discuss the possible need for special education. Ms. Taege also testified that Parents did not mention the Opportunities Program or the Sunburst Academy.

31. On March 17, 2009, Student took and passed the CAHSEE. Under the STAR Program, in spring 2009, Student scored "Basic" in English-Language Arts, Geometry, World History and Biology, and "Proficient" in Life Science.

32. For the second semester of tenth grade, Student earned the following grades in his courses: a "D-" in English 2, a "C+" in Spanish 2, a "C+" in Geometry B, a "D-" in Biology, a "C" in World History, and a "B" in Business Technology. With these grades, Student passed each course and he earned 30 credits towards graduation. At this point, Student had received 125 credits and he was on-track to earn a high school diploma.

33. Student's poor effort in school did not go unnoticed in his home. Mother testified that she and her husband attempted numerous "interventions" in order to redirect their son. Student turned 16 in August 2010. Parents did not allow Student to get a driver license. Parents imposed weekend restrictions. Parents also took away ice hockey which was an activity that Student greatly enjoyed.

34. Russ Sipple is a licensed Educational Psychologist in California and he has served the District as a School Psychologist for 29 years. For several years, Mr. Sipple has worked as a School Psychologist at Sonora High. Mr. Sipple testified at the due process hearing. Mr. Sipple has a son who played on the same ice hockey team as Student. Mother testified that, during the summer of 2009 or at the start of the 2009-2010 school year, she encountered Mr. Sipple at the local ice hockey rink and talked about Student. Mother stated that she inquired about a 504 plan and requested ideas to assist her son. A "504 plan" refers to accommodations that a school district implements in order to assist a pupil. Mr. Sipple admitted that he met Mother during Student's freshman year, but he did not recall a casual meeting in which the two discussed a 504 plan or interventions that might help Student in school.

THE 2009-2010 SCHOOL YEAR – ELEVENTH GRADE

35. For the first part of the 2009-2010 school year, Student attended eleventh grade at Sonora High School. During the first semester, Student took the following courses: English 3, Algebra 2, Chemistry, United States History, the History of Motion Pictures and Teacher Assistant which was an elective course in which Student assisted an instructor.

36. On September 8, 2009, Student received a second discipline mark because he had a cell phone out during class time. Student received a warning that the school would require his parents to pick up the cell phone the next time he committed the same infraction.

37. On November 4, 2009, Student received a third discipline mark because he was wearing a sweatshirt hood in class. Student had resumed wearing the hood after receiving a removal warning. As a consequence, the teacher confiscated the sweatshirt until the end of the school day.

38. At some point, probably during the first semester of his junior year, Student was caught with friends stealing money from a tip jar at a local yogurt shop. This incident did not result in an arrest or the filing of criminal charges.

39. For the first semester of eleventh grade, Student received the following grades in his courses: a "C-" in English 3, an "F" in Algebra 2, a "D-" in Chemistry, a "C" in United States History, a "C" in the History of Motion Pictures, and a passing grade in Teacher Assistant. With these grades, Student passed each course, except Algebra 2, and he earned 22 credits towards graduation. Student earned only four credits for passing English 3, the History of Motion Pictures and Teacher Assistance. Sonora High docked Student one credit in each of these courses based upon unexcused absences. At this point, Student had completed 147 out of the required 217.50 credits towards graduation. He was deficient eight credits.

40. For the second semester of eleventh grade, Student remained in the same classes, except that, shortly after the semester started, Student transferred from the Teacher Assistant class back to Sports-Men and the football team.

41. On January 20, 2010, Student received a fourth mark on his Assertive Discipline Record based upon continued tardy attendance to period one which was his English 3 class. As punishment, Student was required to attend Saturday school.

42. Also on January 20, 2010, Mother went to Sonora High to inform Student's counselor that she and her husband had decided to remove their son from public school. On that day, Mother first spoke with Russ Sipple, the School Psychologist. Mother called Mr. Sipple on a cell phone from the school parking lot. Before this call,

Mr. Sipple had retrieved a phone message from Father who had called the previous day. In the message, Father indicated that there was a pressing situation regarding Student. In her phone call, Mother told Mr. Sipple that Student was doing poorly in school, associating with the wrong friends and acting non-compliant at home; that, on the following Saturday, she was arranging an interview for Student at an Army & Navy Academy in San Clemente; and that she and her husband felt that Student needed a more structured setting for school. Mother mentioned to Mr. Sipple that she and her husband had looked into the Sunburst Academy the previous year. Mother asked Mr. Sipple if he knew about the Army & Navy Academy. Mr. Sipple informed Mother that he had assisted placing pupils in residential settings but that such students were in special education programs and had an emotional disturbance. Mother told Mr. Sipple that she did not think that Student fit this category.

43. Mother then met with Sonia Maria Diaz who was Student's Guidance Counselor for his junior year in high school. Ms. Diaz served as a counselor for the District during the 2009-2010 school year, and previously she has worked as both a teacher and counselor for other school districts. Ms. Diaz testified at the due process hearing. She described the meeting with Mother as unique. Ms. Diaz stated that, normally, parents of pupils who are having problems seek suggestions from school counselors. However, instead of discussing possible solutions regarding Student, Mother flatly told Ms. Diaz that she and her husband had reached a difficult decision. Mother told Ms. Diaz that she and her husband had issues with Student's teenage rebellion, including defiance in the home and testing for alcohol use. Mother informed Ms. Diaz that she and her husband had decided to place Student in a military-style academy and she wondered out loud if this was the right decision.

44. From Ms. Diaz, Mother then visited several of Student's teachers. Annie Lao was Student's junior year Algebra teacher. Ms. Lao testified at the due process

hearing. She stated that Mother asked her to complete an admission form for a naval academy in San Clemente. Mother informed Ms. Lao that the academy was voluntary, but that it had an ice hockey team which would be attractive for Student. Mother told Ms. Lao that her son did not want to get out of bed in the morning, and that all he thought about was girls, drinking and drugs. Mother also requested Coach Chiotti to complete an admission form.

NOTICE OF UNILATERAL PLACEMENT

45. On Monday, January 25, 2010, the District received a letter, dated January 23, 2010, prepared and sent by an Advocate representing Parents. The letter stated, in part: "It is my understanding that parents have attempted on numerous occasions to seek assistance for (Student) at Sonora High School. To date, no meetings or interventions have occurred. We believe (Student) is currently underserved and that his social/emotional needs in the educational environment are not being met." The letter gave the District a 10-day notice of a unilateral placement and requested reimbursement for such placement. The letter did not identify the unilateral placement. The letter also requested that the District make a referral on behalf of Student to the Orange County Health Care Agency (OCHCA) which is the governmental entity that provides mental health services for residents of Orange County, California.

46. On January 29, 2010, the District responded to the January 23rd letter received from the Advocate. Gregory Endelman is the Director of Special Education for the Fullerton Joint Union High School District. He has served in this capacity for the last three years. Mr. Endelman prepared the response which he referenced as follows: "34 CFR 300.503 Response to Intent to Seek Reimbursement for Educational Placement for Parents' Unilateral Placement of Student at Unidentified Location." The reference to "34 CFR 300.503" is to the federal regulation that governs a procedural safeguard in special education matters called "prior written notice." In his response letter, Mr. Endelman

informed the Advocate that the District denied the request for reimbursement for the reasons that the District had not assessed Student and determined whether he qualified for special education services.

47. Mr. Endelman's January 29, 2010 response letter also contained an assessment plan. The purpose of the plan was to permit the District to perform an initial evaluation of Student. The assessment plan designated the following areas of evaluation: (a) academic achievement; (b) intellectual development; (c) psycho-motor development; (d) health/vision/hearing; (e) self-help/career/vocational abilities; (f) social/emotional behaviors status; and (g) a Functional Behavioral Assessment. On February 2, 2010, Parents provided consent for the assessment plan.

48. Mr. Endelman directed Russ Sipple to perform the initial evaluation of Student, including the proposed Functional Behavioral Assessment. On February 4, 2010, Mr. Sipple started the assessment process by sending Teacher Assessment forms to Student's instructors and by initiating the performance of standardized test instruments. Stephanie Henry, the Assistant Principal who had provided academic counseling for Student during the previous school year, observed Student waiting for an interview with Mr. Sipple. Ms. Henry testified that Student expressed confusion that the school was testing him for special education, and that he stated he thought that someone was playing a joke on him.

49. On February 5, 2010, Gregory Endelman sent to the Advocate representing Parents a letter regarding the request for a referral for a mental health assessment by OCHCA. The letter included forms relating to the authorization of the mental health referral and the disclosure of records by OCHCA to the District. On February 8, 2010, Parents signed both forms and thereby authorized the District to attempt a mental health referral to OCHCA.

50. On February 10, 2010, Student met with Sonia Diaz, the Guidance Counselor, in her office at the high school. Despite the January 23rd letter which informed the school of a unilateral placement, Student continued to attend Sonora High. At the February 10th meeting, Student requested Ms. Diaz to change his Teacher Assistant class to Sports-Men. Student expressed his interest in returning to the football team. Ms. Diaz testified that, when she told Student that she thought he was attending another school, he told her "I'm not going anywhere; they tried three times before."

51. On February 22, 2010, Student presented to a medical doctor at the St. Jude Heritage Medical Group for a physical examination relating to his return to the Sonora High football team. Father accompanied Student on this visit. The Progress Note from the physical listed "Active Problems" which included a reference to "Depression." Most likely, the reference to "Depression" on the St. Jude Progress Note came from Father since Student had not previously seen this medical doctor and the visit lasted 30 minutes.

PLACEMENT AT HERITAGE SCHOOL

52. In the early morning hours of February 23, 2010, an escort service removed Student from his home and transported him to the Heritage School in Utah. Upon his removal, Student told his Parents "I'll kill myself if I don't come home tonight." The following day, the Advocate representing Parents sent to the District written notice of this placement.

53. Both Mother and Father testified about the extremely difficult decision of placing their son in an out-of-state residential treatment center. Mother testified that she had attempted on numerous occasions to get help from teachers and administrators at Sonora High. She stated that she and her husband had also attempted interventions in the home. She testified that six to eight months before placement at Heritage, she noted in her son a depression caused by poor grades and low self-worth.

She stated that he lost interest in ice hockey and in socializing with his family. She testified that, not receiving help from the District and in order to save Student's academic career, she and her husband decided upon Heritage School. Father also stressed Student's declining grades and downplayed problems in the home. Before placement at Heritage, Father described his son as angry, depressed and anxious, symptoms which started in Student's sophomore year in high school.

54. Adney Reid is a Certified Social Worker, licensed in the State of Utah, who works at Heritage School. Mr. Reid is Student's primary therapist at Heritage. Mr. Reid testified by telephone during the due process hearing. He stated that he interviewed Student when he arrived at the residential treatment center on February 23rd. He described a young man who was emotionally distraught and confused about his placement at Heritage. Mr. Reid testified that, upon his arrival, Student also presented to the staff psychiatrist for a one-hour meeting.

55. On March 16, 2010, Heritage School produced a document entitled "Heritage Individualized Treatment Plan" concerning Student. Mr. Reid testified that the treatment plan reflected a two-week assessment period in which staff obtained knowledge and impressions of Student. The treatment plan provided as follows regarding the justification for residential care: "(Student) has a history of lying, blaming others, avoiding school, arguing, using substances, stealing, being stubborn and manipulative, quick tempered and being uncompromising and non-compliant." The basis for this explanation derived primarily from an intake form completed by Parents.

56. The Heritage School treatment plan contained a diagnosis based upon the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV) which is a diagnostic manual published by the American Psychiatric Association. Mr. Reid testified that the staff psychiatrist at Heritage made the DSM-IV diagnosis and relied primarily upon information provided by Parents. A DSM-IV diagnosis utilizes a multiaxial

system which refers to different domains of information. Axis I pertains to clinical disorders. Under Axis I, the Heritage psychiatrist diagnosed Student with Anxiety Disorder, Not Otherwise Specified (NOS), Alcohol Abuse and Oppositional-Defiant Disorder. Axis II pertains to personality disorders. Under Axis II, the psychiatrist diagnosed Student with Personality Disorder, NOS Features (Narcissistic, Antisocial). Axis IV pertains to psychosocial and environmental problems. Under Axis IV, the psychiatrist diagnosed Student with "Problems with primary support group, peer difficulties, and legal problems." Axis V is a Global Assessment of Functioning (GAF). The Heritage psychiatrist diagnosed Student with a GAF at 45, which represented a serious impairment in social, occupational or school functioning.

57. Mr. Reid explained several of the DSM-IV diagnosis that appeared in the treatment plan. Regarding the diagnosis of Anxiety Disorder, NOS, he stated that Student arrived at Heritage evincing anxiousness, but that staff could not determine the type of anxiety. Regarding the diagnosis of Oppositional-Defiant Disorder, Mr. Reid stated that Student was oppositional towards his parents. Regarding the diagnosis of Personality Disorder, NOS, with narcissistic and antisocial features, Mr. Reid testified that Student carried a sense of entitlement and a grandiose idea of himself; that he showed little remorse for past legal problems; and that he acted as if rules did not apply to him, especially in the school environment. Mr. Reid also explained that the diagnosis relating to "problems with primary support group" referred to Student's family.

58. The Heritage School treatment plan contained long-term goals and objectives relating to the diagnosis of Oppositional-Defiant Disorder and Anxiety Disorder. The treatment plan described the problem concerning the Oppositional-Defiant Disorder as follows: "(Student) has a history of being oppositional towards his parents, including questioning their instructions, blaming others, being

uncompromising, noncompliant, manipulating, stealing and not accepting/following boundaries set by parents.”

59. Mr. Reid testified that Student has done exceptionally well at Heritage School. The residential treatment center operates on a level system based upon a child’s compliance with rules and expectations. According to Mr. Reid, Student overcame his initial feelings of resentment, and quickly achieved a level four status which entails a certain degree of privileges. Mr. Reid described Student as a young man who is goal-oriented, enthusiastic, and social, but who needs structure to succeed. Mr. Reid stated that the prognosis is good for Student’s early departure from Heritage. Despite Student’s progress, Mr. Reid stated that he maintains the same DSM-IV diagnosis that appeared in his treatment plan. Mr. Reid did not testify that Student was eligible for special education.

60. The ALJ assigned little weight to the Heritage treatment plan and, in particular, the DSM-IV diagnosis contained in the plan. The DSM-IV diagnosis was based primarily upon an intake form provided by Parents. The intake form was not placed into evidence at the due process hearing. Heritage produced the DSM-IV diagnosis after knowing Student for two weeks. During this period, Student was undoubtedly confused and angry. The DSM-IV diagnosis is a portrait of a young man thrust from his home under charged conditions and forced to live in a far-removed setting. The ALJ also gave little weight to Mr. Reid’s testimony that Student still carries the DSM-IV diagnosis in the treatment plan. This testimony was contradicted by Mr. Reid’s statements that Student quickly rebounded from the shock of placement at a residential treatment center; that he has achieved a level four status at Heritage; and that he is enthusiastic, goal-oriented and social.

61. Parents are quite pleased with Student’s progress and increased maturity at Heritage School. Father testified that he has seen a marked improvement in his son’s

happiness. Mother noted that Student is now succeeding in his academics. To date, Parents have expended \$75,000 on the Heritage placement.

MENTAL HEALTH REFERRAL

62. On March 12, 2010, Russ Sipple prepared and sent a letter to the Regional Director of the North Orange County SELPA of which the District is a member. The letter contained a referral packet for forwarding to the Regional Service Chief of the OCHCA. The letter informed OCHCA that the District was requesting a mental health assessment of Student. This request was based upon the Advocate's January 23, 2010 letter which requested the District to make an AB 3632 referral to OCHCA. The referral packet contained the authorization forms signed by Parents and Student's educational records, including his grades and STAR Program results.

63. On March 23, 2010, OCHCA returned the referral for the reason that the packet did not contain certain information mandated by law, including a copy of an individualized education program (IEP) for Student.

THE ASSESSMENT OF STUDENT

64. In late March 2010, Russ Sipple completed the evaluation of Student and prepared a Psychoeducational Report. The purpose of the evaluation was to determine whether Student was an individual with exceptional needs and eligible for special education and related services. In performing the evaluation, Mr. Sipple utilized the following assessment procedures: (a) a health evaluation; (b) a review of Student's educational records; (c) the Woodcock-Johnson Tests of Academic Achievement – Third Edition (WJ-III Academic Achievement); (d) the Woodcock-Johnson Tests of Cognitive Abilities – Third Edition (WJ-III Cognitive); (e) the Bender-Gestalt Visual-Perceptual-Motor Test – Second Edition (Bender-II); (f) classroom observations; (g) teacher reports;

(h) an interview of Student; and (i) the Behavior Assessment System for Children – Second Edition.

65. Mr. Sipple's Psychoeducational Report incorporated information from an Initial Health and Developmental History prepared by Brenda Butler, a Registered Nurse employed by the District. Ms. Butler's health assessment, in turn, relied upon a Family Health Background completed by Parents. In this health background, Parents described Student as short-tempered, withdrawn, loving, impulsive, distrustful, defiant, moody, lazy, a risk-taker and having a low self-esteem. Under "Medical History," Parents marked that Student did not have ADHD. Parents also reported that, regarding Student's attitude towards school: "Hates it, feels he does not need it, doesn't want to go, often goes late or misses classes. Does not do homework or study."

66. For the review of records, Mr. Sipple considered Student's grades and teacher reports from elementary and middle school, his grades at Sonora High, his attendance, counseling and discipline records at high school, and the results of the CAHSEE.

67. Sue Singh, an RSP teacher at Sonora High, administered the WJ-III Academic Achievement. On this test, Student scored in the average range in skills relating to Broad Reading, Broad Writing and Broad Mathematics. Russ Sipple administered the WJ-III Cognitive. On this test, Student scored in the average range for Verbal Ability, Thinking Ability and Cognitive Efficiency. He tested in the low-average range for Processing Speed. Overall, Student's General Intellectual Ability score was average. In his report, Mr. Sipple determined that Student's academic skills were commensurate with his performance on the WJ-III Cognitive assessment. Mr. Sipple also administered the Bender-II, which measures visual-motor integration and perception. On this test, Student scored in the high-average range on both the copy and recall phases of the test.

68. For his evaluation, Mr. Sipple conducted two classroom observations of Student. The observations occurred before Student left for Heritage. He first observed Student in his Algebra 2 class for 20 minutes. Student was sitting at his desk, materials out, paying attention and taking notes. On a later date, Mr. Sipple observed Student in his History of Motion Pictures course for 45 minutes. Student was seated, talked with peers while the teacher was engaged with other pupils, answered a question appropriately, and paid attention to the film under study. Mr. Sipple also interviewed Student. Mr. Sipple reported that Student was polite and cooperative; that he was fully attentive; that he expressed both positive and negative feelings towards school; that the most difficult aspect for him about school was paying attention for a long time; and that, when schoolwork gets difficult, he gives up.

69. For his evaluation, Mr. Sipple requested Student's instructors to complete a Teacher Assessment. The Teacher Assessments requested input in areas such as Class Participation, Peer Relations, Social/Emotional and Attention Span. Regarding Class Participation, Student's academic instructors uniformly marked that he failed to complete assignments, failed to turn in homework, and wasted class time. Only his football coach marked that Student had good study habits. Regarding Peer Relations, the majority of teachers indicated that Student was liked by fellow students. Regarding Social/Emotional, his teachers marked Student as cooperative but immature. Regarding Attention Span, five instructors indicated that Student had average attention for his age or can pay attention for 15-20 minutes. Student's instructor in the History of Motion Pictures marked that Student was easily distracted and had an attention span of less than 10 minutes.

70. The Behavior Assessment System for Children – Second Edition (BASC-2) is designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders in children, and to aid in the design of treatment

plans. The BASC-2 requires the test taker to answer short questions and thereby rate a person who is the subject of the instrument. The ratings are then scored leading to the categorization of the person on different scales as either average, at-risk or clinically significant. The scales include characteristics such as Hyperactivity, Depression and Social Skills. An "at-risk" score identifies either a significant problem that does not require formal treatment or a developing problem that warrants careful monitoring. A "clinically significant" score suggests a high level of maladjustment. In administering this test, Mr. Sipple gave Student the BASC-2 Self-Report-Adolescent; he gave Father the BASC-2 Parent Rating Scales-Adolescent; and he gave Student's instructors the BASC-2 Teacher Rating Scales-Adolescent.

71. On the BASC-2, Student self-reported in the average range on all scales, including Anxiety, Depression, Attention Problems and Hyperactivity. The sole exception was that Student self-reported in the at-risk range on the scale relating to Sense of Inadequacy. In contrast, on the Parent Rating Scales, Father reported his son in the clinically significant range for the scales relating to Hyperactivity, Conduct Problems, Adaptability, Social Skills, Leadership, Activities of Daily Living and Functional Communication. Father also reported Student in the at-risk range on the scales concerning Depression, Atypicality and Attention Problems.

72. On the Teacher Rating Scales, the instructors, on average, rated Student in the at-risk range for the BASC-2 scales concerning Hyperactivity and Attention Problems. In fact, two teachers rated Student in the clinically significant range on the scale of Hyperactivity; three teachers rated Student in the clinically significant range on the scale of Conduct Problems; and three instructors rated Student in the clinically significant range on the scale of Attention Problems. Two teachers rated Student in the at-risk range on the scale for Depression.

73. Mr. Sipple's Psychoeducational Report concluded with an analysis of whether Student qualified for special education. Mr. Sipple considered three areas of eligibility: specific learning disability, emotional disturbance and other health impairment. Mr. Sipple determined that Student did not have a specific learning disability because the Woodcock-Johnson tests did not reveal a severe discrepancy between intellectual disability and academic achievement. Mr. Sipple also determined that Student did not have an emotional disturbance because he did not exhibit any of the five characteristics which mark this disability.

74. Mr. Sipple further determined that Student did not have an "other health impairment." In his report, Mr. Sipple recognized that Student demonstrated "attentional weaknesses." However, he noted that Student did not have a diagnosis of attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD). Mr. Sipple also noted that, according to the DSM-IV, the condition of ADD or ADHD usually manifests before the age of seven, and Student did not show hyperactive-impulsive or inattentive symptoms at this age. Mr. Sipple further noted that attentional problems can be related to a lack of connection to the material presented in the classroom or a pupil falling behind and not being able to follow new material that is presented. Mr. Sipple concluded that, while Student "has some characteristics of an attention-deficit/hyperactivity disorder including difficulty completing tasks that he finds boring, making poor decisions and being impulsive," nevertheless Student appeared "to be experiencing adolescent adjustment problems in high school which are causing a decline in his academic performance."

75. Mr. Sipple's report included a list of recommendations designed to assist Student with schoolwork. In addition, Mr. Sipple prepared a Functional Behavioral Assessment which proposed a plan for assisting Student with his problems relating to homework completion and tardiness to class.

76. In performing the initial evaluation of Student and preparing his Psychoeducational Report, Mr. Sipple did not solicit information from Student's therapists and teachers at Heritage School. Mr. Sipple testified that he did not seek information from Heritage because Student had not been at the private placement for a sufficient length of time for staff and teachers to gain an accurate understanding of him.

77. The ALJ gave great weight to both the Psychoeducational Report and Mr. Sipple's testimony at the due process hearing. The report is thorough, balanced and fair. At the hearing, Mr. Sipple impressed as quiet and unassuming, but experienced and very competent.

THE MARCH 31, 2010 IEP MEETING

78. On March 31, 2010, the District convened an IEP meeting for the purpose of determining whether Student qualified for special education. The persons who attended the meeting were as follows: Parents; their Advocate; Gregory Endelman, District Director of Special Education; Stephanie Henry, Assistant Principal; Russ Sipple, School Psychologist; Kathryn Beecher, English teacher; Sue Singh, Special Education Specialist; Brenda Butler, School Nurse; Bernard Yost, a Sonora High administrator; and an attorney representing the District.

79. At this IEP meeting, Ms. Beecher appeared as Student's general education teacher. Ms. Singh appeared as a special education teacher. Mr. Endelman, Mr. Yost and Ms. Henry appeared as knowledgeable and qualified District representatives. Mr. Sipple appeared as the person who could interpret the implications of the initial evaluation of Student. The District did not invite personnel from Heritage to participate in the meeting; nor did Parents or their Advocate request such participation.

80. The primary focus at the IEP meeting was Mr. Sipple's Psychoeducational Report. Mr. Sipple reviewed the report and discussed his determinations regarding Student's eligibility for special education. Except for Parents and their Advocate, the IEP

team agreed with Mr. Sipple's judgment that Student did not qualify for special education.

81. At the IEP meeting, the Advocate representing Parents informed the team of Student's "present levels" at Heritage School. In this regard, the Advocate stated that Student was earning "A" and "B" grades; that he was on the honor roll; that he was regularly attending classes; and that he did not have "task completion" issues. At the meeting, Parents shared the St. Jude Progress Note from Student's February 22, 2010 physical examination. (Factual Finding, ¶ 51.)

82. At the due process hearing, Mother and Father testified that they provided the IEP team with a copy of the March 16, 2010 Heritage Individualized Master Treatment Plan which contained the DSM-IV diagnosis of Student. (Factual Finding, ¶ 56.) However, District members of the team, including Mr. Endelman, Mr. Sipple and Ms. Henry, do not recall seeing this document. The notes from the IEP meeting make reference to the St. Jude Progress Note, but do not reference the Heritage treatment plan.

83. Nevertheless, upon review of the treatment plan at the due process hearing, both Mr. Endelman and Mr. Sipple offered opinions on whether the DSM-IV diagnosis made by the Heritage psychiatrist altered the District's determination that Student did not qualify for special education services. Mr. Endelman is highly qualified to render such an opinion. He is licensed in California as an Educational Psychologist; he has served as a School Psychologist for several school districts in Southern California; and he continues to perform psychoeducational assessments of pupils. Mr. Endelman testified that the diagnosis of Anxiety Disorder, NOS, in the Heritage treatment plan did not rise to the level of a diagnosable condition and failed to qualify as either an emotional disturbance or other health impairment. Mr. Endelman testified that the diagnoses of Alcohol Abuse, Oppositional-Defiant Disorder and Personality Disorder,

NOS, related to a social maladjustment in Student and thereby excluded a finding that he had an emotional disturbance. Mr. Endelman further testified that the diagnosis of a GAF of 45 placed Student in the severely impaired range which is a condition that staff and teachers at Sonora High did not see.

84. Mr. Sipple largely confirmed Mr. Endelman's opinions. Mr. Sipple testified that none of the DSM-IV diagnoses that appear in the Heritage treatment plan meet the special education criteria for emotional disturbance or other health impairment. He stated that the diagnosis of Anxiety Disorder, NOS, is a condition that is not clearly observable and so does not satisfy the elements of an emotional disturbance which require a pervasive unhappiness or depression, to a marked degree and over a long period of time. Mr. Sipple testified that the "long period of time" is usually six months or more. Mr. Sipple also stated that he considered the diagnosis of Personality Disorder, NOS, as quite unusual for a teenager whose personality is not fully developed. He testified that, rather than seeing a narcissistic and antisocial young man, he observed that Student was polite, well-liked, looked people in the eyes when conversing, and generally upbeat. Mr. Sipple also stated that he had not received reports that Student had difficulties with peers.

85. Against this testimony, Parents and their Advocate did not offer any expert testimony on whether Student qualified for special education under the disabling conditions of emotional disturbance and/or other health impairment.

TEACHER TESTIMONY

86. Five of Student's junior year teachers from Sonora High testified at the due process hearing: Kathryn Beecher, Annie Lao, Paul Chiotti, Mason Morris, and Lloyd Walls.

87. Kathryn Beecher was Student's eleventh grade instructor in English 3. Ms. Beecher has served as an English teacher at Sonora High for over 20 years. The class

started at 7:40 a.m., and Student was tardy 17 times. Ms. Beecher described Student as funny, well-liked, a great kid. She admitted that he slept at least four times in her class for brief periods. Student told her that he had been up late at night talking on the phone with his girlfriend. Ms. Beecher stated that Student was capable. When he completed assignments, he did good work. However, she stated that Student earned a poor grade in English 3 because he did not perform homework and failed to complete most assignments. For 10 years, Ms. Beecher has been a member of the Student Intervention Team (SIT) which recommends interventions for pupils who are experiencing problems. She has also referred pupils for special education evaluations. She stated that she did not refer Student to either SIT or a special education assessment because her perception was that he was performing poorly, not because he was unable, but because he chose not to do the work. She testified that Student admitted to her: "I'm lazy." She testified that, by passing the CAHSEE in his sophomore year, Student did not fit the profile of a special education pupil. Ms. Beecher stated that a "D" is not a failing grade and that, even though Student received "D" grades in his high school classes, he could still graduate and attend a community college. Ms. Beecher stated that Student was affable and gregarious, but that his demeanor changed about three weeks before his removal from Sonora High. She stated that Student told her that "My parents are mad at me and want to take me out of school."

88. Annie Lao was Student's eleventh grade Algebra 2 instructor. Ms. Lao has taught Mathematics at Sonora High for five years. She described Student as the "class clown" who liked to talk with peers but who followed her instructions. She did not observe that he was depressed. She did see that he slept in class on occasion. Ms. Lao testified that, in her experience, the average attention span for a teenager is 10 to 15 minutes. She stated that Student had average attention in her class. Ms. Lao stated that Student did poorly in Algebra 2 because he did not do the homework and quickly fell

behind in the curriculum. She testified that she discussed matters with Student who understood what he needed to do, but did not expend the necessary effort. She described Student as a normal teenager who sought attention in a negative manner.

89. Paul Chiotti has served the District for four years as a coach and Social Science teacher at Sonora High. Mr. Chiotti first met Student during the 2008-2009 school year when he was a member of the football team. Mr. Chiotti described Student as a young man who was very social, who had many friends and who got along with the players on the team. Mr. Chiotti testified that Student always acted respectfully towards him and that Student had potential as a football player. Mr. Chiotti stated that he has referred several pupils for special education evaluations. These pupils either had behavior problems in class or had difficulty understanding the curriculum. Mr. Chiotti testified that it never entered his mind to make such a referral for Student. Mr. Chiotti stated that Student wrote him a letter from Heritage School asking for the chance to play on the football team for his senior year at Sonora High.

90. Mason Morris was Student's eleventh grade instructor in Chemistry. Mr. Morris has served as a Chemistry teacher at Sonora High for 12 years. Mr. Morris described Student as a social young man who preferred to talk and banter with peers rather than focus on the lesson in class. Mr. Morris testified that, from tests and oral responses, he knew that Student was capable, but that Student received a poor grade because he did not do homework. Although Mr. Morris rated Student on the BASC-2 in the clinically significant range on the scale for Attention Problems, he testified that Student had an average attention span in Chemistry. Mr. Morris stated that Student was not defiant and complied with his requests to redirect his attention to class activities.

91. Lloyd Walls was Student's eleventh grade instructor in United States History. Mr. Walls served as a teacher at Sonora High for two years. Mr. Walls described Student as a social creature who liked to associate with friends rather than focus on

schoolwork. Mr. Walls stated that Student was upbeat and happy except for the short period before his removal from school. Mr. Walls testified that he noticed that Student was withdrawn and down; that he asked what was the matter; and that Student responded that he was getting assessed for special education. Mr. Walls stated that, in his experience, an average teenager can pay attention an amount of minutes equal to the pupil's age. He stated that Student's attention in his class fit this standard. Mr. Walls testified that he considered Student capable, but more interested in socializing than performing schoolwork.

REQUEST FOR STUDENT RECORDS

92. In the January 23, 2010 notice of unilateral placement letter to the District, the Advocate representing Parents requested "a copy of all educational records" relating to Student. At the March 31, 2010 IEP for Student, the Advocate requested the District to produce the protocols for the tests used to assess Student. In an April 3, 2010 letter to Gregory Endelman, the Advocate requested the District to produce copies of assessment protocols, Student's assertive discipline file, the referral packet to OCHCA, counseling records, staff observation notes relating to the evaluation of Student, and the letter from OCHCA explaining why a representative from OCHCA did not attend Student's March 31, 2010 IEP meeting. In a letter from Mr. Endelman to the Advocate, dated April 19, 2010, he informed that the District had complied with all requests for records, except the OCHCA letter regarding Student's IEP, which Mr. Endelman explained did not exist.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a special education administrative due process proceeding, the party who is seeking relief has the burden of proof or persuasion. (*Schaffer v. Weast* (2005))

546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has brought the complaint and has the burden of proof.

OAH JURISDICTION

2. The Office of Administrative Hearings has the authority to hear and decide special education matters pertaining to the identification, assessment or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. (Ed. Code, § 56501, subd. (a).) In this case, the Request for Due Process raises issues relating to the appropriate identification, evaluation and placement of Student. OAH has the authority to hear and decide these issues. (*Compton Unified School Dist. v. Addison* (9th Cir. 2010) 598 F.3d 1181, 1184 (*Addison*); *Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029.)

BACKGROUND

3. Special education law derives from the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. § 1400 et seq.) The IDEA is a comprehensive educational scheme conferring upon disabled students a substantive right to public education. (*Honig v. Doe* (1987) 484 U.S. 305, 310 [108 S.Ct. 592, 98 L.Ed.2d 686].)

4. The IDEA ensures that “all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” (20 U.S.C. § 1400(d)(1)(A).)

5. Under the IDEA, a FAPE is defined as follows: special education and services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the school standards of the state educational agency; (C) include an appropriate pre-school, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the

individualized education program (IEP) required under section 1414(d) of the Act. (20 U.S.C. § 1401(9).)

6. The term “special education” means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39(2006); Ed. Code, § 56031, subd. (a).) “Specially designed instruction” means the adaptation, as appropriate to the needs of the disabled child, of the content, methodology or delivery of instruction to address the unique needs of the child that result from the child’s disability. (34 C.F.R. § 300.39(b)(3) (2006).) The term “related services” means transportation and developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a)(2006).) In California, “related services” are called “designated instruction and services.” (Ed. Code, § 56363, subd. (a).)

7. The IDEA seeks to accomplish the objective of providing a disabled child with a FAPE through a complex statutory framework that grants substantive and procedural rights to children and their parents. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 522-533 [127 S.Ct. 1994, 167 L.Ed.2d 904].) In general, “school districts are required to locate potentially eligible children, assess and evaluate them, determine which children are eligible for benefits, develop individual programs for eligible children, and propose school placements for them.” (*Benjamin G. v. California Education Hearing Office* (2005) 131 Cal.App.4th 875, 880.)

8. The United States Supreme Court has established a two-part test to determine whether a school district has provided a disabled pupil with a FAPE. (*Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) First, in an administrative due process proceeding, the ALJ must determine whether the school district has complied with the procedural requirements of the IDEA. (*Id.* at p. 206.) Second, the ALJ must determine whether “the

individualized education program developed through the Act's procedures (is) reasonably calculated to enable the child to receive educational benefit." (*Id.* at pp. 206-207.)

9. A procedural safeguard in federal and state law requires that an ALJ, upon hearing a special education administrative due process proceeding, shall make a decision on substantive grounds based upon a determination of whether the child received a FAPE. (20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1)(2006); Ed. Code, § 56505, subd. (f)(1).) For cases in which a party alleges a procedural violation, the ALJ may find that the child did not receive a FAPE only if the procedural inadequacy (1) impeded the child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE for the child, or (3) caused a deprivation of educational benefit. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(2006); Ed. Code, § 56505, subd. (f)(2).)

10. In this case, Student has raised issues of procedure, including matters relating to identification, assessment and an IEP eligibility determination meeting, and contends that the alleged procedural inadequacies rise to the level of substantive violations.

INDIVIDUAL WITH EXCEPTIONAL NEEDS

11. This case involves the basic proposition of whether Student is eligible for special education services as a child with a disability. Under federal law, a "child with a disability" is a pupil who has a recognized disability and, who by reason thereof, needs special education and related services. (20 U.S.C. § 1401(3)(A)(i); 34 C.F.R. § 300.8(a)(1)(2006).) Two of the recognized disability categories include "serious emotional disturbance," referred to as an "emotional disturbance," and "other health impairment." (20 U.S.C. § 1401(3)(A)(i); 34 C.F.R. § 300.8(a)(1)(2006).)

12. California law uses the term “individual with exceptional needs” to describe a pupil who is eligible for special education services. (Ed. Code, § 56026.) In California, an “individual with exceptional needs” meets four criteria. First, the pupil must be a “child with a disability” within the meaning of federal law. (Ed. Code, § 56026, subd. (a).) Second, the pupil’s impairment must require instruction and services which cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b).) Third, the pupil must be within the ages of three and 21. (Ed. Code, § 56026, subd. (c).) Fourth, the pupil must meet the eligibility criteria set forth in regulations adopted by the state Department of Education. (Ed. Code, § 56026, subd. (d).) The regulation that contains the disability classifications for individuals with exceptional needs appears in the California Code of Regulations, title 5, section 3030 (Regulation 3030).

EMOTIONAL DISTURBANCE

13. Regulation 3030 includes “serious emotional disturbance” as a disability category. (Cal. Code Regs., tit. 5, § 3030, subd. (i).) This regulation provides as follows: “Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory or health factors.
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (3) Inappropriate types of behavior or feelings under normal circumstances exhibited in several situations.
- (4) A general pervasive mood of unhappiness or depression.
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

(*Ibid*; see also 34 C.F.R. § 300.8(c)(4)(i)(A)-(E)(2006).)

14. The disability category of “emotional disturbance” does not apply to children who are socially maladjusted. (34 C.F.R. § 300.8(c)(4)(ii)(2006); see also Ed. Code, § 56026, subd. (e); Gov. Code, § 7576, subd. (b)(3)(D).)

OTHER HEALTH IMPAIRMENT

15. Regulation 3030 also includes “other health impairment” as a disability category. (Cal. Code Regs., tit. 5, § 3030, subd. (f).) This regulation provides as follows: “(Other health impairment occurs when) a pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affect a pupil’s educational performance.” (*Ibid*; see also 34 C.F.R. § 300.8(c)(9)(2006).)

16. In California, a pupil whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) and who demonstrates a need for special education and related services by meeting the eligibility criteria for “emotional disturbance” or “other health impairment” is entitled to special education services. (Ed. Code, § 56339, subd. (a); see also 34 C.F.R. § 300.8(c)(9)(i)(2006).)

ISSUE NO. 1: DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2008-2009 AND 2009-2010 SCHOOL YEARS BY FAILING IN ITS CHILD FIND DUTIES TOWARDS STUDENT?

17. Student contends that the District failed to identify him as an individual with exceptional needs.

18. The IDEA and companion State law place an affirmative duty upon public agencies to identify, locate and evaluate all children with disabilities. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1)(i)(2006); Ed. Code, §§ 56300, 56301, subd. (a).) This duty is known as the “child find” requirement. (*Addison, supra*, 598 F.3d at p. 1183.)

19. Through the child find requirement, Congress acknowledged the “paramount importance” of properly identifying each child eligible for special education services. (*Forest Grove School Dist. v. T.A.* (2009) ___ U.S. ___ [129 S.Ct. 2484, 2495, 174 L.Ed.2d 168].) The purpose of child find is to ensure that children with disabilities are found and have the opportunity to enter into the special education system. (*DL v. District of Columbia* (D.D.C. 2006) 450 F.Supp.2d 21, 22.) Accordingly, the child find duty extends to children suspected of being a child with a disability even though they are advancing from grade to grade. (34 C.F.R. § 300.111(c)(1) (2006).)

20. The child find duty arises when a school district has reason to suspect that a pupil has a disability and that special education services may be needed to address the disability. (*Department of Education, State of Hawaii v. Cari Rae S.* (D.Hawaii 2001) 158 F.Supp.2d 1190, 1194 (*Cari Rae*).) Stated otherwise, a school district violates the child find requirement when school officials overlook clear signs of a disability and are negligent in failing to order testing, or when there is no rational justification for not deciding to evaluate. (*A.P. v. Woodstock Bd. of Education* (D.Conn. 2008) 572 F.Supp.2d 221, 225.)

21. The clear signs that trigger the child find duty include a pupil who is performing below grade average in basic academic functions such as reading; failing grades; behavior and discipline problems; a significant amount of absences from school; concerns expressed by parents and teachers; signs of substance abuse; a medical diagnosis of a recognized disability; psychiatric hospitalizations; suicide attempts; and a request for an evaluation from the parents. (See e.g., *Addison, supra*, 598 F.3d at pp.

1182-1183 ; *Cari Rae, supra*, 158 F.Supp.2d at p. 1195; *Wiesenberg v. Bd. of Education of Salt Lake City School Dist.* (D.Utah 2002) 181 F.Supp.2d 1307, 1311-1312; *Hicks v. Purchase Line School Dist.* (W.D.Pa. 2003) 251 F.Supp.2d 1250, 1254; *N.G. v. District of Columbia* (D.D.C. 2008) 556 F.Supp.2d 11, 18-21.)

22. In this case, Student contends that he is eligible for special education under the disability categories of emotional disturbance and other health impairment. More specifically, Student charges that he was a child with an emotional disturbance because he had a general pervasive mood of unhappiness or depression, over a long period of time and to a marked degree, which adversely affected his educational performance. Student also charges that he was a child with an other health impairment because he had limited strength, vitality or alertness due to a suspected diagnosis of ADD or ADHD which adversely affected his educational performance.

23. Regarding the disability of emotional disturbance, Student has failed to cite any warning signal or red flag that occurred during his sophomore and junior years at Sonora High that would have alerted staff or teachers that he suffered from a general pervasive mood of unhappiness or depression. Mother testified that she observed that her son was depressed for six to eight months before his placement at Heritage School. However, Parents did not mention that Student was unhappy or depressed at his two academic counseling sessions during his sophomore year. Further, Sonora High staff and teachers saw an upbeat, affable and quite social young man. The only time that they saw a change in demeanor was after Parents initiated the evaluation process and threatened to remove Student from school. (Factual Findings, ¶¶ 17, 18, 20-25, 28-30, 34, 48, 53, 86-91.)

24. Regarding the disability category of other health impairment, Student points to several warning signs which he contends triggered the District's child find duties. Student cites his failing grades and the frequent visits that his Parents had with

staff and teachers at Sonora High. Student also cites the fact that he quit football during his sophomore year and that he was often tardy and slept in class during his junior year. Student further cites to the BASC-2 Teacher Rating Scales in which his eleventh grade instructors scored him in the at-risk range on the scales for Hyperactivity and Attention Problems.

25. Student's poor grades were not a warning sign that triggered the child find requirement. Student did not have failing grades. While he received an "F" in Algebra 1 during his freshman year, he remediated this class during summer school. He also received an "F" in Algebra 2 during his junior year. Ms. Lao issued this grade at about the time that Parents gave notice of the unilateral placement and requested a special education evaluation. Otherwise, even though he received many "D" grades, Student was taking and passing courses required for graduation. (Ed. Code, § 51225.3.) Further during his sophomore year, Student took and passed the CAHSEE. (Ed. Code, § 60851.) Ms. Beecher testified that she would not expect a special education pupil to perform this accomplishment. Ms. Beecher also testified that, even with "D" grades, Student could graduate and attend a state community college. In addition, during his freshman and sophomore years, Student mostly scored "Basic" or "Proficient" under the STAR Program testing. (Ed. Code, § 60641; Factual Findings, ¶¶ 7-10, 11-15, 19, 26-27, 31-32, 35, 39, 87.)

26. Likewise, the visits by Parents to staff and teachers did not trigger the child find requirement. At the academic counseling sessions that occurred during the 2008-2009 school year, Parents mentioned nothing to Stephanie Henry or Brandy Taege indicating that Student had a suspected diagnosis of ADD or ADHD. Mother testified that she met with either Ms. Henry or Assistant Principal Gary Day to discuss the Opportunities Program and the Sunburst Academy. However, neither Ms. Henry or Mr. Day recalled such a meeting. Mother also testified that she encountered Russ Sipple, the

School Psychologist, at an ice hockey rink and discussed the possible need for a 504 plan or other interventions to help Student in school. Mr. Sipple did not recall such an encounter. Even if the meetings occurred, there is no evidence that Parents imparted a concern that their son had a suspected attention disorder. In fact, in the Family Health Background, completed as part of the District's assessment of Student, Parents marked that Student did not have ADHD. (Factual Findings, ¶¶ 17, 20-24, 28-30, 34, 65.)

27. Finally, Student's conduct in his classes did not trigger the child find requirement. Paul Chiotti testified that a pupil quitting the football team is a common experience. Kathryn Beecher indicated that at times Student slept in class because he stayed up late and was tired the next day. Student's eleventh grade teachers testified that he had an average attention span in their classes. The instructors attributed his poor grades, not to attention problems, but to the fact that an otherwise capable young man was not doing homework and completing assignments. In his Psychoeducational Report, Mr. Sipple corroborated this testimony by noting that a pupil can have attention problems if he or she lacks a connection to the material presented in class or falls behind in assignments and thereby does not understand the lesson. (Factual Findings, ¶¶ 27, 69, 74, 87-91.)

28. The determination that the District did not violate its child find obligation towards Student is supported by Factual Findings, paragraphs 1-2, 7-10, 11-18, 19-34, 35-44, 48, 64-77 and 87-91, and Legal Conclusions, paragraphs 1-27.

ISSUE NO. 2: DID THE DISTRICT DENY STUDENT A FAPE BECAUSE THE ASSESSMENT PERFORMED BY THE SCHOOL PSYCHOLOGIST WAS INCOMPLETE AND NOT CONSISTENT WITH THE REQUIREMENTS OF A COMPREHENSIVE ASSESSMENT?

29. Student contends that the assessment that the District performed in determining that he was not eligible for special education services was not appropriate, for the following reasons: (1) the assessors did not obtain and review records from

Heritage or interview any personnel at Heritage; (2) the assessors did not have Student's teachers and therapist at Heritage participate in any of the standardized assessment questionnaires; (3) the assessors did not ask Heritage personnel to provide written input regarding Student's present levels of performance; and (4) the assessors failed to conduct a classroom observation of Student.

30. On January 23, 2010, the Advocate representing Parents sent a letter requesting that the District perform an assessment of Student. This letter set in motion the District's initial evaluation of Student to determine whether he was an individual with exceptional needs. (Factual Findings, ¶¶ 45-47.)

31. In performing an initial evaluation to determine special education eligibility, a school district must follow certain procedures prescribed by federal and State law. In general, the initial evaluation must consist of procedures to determine if the child is an individual with exceptional needs, and to determine the educational needs of the child. (20 U.S.C. § 1414(a)(1)(C)(i); 34 C.F.R. § 300.301(c)(2)(2006); Ed. Code, § 56302.1, subd. (a).)

32. More specifically, in determining whether the child is an individual with exceptional needs, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information, including information provided by the child's parents. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(i) (2006).)

33. Further, a school district in conducting an initial evaluation cannot use any single measure or assessment, any single score or product of scores, as the sole criterion in making an eligibility determination. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)(2006); Ed. Code, § 56320, subd. (e); Cal. Code Regs., tit. 5, § 3030.)

34. Additionally, in determining whether a child is an individual with exceptional needs and the educational needs of the child, the school district in

performing an initial evaluation, as appropriate, must review existing evaluation data on the child, including assessments, classroom-based observations, teacher observations and state tests. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1)(2006); Ed. Code, § 56320, subd. (h).)

35. The District satisfied the foregoing standards relating to an initial evaluation. Mr. Sipple, in conducting Student's assessment, utilized a variety of evaluation tools, including the Woodcock-Johnson tests of academic achievement and cognitive abilities, the Bender-II and the BASC-2. The initial evaluation included classroom observations conducted by Mr. Sipple who also considered teacher reports and records from Student's entire history in the public school system and the results of his CASHEE. The test instruments utilized by Mr. Sipple allowed him to develop functional, developmental and academic information concerning Student, determine his educational needs, and further determine his eligibility for special education. (Factual Findings, ¶¶ 64-77.)

36. Student complains that the District assessment did not include information from Heritage School. The standards relating to an initial evaluation permit parents to provide information which must be considered by the school district assessment team. Here, Parents submitted information in a Family Health Background which Mr. Sipple incorporated into his report. However, Parents and their Advocate elected not to provide information from Heritage during Student's initial evaluation. The weight of the evidence established that Parents and their Advocate produced the Heritage Individualized Master Treatment Plan, with the DSM-IV diagnosis of Student, after the March 31, 2010 IEP meeting. (Factual Findings, ¶¶ 81-82.)

37. In the same vein, Student complains that Mr. Sipple did not have Heritage personnel participate in the standardized assessment questionnaires. This complaint concerns the BASC-2, and, more specifically, the Teacher Rating Scales. Mr. Sipple

testified that, had Heritage provided information for the assessment, he would have assigned little value to such information since Student had been at Heritage for a short period of time. (Factual Findings, ¶¶ 60, 76.)

38. Regarding these latter charges, Student failed to establish that written information from Heritage would have assisted or altered the District's assessment. The DSM-IV diagnosis in the treatment plan was not an accurate portrayal of Student. At the least, the treatment plan portrayed a young man that staff and teachers at Sonora High did not know. The justification for residential care and one of the long-term goals and objectives in the treatment plan described Student as having a history of lying, blaming others, arguing, using substances, stealing, being stubborn and manipulative, quick-tempered and uncompromising, non-compliant and not accepting boundaries set by his parents. Staff and instructors at Sonora High did not see this individual. Instead, they saw a young man who was friendly, good with people and respectful of school authority. Clearly, Parents placed their son at Heritage as much for problems in the home as for problems at school. (Factual Findings, ¶¶ 17, 24, 29, 52-61, 83-84, 87-91.)

39. Student further complains that the District evaluation is not appropriate because Mr. Sipple did not request Heritage School to provide written input regarding Student's present levels of performance. The term "present levels" in special education law appears in connection with the standards that concern the content of an individualized education program after a school district has determined that a pupil is an individual with exceptional needs. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1)(2006); Ed. Code, § 56345, subd. (a)(1).) In particular, the IEP for an individual with exceptional needs must contain, inter alia, "a statement of the individual's present levels of academic achievement and functional performance." (Ed. Code, § 56345, subd. (a)(1).) The standard for performing an initial evaluation requires a school district to determine the "educational needs" of the pupil. While "educational

needs” may include “present levels,” the two standards are not the same. Here, Mr. Sipple performed an initial evaluation of Student that determined his educational needs. Specifically, he administered standardized tests that measured Student’s academic achievement and cognitive abilities, he made recommendations to assist Student with his schoolwork, and he prepared a Functional Behavioral Assessment. (Factual Findings, ¶¶ 64-75.)

40. The determination that the District performed a proper initial evaluation of Student is supported by Factual Findings, paragraphs 1-2, 3-6, 11-16, 19, 23-32, 35-44, 45-47, 52-61, 64-77, 81-84 and 87-91, and Legal Conclusions, paragraphs 1-16 and 29-39.

ISSUE NO. 3: DID THE DISTRICT DENY STUDENT A FAPE BY HOLDING AN INAPPROPRIATE IEP ELIGIBILITY DETERMINATION MEETING?

41. Student contends that the March 31, 2010 IEP meeting convened by the District to determine whether Student was eligible for special education services was inappropriate, for the following reasons: (1) the District did not have at the meeting a single party who knew or had worked with Student; (2) the District did not invite to the meeting Student’s current teachers at Heritage; and (3) the District did not know Student’s present levels because it failed to collect any information on this subject.

42. A school district must also follow specific procedures in determining whether a child is an individual with exceptional needs. In California, a school district must conduct an initial evaluation and hold an eligibility IEP meeting within 60 days of receiving consent from the child’s parents to perform the assessment. (Ed. Code, §§ 56302.1, subd. (a); 56043, subd. (c); see also 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.301(c)(1)(i)(2006).)

43. Upon completion of the initial evaluation, “a group of qualified professionals and the parent of the child” makes the determination of whether the child

is an individual with exceptional needs and the educational needs of the child. (20 U.S.C. § 1414(b)(4); 34 C.F.R. § 300.306(a)(1)(2006); see also Ed. Code, § 56304, subd. (a).)

44. In California, the determination of special education eligibility is conducted at an IEP meeting which must conform to the requirements of Education Code section 56341. (Ed. Code, § 56329, subd. (a)(1).) Such requirements cover the composition of the IEP team which must include (1) the parents, (2) not less than one regular education teacher, (3) not less than one special education teacher, (4) a knowledgeable and qualified school district representative, (5) an individual who can interpret the instructional implications of assessment results, (6) at the discretion of the parents or agency, other individuals who have knowledge or special expertise regarding the child, and (7) the child. (Ed. Code, § 56341, subd. (b)(1)-(7); see also 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2006).)

45. In interpreting data from the initial evaluation, the IEP team that determines eligibility must "draw upon a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior." (34 C.F.R. § 300.306(c)(1)(i)(2006); Ed. Code, § 56330.)

46. In addition, the IEP team must "ensure that information obtained from all these sources is documented and carefully considered." (34 C.F.R. § 300.306(c)(1)(ii) (2006); Ed. Code, § 56330.)

47. The District satisfied the foregoing standards which concern the conduct of an IEP meeting that determines special education eligibility. At Student's March 31, 2010 IEP meeting, the team members represented a group of qualified professionals and included personnel required by law. In making the determination against eligibility, the team relied upon Mr. Sipple's Psychoeducational Report which contained the results of aptitude and achievement tests, teacher reports, a health assessment and Student's

school records. The team also permitted Parents and their Advocate to provide information concerning Student. (Factual Findings, ¶¶ 78-81.)

48. Student complains that, at the March 31, 2010 IEP meeting, the District did not have a single party present who knew or had worked with Student. This contention is clearly not accurate. Stephanie Henry attended the IEP meeting. Ms. Henry had provided academic counseling for Student at the outset of his sophomore year at Sonora High. Kathryn Beecher attended the IEP meeting. Ms. Beecher was Student's eleventh grade English teacher who had a genuine fondness for him. Russ Sipple also attended the IEP meeting. Mr. Sipple, in performing an evaluation of Student, administered standardized test instruments, observed him in two classrooms and conducted an interview of him. (Factual Findings, ¶¶ 23, 64-75, 78-79, 87.)

49. Student complains that the March 31, 2010 IEP meeting was improper because the District did not invite his Heritage School instructors and therapist to the meeting. Under the standards that control the composition of an IEP team, parents have the right to invite to an IEP meeting "individuals who have knowledge or special expertise regarding the child." (20 U.S.C. § 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6)(2006); Ed. Code, § 56341, subd. (b)(6).) Here, Parents and their Advocate did not invite, and did not request the District to invite, Heritage personnel who satisfied this standard. (Factual Findings, ¶¶ 78-79.) Beyond this point, a school district is not required to include at an IEP meeting the current teacher of a child who is in an out-of-state placement as long as the district satisfies the requirement of having at least one regular education teacher and one special education teacher at the meeting. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 938-940 (*Napa Valley*).)

50. Student further complains that the March 31, 2010 IEP meeting was improper because the District failed to have his present levels of performance. This contention was discussed in Legal Conclusions, paragraph 39. Had Fullerton found

Student eligible for special education, then the law required the District to hold an IEP meeting within 30 days to develop an appropriate program. (34 C.F.R. § 300.306(c)(2)(2006); Ed. Code, § 56344, subd. (a).) In order to develop an appropriate program, the District would need to establish Student's present levels. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1)(2006); Ed. Code, § 56345, subd. (a)(1).) As determined, in performing the initial evaluation of Student, the District appropriately considered his educational needs; there was not a separate requirement that the District set forth his present levels of academic achievement and functional performance.

51. The determination that the District did not commit a procedural violation at the March 31, 2010 IEP meeting is supported by Factual Findings, paragraphs 23, 64-77, 78-82 and 87, and Legal Conclusions, paragraphs 1-10 and 41-50.

ISSUE NO. 4: DID THE DISTRICT DENY STUDENT A FAPE AT THE MARCH 31, 2010 IEP MEETING BY FINDING THAT HE WAS NOT ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES UNDER THE DISABILITY CATEGORIES OF EMOTIONAL DISTURBANCE AND/OR OTHER HEALTH IMPAIRMENT?

52. Student contends that the District erred in not finding that he was an individual with exceptional needs under the disability categories of emotional disturbance and other health impairment. "(A)n eligibility determination is the most important aspect of the IDEA. It is the lynchpin from which all other rights under the statute flow." (*V.S. v. Los Gatos-Saratoga Joint Union High School Dist.* (9th Cir. 2007) 484 F.3d 1230, 1233.) An IDEA eligibility determination is a fact-intensive process. (*Napa Valley, supra*, 496 F.3d at p. 943.)

53. Student contends that he qualified for special education as a child with an emotional disturbance because he had a general pervasive mood of unhappiness or depression, over a long period of time and to a marked degree, which adversely affected his educational performance. However, Student has presented insufficient

evidence on this score. Parents testified that their son was sad and depressed before his removal to Heritage School. Yet, staff and teachers at Sonora High observed the opposite, and Parents never directly informed personnel at the high school of such concerns. Student points to the Heritage treatment plan and the DSM-IV diagnosis of Anxiety Disorder, NOS. Yet, Adney Reid did not testify that Student qualified for special education and, much less, that this diagnosis meant that Student was depressed. Both Gregory Endelman and Russ Sipple offered expert testimony that a DSM-IV diagnosis of Anxiety Disorder, NOS, does not qualify as an emotional disturbance. More specifically, Mr. Sipple testified that a diagnosis of Anxiety Disorder, NOS, is not clearly observable, and, therefore, does not satisfy the criteria of an emotional disturbance as a clearly marked and long-lasting pervasive condition. (Factual Findings, ¶¶ 23-24, 28-30, 53-60, 73, 83-84.)

54. Student also contends that he qualified for special education as a child with an other health impairment caused by a suspected diagnosis of ADD or ADHD which caused him to have limited strength, vitality or alertness, and which adversely affected his educational performance. Again, Student presented insufficient evidence to prove this point. In this regard, Student relied primarily upon the BASC-2 Teacher Rating Scales in which his eleventh grade instructors placed him in the at-risk range on the scales of Hyperactivity and Attention Problems. However, the same teachers testified that Student had average attention in their classes. The instructors attributed Student's troubles, not to a suspected attention disorder, but to a singular lack of motivation and willingness to perform homework and class assignments. (Factual Findings, ¶¶ 69-70, 72, 87-91.)

55. From the BASC-2 results, Russ Sipple recognized that Student had attention weaknesses that might indicate ADHD. However, he also noted several countervailing facts. First, Student did not have a diagnosis of ADD or ADHD. Second,

Mr. Sipple noted that the symptoms of an attention deficit disorder are usually evident in elementary school, and Student's records did not reflect such a problem. Third, the Teacher Assessments completed by Student's eleventh grade instructors rated his attention span in class as average. Fourth, in his observations of Student both in classroom settings and during the assessment interview, Mr. Sipple noted that Student appropriately paid attention to the matters at hand. Balancing this data, Mr. Sipple concluded that Student did not meet the eligibility criteria for a child with an other health impairment through an attention disorder. In addition, both Mr. Endelman and Mr. Sipple offered expert testimony that nothing in the Heritage DSM-IV diagnosis of Student qualified as an other health impairment. Student offered no expert evidence to refute these opinions. (Factual Findings, ¶¶ 3, 68-72, 74.)

56. The determination that the District correctly found that Student was not an individual with exceptional needs under the disability categories of emotional disturbance and other health impairment is supported by Factual Findings, paragraphs 1-3, 23-24, 28-30, 64-77 and 87-91, and Legal Conclusions, paragraphs 1-16 and 52-55.

ISSUE NO. 5: DID THE DISTRICT DENY STUDENT A FAPE BY NOT PROVIDING PRIOR WRITTEN NOTICE AFTER PARENTS SENT THE DISTRICT A 10-DAY NOTICE OF UNILATERAL PLACEMENT IN JANUARY 2010?

57. In a letter dated January 23, 2010, the Advocate representing Parents gave the District a "10 day notice of unilateral placement" of Student. (Factual Finding, ¶ 45.) The 10-day notice of a unilateral placement gives a school district the opportunity to correct a possible oversight concerning a pupil, and thereby eliminates a reason for an administrative tribunal or reviewing court to reduce an award of reimbursement in the event that there is a finding that the school district denied the child a FAPE. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1)(ii)(2006); Ed. Code, § 56176, subd. (b).)

58. Student contends that the District failed to follow the receipt of the letter containing the 10-day notice of unilateral placement with "prior written notice." Student further contends that the failure to provide such prior written notice had the result of Parents funding Student's placement at Heritage.

59. Prior written notice is a procedural safeguard in special education law. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)(2006); Ed. Code, §56500.4, subd. (a).) A school district must provide prior written notice to the parents of an individual with exceptional needs upon the initial referral for assessment, or "a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, educational placement of the child, or the provision of a free appropriate public education to the child." (Ed. Code, § 56500.4, subd. (a).)

60. In this case, four days after receipt of the Advocate's January 23rd letter of unilateral placement, the District Director of Special Education sent the Advocate a response letter. The response letter informed the Advocate that the District denied the request to reimburse Parents for the unilateral placement for the reason that the District had not assessed Student and determined his eligibility for special education. The response letter included a proposed assessment plan. (Factual Findings, ¶¶ 45-47.) Both the response letter and the proposed assessment plan constituted prior written notice as regards the announcement of the parental decision to place Student outside the public school system.

61. The determination that the District did not fail to provide prior written notice in answer to the January 23rd letter of unilateral placement is supported by Factual Findings, paragraphs 45-47, and Legal Conclusions, paragraphs 1-10 and 57-60.

ISSUE NO. 6: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO MAKE A REQUESTED AB 3632 REFERRAL TO THE ORANGE COUNTY MENTAL HEALTH AGENCY?

62. California has established a statutory scheme that provides for interagency responsibility as regards the provision of related services. (Gov. Code, §§ 7570 – 7588.) This statutory scheme is known as AB 3632 after the Assembly Bill that created the law. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1463, fn. 2.) The statutory scheme provides that the State Department of Mental Health, through county departments like the Orange County Health Care Agency, is responsible for providing mental health services if required in the IEP of a child. (Gov. Code, § 7576, subd. (a).) The law provides that a school district, IEP team or parents can make a referral for a mental health assessment. (Gov. Code, § 7576, subd. (b).) This referral is known as an “AB 3632 referral.”

63. Student contends that the District failed to make an AB 3632 referral after a request for one in the January 23, 2010 notice of unilateral placement letter. However, an AB 3632 referral requires the existence of certain conditions, including a determination by an IEP team that, based upon an assessment, the child has emotional or behavioral characteristics that require and that would benefit from mental health services. (Gov. Code, § 7576, subd. (b)(3).) In addition, the AB 3632 referral packet must include certain documents, including a copy of the child’s current IEP and assessment reports. (Gov. Code, § 7576, subd. (c).) In this case, the District attempted an AB 3632 referral, but OCHCA returned the packet because the predicate conditions for consideration of the referral did not exist. (Factual Findings, ¶¶ 62-63.)

64. The determination that the District did not fail to make an AB 3632 referral to OCHCA is supported by Factual Findings, paragraphs 45 and 62-63, and Legal Conclusions, paragraphs 1-10 and 62-63.

ISSUE NO. 7: DID THE DISTRICT DENY STUDENT A FAPE BY NOT SUPPLYING ALL EDUCATIONAL RECORDS AFTER A REQUEST FOR SUCH RECORDS WAS MADE ON JANUARY 25, 2010, AND MARCH 31, 2010?

65. Another procedural safeguard in special education law requires a school district to provide “an opportunity for the parents of a child with a disability to examine all records relating to such child.” (20 U.S.C. § 1415(b)(1).) In California, a district must comply within five days after a parent makes such a request. (Ed. Code, §§ 49065, 56504.) Here, Student contends that the District failed to respond to record requests made by the Advocate representing Parents. However, the evidence established that the District complied with such requests. This determination is supported by Factual Findings, paragraphs 45 and 91, and Legal Conclusions, paragraphs 1-10 and 65.

TUITION REIMBURSEMENT

66. Through the Request for Due Process, Parents have requested reimbursement for the cost of placing Student at the Heritage School. Parents who unilaterally change their child’s placement without the consent of the applicable school district do so at their own financial risk. (*Florence County School Dist. v. Carter* (1993) 510 U.S. 7, 15 [114 S.Ct. 361, 126 L.Ed.2d 284].) In such case, the parents are entitled to reimbursement only if they establish that the public placement violated the IDEA and that the private school placement was appropriate under the Act. (*Ibid.*) Here, Parents have not established that the Fullerton Joint Union High School District violated the IDEA by denying Student a FAPE. Therefore, the claim for tuition reimbursement is denied.

ORDER

Student’s claims for relief are denied.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d). The District prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

Dated: July 26, 2010

_____/S/_____
TIMOTHY L. NEWLOVE
Administrative Law Judge
Office of Administrative Hearings