

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2010071003

v.

OCEANSIDE UNIFIED SCHOOL DISTRICT.

DECISION

Administrative Law Judge Susan Ruff, Office of Administrative Hearings, State of California (OAH) heard this matter on October 4 – 6, 2010, in Oceanside, California.

Thomas Nelson, Esq., represented Student and his mother (Student). Student's mother was present for most of the hearing.

Jonathan Read, Esq., represented the Oceanside Unified School District (District). Diana Casato, Coordinator of Special Education, also appeared on behalf of the District.

Student filed his request for a due process hearing on July 21, 2010. On September 7, 2010, OAH granted the District's request for continuance. At the close of the hearing, the District requested time to file written closing argument. Student's written closing argument was filed on October 13, 2010. The District's written closing argument was filed on October 20, 2010. Student's reply was filed on October 25, 2010.¹

¹ To maintain a clear record, Student's written closing argument has been marked as Exhibit S-85, the District's written closing argument has been marked as Exhibit D-36, and Student's reply has been marked as Exhibit S-86.

ISSUE

Should Student have been found eligible for special education services under the handicapping condition of Other Health Impairment from July 2008 to the present?²

CONTENTIONS OF THE PARTIES

This matter involves a child who exhibits both a disability – attention deficit hyperactivity disorder (ADHD) – and a conduct problem. Neither party disputes that Student has significant difficulties with his school classes. The dispute arises over the reason for those difficulties and whether Student requires special education.

Student contends that the reason for Student's poor performance in school is his ADHD and that he requires special education as a result of his disability. Even if some of Student's misbehavior is due to other factors, such as social maladjustment, that should not make Student ineligible.

² The prehearing conference order originally contained five issues for hearing. During the hearing, Student's counsel explained that two of those issues – whether the District should fund an independent functional analysis assessment and independent neuropsychological assessment – were intended as proposed resolutions, not separate issues for hearing. The parties also agreed that the first and fifth issue, regarding the District's child-find obligation and the appropriateness of Student's placement, were subparts of the real issue in this case -- whether Student should have been found eligible for special education. Student's eligibility issue originally alleged that the District should have found Student eligible under the categories of specific learning disability (SLD) and other health impairment (OHI). On the first day of the hearing, Student's counsel explained that Student was withdrawing the issue regarding SLD and going forward to hearing solely on the issue of whether Student should have been found eligible for special education due to OHI.

The District contends that unstable factors in Student's environment and his social maladjustment have caused his school difficulties. The District believes that Student's current Section 504 plan is sufficient to address any academic difficulties he may experience due to his ADHD and that he does not require special education.

As will be discussed in more detail below, this Decision finds that by April 2010, the District had sufficient information to alert it that Student needed special education due to Student's ADHD. The District should have found Student eligible for special education at that time, and Student is entitled to compensatory education to make up for the lost educational benefit that Student suffered between that time and the date of filing Student's due process case.

FACTUAL FINDINGS

1. Student is a 13-year-old boy who attends the ninth grade within the District. Student has never been found eligible for special education by the District.

2. Student has had attention problems since he was a young child. When Student was in the third grade, he was diagnosed as having ADHD. His elementary school records contained numerous references to his difficulties with organization, focus, attention, and maintenance to tasks.

3. In the fourth grade, during the 2005-2006 school year, Student received D's in many of his classes. His report card noted that he had many tardies and absences and that he was having "family issues." In the first trimester comments, the report card noted that Student

is a boy who wants to do well. However, his behavior and lack of attention inhibit him from performing at the level expected of him in fourth grade. He has difficulty in exercising self control and completing his class work or

homework. Without constant supervision and accountability, I do not see his performance changing. [Student] must have consequences for his actions and rewards for his accomplishments.

Student's scores on the California Standards Tests (STAR) showed him to be below basic in English-language arts and far below basic in mathematics.

4. During the 2006-2007 school year, when Student was in the fifth grade, a Student Study Team Meeting was held. The team determined that Student was eligible for accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 due to his ADHD and drafted an accommodation plan (504 plan).

5. According to the 504 plan, the following school interventions had previously been tried with Student prior to the formation of the plan: small group instruction, preferential seating, incentives for work completion and attendance, group and individual counseling, counseling at school, modified assignments, and class work broken down into smaller amounts. The team meeting notes and 504 plan indicated that Student was taking medication for his ADHD and that he was affected by environmental factors, including his older brother's health issues and the fact that his father had come back into Student's life the year before but was no longer involved.

6. The 504 plan included accommodations to assist with work completion and social/emotional areas of need. Included within the accommodations was an "Invisible Mentor to assist with defiance." The 504 plan noted that Student's ADHD substantially impacted a major life activity (learning). Every 504 plan modified or developed for Student subsequent to that date found the same substantial impact of the ADHD on Student's learning.

7. Student's fifth grade report card for the third trimester contained two C's in reading and mathematics, two F's in writing and history/social science and a D in life

science. The report card noted that Student needed improvement in almost all categories of social skills and work habits. The comments at the end of the report card indicated that he was capable of being a good student but had become defiant and increasingly difficult to handle. His STAR test results for the spring of 2007 showed him to be far below basic in English language arts, below basic in mathematics, and below basic in science.

THE 2007-2008 SCHOOL YEAR (STUDENT'S SIXTH GRADE YEAR)

8. Student's poor grades and behavior problems continued during his sixth grade year, the 2007-2008 school year. Student's Section 504 team met on September 19, 2007, for a reevaluation. The nature of the concern listed in the 504 plan was "behavior problems, easily distracted, and lacks organizational skills. 26 referrals from elementary school. Two bus referrals and one class referral this school year." In the section regarding the responsibility of the parent, the plan recommended that the parent, among other things, "consider individual counseling to help with behaviors related to ADHD."

9. Between September 2007 and January 2008, Student was tardy on many occasions, and had incidents of class disruption, defiance toward his teachers, and refusal to do work. He was suspended one or more times due to behavior.

10. On January 15, 2008, Student's Section 504 team met again for a reevaluation. The concerns listed on the plan were similar to those listed for the September 19 meeting. Student's mother agreed to the 504 plan. Student's tardiness, disruptive behavior, defiance, and school suspensions continued after that date.

11. By May 2008, Student's misbehavior had continued to the point that the District considered expulsion. On May 15, 2008, Melinda Pourtash, a school psychologist for the District, prepared a pre-expulsion assessment report to determine whether Student's conduct was a manifestation of his ADHD. The conduct in question involved

“making continuous inappropriate comments and disrupting the classroom.” The report indicated that Student had been suspended in excess of 10 days. Pourtash determined that Student’s disabling condition impaired his understanding of the potential impact and outcome of his behavior and that the conduct in question was caused by or had a direct and substantial relationship to his disability.³

12. The Section 504 team disagreed with Pourtash’s findings and determined that the conduct was not a manifestation of Student’s disability. The team noted that Student “is believed to be able to control his behavior. His comments and language do not appear to be impulsive in nature and are not believed to be substantially related to his attention problems.” However, the team concluded that Student should not be disciplined. Instead, the team recommended that a behavior support plan (BSP) be developed and implemented. The team also noted that Student had begun counseling and the team wanted to give more time to see if that counseling had results.

13. At some point after the meeting, a BSP was developed. The behaviors addressed in the plan involved Student disrupting class by making inappropriate comments and sexual remarks to other pupils. The predictors for the problem behavior were listed as “When [Student] is bored or not engaged in the lesson. When [Student] is presented with something he doesn’t like.” The behavior plan noted that Student’s conduct “draws attention to him, assists in work avoidance, distracts from educational deficiencies.” The behavior plan also noted that Student “needs an activity which he can engage in when he has completed his assignments. [Student] needs modified assignments because he has not achieved many standards due to his inappropriate behavior.”

³ Pourtash testified at hearing, but had very little recollection of Student or the rationale for the findings in her report.

14. On June 4, 2008, Student's Section 504 team met and reviewed his plan. The concerns listed in the plan included:

behavior problems, easily distracted, and lacks organizational skills. 25 behavioral disciplinary referrals this school year. Comes to school with no supplies, denies responsibility for his actions. Accumulated 14 days of suspensions and 4 in school suspensions, absent 17 days from 1st, 10 days from 2nd. There are over 30 days of tardies, half are in 1st period.

15. In the section involving how the disability affects the child, the team wrote that Student "has difficulty staying focused, completing assignments, and lacks organization skills. Inconsistency in medication significantly impacts him. In addition, environmental factors appear to be significantly impacting his academic progress."

16. In spring 2008, Student scored in the "proficient" category for mathematics and the "basic" category in English-language arts on the STAR testing. During the final semester of sixth grade, Student's grades were: a C in math, a C in teacher's aide, D's in science and PE, and F's in language arts and social science. The report card noted numerous absences and tardies during the second semester.

THE 2008-2009 SCHOOL YEAR (STUDENT'S SEVENTH GRADE YEAR)

17. The 2008-2009 school year was Student's seventh grade year. Student's disruptive and defiant behavior continued unabated. On October 30, 2008, a review meeting for Student's Section 504 plan was held. The Section 504 team described Student's problems as follows:

behavior problems, easily distracted, and lacks organizational skills, multiple behavioral disciplinary referrals this school

year. Comes to school with no supplies, denies responsibility for his actions. Mother has seen some gradual [increase] in the lack of concern for school. Student [has] been challenging the rules and consequences more and more and lately. Student has...exhibited more [manipulative] behavior in reaction to new rules and consequences being set. Team is concerned that student's behavior may lead him to encountering increasing more severe consequences i.e. law enforcement and juvenile detention. Student appears to be disconnected.

18. In the section of the 504 plan which called for the team to describe how the child's disability impacted the child, the report stated: "[Student] has difficulty staying focused, completing assignments, and lacks organization skills. Inconsistency in medication significantly impacts him. In addition, environmental factors appear to be significantly impacting his academic progress." The report noted that Student had a behavior support plan, and, among other things, called for individual and family counseling "to help with behaviors environmental factors."

19. On November 21, 2008, Student's mother requested that the District assess Student to see if he qualified for special education services. The District did not assess Student at that time. Instead, the District convened a Student Study Team (SST) meeting on December 4, 2008, to discuss the possibility of assessment. The team reviewed Student's records and determined that a formal evaluation was not necessary. Student's mother was not at the meeting.

20. During the hearing, Michael Holz, the school psychologist involved with the SST, explained that the team elected not to conduct a formal evaluation because they believed they had a responsibility to attempt general education interventions first.

They wanted to work on making sure Student's medication protocol was accurate, helping him get to school on time, and getting his work together before they assessed him to see if he was a special education pupil. There were so many environmental factors that they wanted to address with Student's mother that they were hesitant to assess for special education.

21. However, Holz said the team was not "crystal clear" that environmental factors were the problem, so they decided to administer the Behavioral Assessment Scale for Children (BASC) to be certain. The BASC is a rating scale filled out by individuals who know a child well, such as teachers and parents. Holz believed that the BASC would help distinguish environmental factors from internal factors (caused by ADHD) in Student's behavior. The SST ordered that the BASC be administered by January 9, 2009.

22. In December 2008, Student was suspended because he "cussed out and then threw a broom at one student, who ducked, so the broom hit two other students who were standing nearby." Holz prepared the manifestation report and determined that the conduct was not a manifestation of Student's ADHD. The report noted the following regarding Student's behaviors:

Using profanity with consistency, example, calling Mrs. Walker a "bitch," contradicts teachers constantly, argues, points and then mutters under his breath. Comes to school unprepared frequently, if he has his belongings, he leaves them in other places on campus and then will not retrieve them in order to be prepared for class. Move seats, on his own during class and has to be told to go back to his original seat, is sent out of the room frequently due to disruptive behavior, talks with others around him and bothers them,

makes gestures to those in class. When he brings paper and pencil to class he is very slow to get to work and has to be told to get his materials out to get started. Makes noises in class and unsolicited comments; sometimes of a sexual nature. Does little or no work in class, plans on being expelled, chooses not to make up assignments even with teacher assistance and encouragement. These behaviors are from a list compiled by his four teachers during the month of October 2008. These behaviors are more a reflection of [Student's] attitude and defiance towards authority and his way of getting negative attention from others. They have nothing to do with his ADHD which manifests as inattentive, off task behaviors. These aforementioned behaviors are conscious decisions to be oppositional to authority, and fall within the domain of socially maladjusted behaviors, learned from his environment.

23. The report concluded that Student's cussing out and then throwing a broom at a student; missing and hitting two other students is not a manifestation of his ADHD disability. Being off task on a classroom assignment, loosing homework materials, being disorganized are manifestations of his ADHD. Cussing out; and then throwing objects at students are a manifestation of his socially maladaptive behaviors, and fall within the domain of Social Maladaptive behavior, caused by environmental issues.

24. The Section 504 manifestation determination team followed Holz's recommendation. On February 6, 2009, the team found that Student's conduct was a result of socially maladaptive behavior, not a result of his ADHD.

25. In January 2009, Holz conducted a behavioral evaluation of Student using the BASC and prepared a report. Holz distributed the BASC to Student's mother and to five of Student's teachers. The teachers completed and returned the evaluation form. Student's mother did not return her form to Holz.

26. Based on the teachers' evaluation forms, Holz concluded that Student had clinically significant behaviors in the areas of hyperactivity, aggression, conduct problems, attention problems, learning problems, social skills, study skills, adaptability, and atypicality. Holz concluded that the behaviors were "primarily environmentally learned." In his opinion, they could be mitigated "by behavioral therapy and family counseling by creating effective consequences and positive rewards for the targeted behaviors." The clinically significant behaviors of hyperactivity and attention "may be chemically/biologically based and intervened in through a medication protocol combined with behavioral therapy." He concluded that Student may be considered ADHD and a medication protocol prescribed; however the clinically significant co-morbid behaviors seen in school, for the most part seem to be supported by the home environment due to ineffective behavioral strategies and the possibility that the medication protocol is not being followed consistently.

27. Between January and June 2009, Student's home environment was unstable. Student's father was incarcerated. Student's mother explained during the hearing that she was forced to leave her rental home as of January 31, 2009, and was in the process of moving even before that. She testified that she lived with her brother between January and May. On May 11, 2009, Student reported to Tiana Thorpe, a District school psychologist, that his family was living with a friend and looking for a permanent place to live. At times, Student lived with his grandmother. Student's mother was inconsistent in her participation in Student's educational life during that time. She did not fill out the BASC in January 2009, but attended the manifestation determination

hearing held on February 6, 2009. She signed a proposed assessment plan on April 1, 2009, but wrote a false address on the document, making it difficult for the District to contact her. When asked at hearing about the address, she explained it was an old address that her brother used in order to enable his daughter to attend a particular school. Neither Student's mother nor the brother lived at that address at the time. During and before the IEP team meeting in June 2009, the District was unable to contact Student's mother. Student's grandmother attended the IEP meeting in June 2009 (at which the team discussed Student's eligibility for special education) and the grandmother signed the IEP, indicating that she understood Student was not eligible for special education. Student's grandmother told District personnel that she was unable to contact Student's mother.

28. Student's disruptive and defiant behavior continued during the months between November 2008 and June 2009. On January 22, 2009, Student and another child disrupted the science class by pushing each other while class was in session. Holz prepared the Section 504 manifestation determination report on behalf of the District and determined that Student's conduct was not a manifestation of his ADHD. The manifestation team agreed and suggested, among other things, that Student "[c]ontinue individual counseling to help with behaviors related to ADHD and environmental factors." Holz's report also noted that Student was supposed to be following a medication protocol to address his ADHD but that the protocol "may or may not have been followed through on a daily basis, as [Student] appears to not be medicated a lot of the time when acting out."

29. On February 6, 2009, Student's behavior support plan was reviewed. For the most part, the behavior support plan followed the previous behavior support plans, but it added Student's failure to follow his medication protocol as one of the reasons for his behavior.

30. On March 5, 2009, Holz prepared a pre-expulsion manifestation determination report regarding an incident in which Student shouted a racial slur in response to a question asked by the teacher. The report noted that since Student's last manifestation determination, Student had been suspended for two more days for disrupting class, throwing a paper airplane, taking another student's backpack, talking and disrupting others during a test, and not bringing his clothes to dress out in PE class. Holz's pre-expulsion manifestation determination report concluded that Student's conduct in shouting out the racial slur in answer to the question was a manifestation of socially maladaptive behavior, caused by environmental issues and was not a manifestation of his ADHD.

31. On March 5, 2009, the team issued its manifestation determination regarding the racial slur incident. The team agreed with Holz and determined that the conduct was not a manifestation of Student's disability. The team determined that Student was not able to function in a comprehensive middle school due to socially maladjusted behavior. Student was expelled and transferred from Chavez Middle School, his current middle school placement, to Jefferson Middle School.

32. On April 1, 2009, Student's mother signed a proposed assessment plan to allow the District to assess Student for special education eligibility. The reason for the evaluation was listed as "Parent Request." As stated above in Factual Finding 27, Student's mother listed a false address on this document.

33. On April 28, 2009, a revised 504 plan was drafted. The plan noted Student's ongoing problems with distraction and organizational skills. It also noted the concerns by Student's mother that Student had a gradual increase in lack of concern for school and was challenging rules and consequences more and more. It stated that "Inconsistency in education significantly impacts him. In addition environmental factors appear to be significantly impacting his academic progress."

34. In May 2009, the District conducted a psycho-educational evaluation of Student. Student was at Jefferson Middle School at this point, and District school psychologist Tiana Thorpe conducted the assessment. The purpose of the assessment was to determine if Student qualified for special education services. As part of the assessment, Thorpe reviewed Student's records, conducted classroom observations, interviewed Student's teachers, and conducted testing. The tests she administered included the Test of Visual Perceptual Skills, Test of Auditory Processing Skills, and the Test of Visual Motor Integration. Student scored in the average range on all of these tests. The Woodcock Johnson Tests of Achievement -- Third Edition (WJ-III) was also administered to Student. His standard scores ranged from 83 (low average) in reading fluency to 111 (high average) in math fluency.

35. In her assessment, Thorpe noted that there were significant environmental factors affecting Student. Student's father had been incarcerated for three years. As of May 11, 2009, Student's family was staying with a friend and looking for a permanent place to live. On June 1, 2009, Student was living with his grandmother. On the morning of the testing, Student was tired and reported to Thorpe that he had been out late the night before, driving around and visiting friends with his older brother. Student's teachers reported to Thorpe that they had noticed an increase in Student's problem behaviors during the time that he was living with his grandmother.

36. Thorpe also noted factors indicating that Student's ADHD was affecting his learning. For example, Student's pre-algebra and math teachers reported that Student tended to become frustrated and "shut down" when presented with a new topic or something he did not understand. Student had been prescribed medication to address his ADHD, but his compliance in taking the medication was very inconsistent.

37. Page eight of the assessment report contained the following sentence: "[b]ased upon the information obtained during the course of this evaluation, no

educational, environmental, economic disadvantage or cultural, ethnic difference is considered to be the primary factor influencing [Student's] educational difficulties." During the hearing, Thorpe testified that this sentence was left in the assessment report by mistake. She said that was standard language used when a child was found eligible for special education under the category of specific learning disability. It should have been deleted, because her assessment found that Student did not qualify for special education under that category.

38. Thorpe's report concluded, among other things, that Student did not qualify for special education under the eligibility category of OHI. She observed that Student had a medical diagnosis of ADHD but that current testing indicated he was within an average range in achievement. The report went on to note:

He is an academically capable student. The impact (at least in part) of current environmental factors for [Student] cannot be ruled out as affecting his grades and academic progress. Lack of effort and interest in school are described by teachers as being present to a significant degree at this time for [Student]. Accommodations to address behaviors associated with [Student's] ADHD in the classroom are outlined in his current 504 Plan as well as a Behavior Support Plan.

Thorpe recommended that Student's 504 Plan be continued and that the District continue to implement Student's BSP. During the hearing, Thorpe admitted that Student's ADHD affected his education, but stated that she believed his social maladjustment was the primary factor causing his academic and behavioral problems.

39. On June 4, 2009, an individualized education program (IEP) team meeting was held. Student's grandmother attended the meeting. The team determined that Student did not qualify for special education under either the eligibility categories of specific learning disability or OHI. With respect to the category of OHI, the team noted the following:

[Student] does not meet the eligibility criteria for Other Health Impairment at this time due to his ADHD diagnosis. Environmental factors cannot be ruled out as impacting school performance to a significant degree at this time.

40. The IEP also stated that Student "demonstrates strong academic ability" and "does not demonstrate a learning disability." With respect to behavior, the team noted that Student:

has had discipline file extending from 2nd grade, primarily for defiance. Lifeline was working with family till recently. Has a 504 for attentional issues that are exacerbated when he doesn't take meds or changes to his environment. BSP in place.

41. The IEP team also noted that the school had not been able to contact Student's mother for several months "and must consider [Student's] present placement as his residence." The notes also indicated that the team "is concerned regarding environmental factors that may be impacting [Student's] behavior." The team recommended that the 504 plan and the BSP continue.

42. The team elaborated on the environmental factors affecting Student as follows:

[Student] has several environmental factors impacting school performance at this time. School attendance has been inconsistent. [Student's] mother is currently finding permanent housing and [Student] has recently moved in with his grandparents.

43. Student's grades for the second semester of the 2008-2009 school year were three D's in art, life sciences and PE and the rest F's.

THE 2009-2010 SCHOOL YEAR (STUDENT'S EIGHTH GRADE YEAR)

44. By the start of the 2009-2010 school year, Student's mother had moved into her new home, and she maintained a stable home address during that school year.

45. On October 13, 2009, Student's Section 504 team met for a reevaluation. The concerns noted in the plan mirrored those of the previous plans. The accommodations to be provided included, but were not limited to, daily updates by email. The behavioral accommodations included verbal cues and warnings, followed by detentions and Saturday School. With respect to attendance, the plan called for Student to be on time to every class every day. Any tardy or truancy would result in Saturday School or a referral to the School Attendance Review Board. Student's mother signed her agreement to the plan on October 14, 2009. Student's first semester grades for the 2009-2010 school year included a C in algebra, a D in US history and the rest F's.

46. On April 20, 2010, Student's mother sent a letter to the principal of Student's school discussing her request for a special education assessment the year before. She complained that she had never been given any writing indicating the decision of the IEP team in June of 2009, and requested prior written notice regarding

the assessments that were administered, the scheduling of the meeting, and a written explanation of the District's denial of services.⁴

47. On April 21, 22 and 27, 2010, Student engaged in conduct that led to another manifestation determination on April 28, 2010. The conduct described in the manifestation determination was as follows:

In PE, [Student] was defiant to the teacher by refusing to run. He claimed his leg was hurt, but then wanted to play basketball. When directed to walk around the courts as an alternative, [Student] was disrespectful to the teacher. Instead of walking as directed, [Student] tried to hang out in the basketball courts where his friends were playing. He then asked the teacher for a referral so he could go be in the office.

[Student] was given his interactive reader to follow a lesson regarding the civil war. [Student] was in class with no supplies as he has been frequently in the past. The teacher gave him supplies and explained the lesson to him. [Student] still did not initiate the lesson. Instead, he disrupted the class by saying out loud that he wanted to go to the bathroom, even though it was only a few moments from lunch.

⁴ The parties provided very little evidence of Student's conduct between October 2009 and April 2010, but it appears that his defiant and disruptive behavior continued during that time.

[Student] talks out loud and is disrespectful to the teacher daily in social studies.

[Student] was throwing crayons at students in science class, and hitting other students during the lesson.

48. The Section 504 team determined that Student's disability substantially impaired his ability to control the behavior subject to disciplinary action. The team noted that Student: "is able to ascertain right from wrong and has admitted that he chooses actions that will result in office referrals and suspensions because he prefers to not be in class. However, [Student] does have a diagnosis of Attention Deficit Hyperactivity Disorder, and his difficulty controlling his impulses is a manifestation of his ADHD. [Student's] lack of impulse control cannot be ruled out as at least partially impacting his ability to make positive choices in school."

49. During the hearing Thorpe testified that the team was trying to err on the side of safety because some of the behaviors could be related to his ADHD, so they decided not to discipline him. During the meeting held to discuss the manifestation determination there was a discussion about why Student did not qualify for special education in light of the team's findings. Thorpe told the team that under federal law there were "exclusionary factors" for special education eligibility. She said that even though Student had the ADHD diagnosis, "there can't be factors that also may be impacting his school progress." She went on to say that "conduct disorder...is another exclusionary factor." When questioned about these statements during the hearing, Thorpe affirmed making the statements and stated that she should have added during the meeting that Student needed to demonstrate an educational need to be eligible for special education.

50. On May 4, 2010, Student possessed a bag of marijuana at school. Student was suspended from school and ultimately expelled. His Section 504 team determined that his conduct was not a manifestation of his disability. At one point the manifestation determination decision noted that:

[Student] has been consistently observed to come to school unprepared to learn. He lacks materials, and disrupts the learning environment by talking out and refusing to follow staff directions. These behaviors are consistent with his diagnosis of ADHD.

51. On May 6, 2010, a review of Student's 504 plan was held. In describing the nature of the concern, the plan stated:

[Student] exhibits a variety of very significant behaviors associated with ADHD which include lack of organizational skills, difficulty focusing and failure to bring materials on a daily basis. In addition, this school year [Student] has experienced a variety of behavior difficulties including defiance to adults, failure to follow staff directives, use of profanity, taking items that do not belong to him, sexual harassment, truancy, classroom disruptions and chronic tardies. [Student] takes no responsibility for his behavior and academics.

52. The 504 plan included a behavior support plan. The behavior support plan described the behavior that impedes learning as "[Student] forgets materials, does not initiate tasks in the classroom, is defiant to teachers and ignores teacher directives. This

school year, he has also taken property that does not belong to him (wallet and a cell phone), been in the girl's bathroom, and used profanity toward girls as documented in school records." The predictors for the behavior were listed as when Student "is uninterested in a task or not engaged. When [Student] is asked to initiate a non-preferred activity or assignment." The plan noted that the behavior was designed for task avoidance, attention from peers, and the desire for adult attention.

53. The accommodations in the 504 plan, among other things, called for Student to be seated near the teacher and away from peers who distract him, for teachers to gain his attention before delivering instructions and have him repeat back instructions, individual or small group testing, reduced number of questions or ability to give oral answers, to have him utilize a planner and keep extra supplies in the counselor's office, and to have email communications between home and school. The plan also called for a reward system to be developed between Student and his counselor if he consistently demonstrated appropriate behaviors for one week. The plan concluded with the comment: "[Student] is able to understand school however disability impact is ability to follow school rules."

54. On July 29, 2010, after this due process case had been filed, the District sent Student's mother an assessment plan to determine whether Student was eligible for special education. The plan called for Student to be assessed in the areas of academic/pre-academic achievement, intellectual development, social/emotional/behavioral status, and health development. Student's mother had not agreed to that assessment as of the dates of the hearing in October 2010.

WAS STUDENT'S ADHD OR SOCIAL MALADJUSTMENT THE CAUSE OF HIS ACADEMIC AND BEHAVIORAL DIFFICULTIES IN SCHOOL?

55. The experts who testified in the case described the difference between ADHD and social maladjustment. Social maladjustment is purposeful behavior with little

concern for the consequences to others. It can be characterized by defiance, lack of following social norms, and lack of effort or interest in school. It is volitional in nature and can involve things such as theft or making poor choices. Socially maladjusted behaviors are generally intended for the self gain of the individual engaging in them.

56. ADHD is an organic disorder that makes it difficult for individuals to maintain focus or control their impulses. ADHD can involve difficulty with organizational skills, maintaining focus across settings, and difficulty controlling impulses across settings. It can manifest in behavior problems, including disruption in class and aggression.

57. The parties dispute the reasons that Student is failing his classes. Student relies upon the opinion of his expert witness Robert Kelin, Psy. D. Kelin received his bachelor's degree in psychology from Rutgers University in 1975, his master's degree from Montclair State College in educational psychology in 1977, and his doctorate from Rutgers University in professional psychology in 1979. He has worked as a psychologist for over 25 years and has assisted the juvenile courts by providing juvenile forensic services starting in 1984. For approximately the last 10 years, he has been a school psychologist with Sweetwater Union High School District. As a school psychologist, he has participated in IEP meetings, conducted assessments, and is familiar with ADHD.

58. In Kelin's opinion, 30 to 50 percent of all children with ADHD also have a conduct disorder or oppositional defiant disorder. Many of his forensic investigations found that children had comorbid ADHD and conduct problems, in which both are present and it is difficult to separate the two. Children who have a hyperactive type of ADHD are more likely to show aggressive behavior, and it is possible that aggressive behavior by such a child is related to ADHD.

59. Kelin believes that the most effective way to treat ADHD is through medication. If the medication is effective in controlling the ADHD symptoms, then that is

usually an indication that the child's problems are due to ADHD. If the child does not have ADHD, the child's problems are not usually improved through medication. For example, a child with oppositional defiant disorder who does not also have ADHD might be slowed down by the medication, but the misconduct would not go away.

60. Kelin met with Student and Student's mother in his office in San Diego about a month before the hearing. He interviewed Student for approximately 45 minutes and Student's mother for another 15 minutes. He had not met them prior to that date. Kelin has never seen Student at school or met with any of his teachers. Kelin based his opinion on his meeting with Student and his review of the educational records for Student.

61. In Kelin's opinion, Student's school records showed that Student's ADHD is affecting his education. Even though Student scored in the average range of achievement during the District's assessment, Kelin believes that Student is not learning up to his potential, as shown by his behavioral problems and failing grades in school.

62. He believes that Student's behavioral problems are due to his ADHD. When he interviewed Student in his office he found Student to be cooperative. He explained that it was easy to get Student's attention in a one-to-one setting. He would not expect to see that cooperation with an oppositional pupil, even in a one-to-one testing situation. Kelin relied upon the records for Student over the years, which showed lack of organizational skills, distraction, and poor impulse control. He said that it is not uncommon for ADHD children to develop behavior problems over the years. They typically do not like school because it is difficult for them, and their behaviors can escalate over the years into conduct problems. He also found it significant that the district employees on multiple occasions had noted that Student's medication regimen was inconsistent and that Student's conduct was worse when he was off his medication.

In Kelin's opinion those statements confirmed that the medication provided benefit to Student, which confirmed the diagnosis of ADHD.⁵

63. Kelin believes that Student should have been found eligible for special education because of his ADHD. He opined that Student's ADHD caused him to be inattentive and disruptive in class which resulted in a loss of education. Numerous efforts with other interventions had been tried and were not working, so the District should have found him eligible. Kelin would have found Student eligible for special education in the third or fourth grade. Based on his review of the records and his interview of Student, he believed that Student would benefit from individual tutoring and a smaller class size.

64. He agreed that Student could have social maladjustment as well as ADHD. He also admitted that other factors besides ADHD, such as the unstable family environment, could contribute to Student's problems. However, in his opinion, he would still find Student eligible for special education based on the consistency of the ADHD factors over the years.

⁵ The evidence for whether Student's medication helped his behavior is inconclusive. Neither side produced evidence of a long period of time in which Student regularly took his medicine, so it is not possible from the evidence to determine what the result of a regular medication regimen might have been. It is also not possible to determine if one medication would have been more effective than any others. Student apparently did not like to take any of the ADHD medications prescribed for him over the years. The District's attempts to encourage a regular medication regimen are not sufficient to show that the medication would have helped him over the long term. The inconsistency in his medication regimen undoubtedly affected his behavior, but it is not sufficient to show his misbehavior was due to ADHD.

65. Student's mother also believes that Student's behaviors are related to his disability. She described the attention problems he has exhibited over the years. She sees a connection between his impulsivity and his other behaviors -- he exhibits the same behaviors both at home and in school. She believes that his medication has helped his behavior but he does not like to take it because of the side effects. She believes that Student's problems in school result from the fact that he does not know what is going on in the classroom and has no support there.

66. The District relied on the opinions of two school psychologists and a school counselor to support its position that Student's failure in school was due to social maladjustment and not ADHD.

67. Tiana Thorpe was the District school psychologist who conducted the assessment of Student in May 2009. She holds master's degrees and credentials in school psychology and school counseling and has worked as a school psychologist for 13 years. She has conducted hundreds of assessments, including assessments of children with ADHD. She testified that, in her opinion, the primary factor influencing Student's educational difficulties was social maladjustment, not his ADHD. She thinks the environmental factors at the time of her assessment played a large part in leading to his social maladjustment. He had a history of tardiness and missing school. At the time of her assessment, his home life was unstable, his father was incarcerated, he was living with his grandmother, and the District was unable to contact his mother. Thorpe tried to contact Student's mother during the assessment, but was unable to reach her. Student's achievement test scores and other test scores during the assessment were mostly average, and Thorpe did not believe that Student needed special education to address his ADHD.

68. Michael Holz also testified in support of the District's position. Holz has had experience in both clinical therapy and educational psychology. He has a pupil

personnel services credential in school psychology and a marriage family therapist license. He received his bachelor's degree in social ecology in 1975 from the University of California at Irvine, his masters in counseling psychology in 1983 from San Diego State University, and his licensure as a marriage and family therapist in 1990. He has served as a school psychologist since the 1990's. He has assessed hundreds of pupils in his career, including pupils with ADHD.

69. Holz worked with Student during most of the 2008-2009 school year while Student was in seventh grade at Chavez Middle School. He was familiar with Student because Student would come into his office to talk. Holz also wrote reports for the Section 504 team when Student's behavior led to disciplinary action and manifestation review. He conducted the BASC in January 2009.

70. In Holz' opinion, Student's ADHD caused a lack of focus, difficulty completing assignments, and trouble with organizational skills, but those deficits were not the reason that Student was failing in school. Instead, Student's absences, tardies and socially maladjusted behavior were the cause of his difficulties. Student did not have the proper constructs in place at home to get to school on time and have the materials he needed. Even if Student had taken his medication consistently, it would not have changed his socially maladjusted behaviors. While some children with ADHD may become frustrated with school work and shut down, Holz opined that such behavior is very different from the defiance and manipulating conduct that Student exhibited. Some of Student's behavior involved task avoidance related to ADHD, but Student also engaged in attention seeking behavior designed to impress his peers. Holz described Student as needing to be "top dog" and in charge of a classroom. Those attention seeking behaviors were not related to or caused by his ADHD. Holz explained that was why Student did well when working as a teacher's aide with the severely handicapped children. There was no "pay off" for him to misbehave in front of these children, because

they were not the peers from whom he sought attention. In his opinion, Student could choose or choose not to engage in negative behaviors.

71. Holz believed that the reason the behavioral interventions attempted between Student's fifth through seventh grade were not effective, was because of lack of follow-through by Student's family. The family either failed to participate or stopped whatever intervention was attempted. Because there were no behavioral consequences in the home environment, Student's socially maladjusted behavior was never extinguished.

72. Holz did not believe that Student required special education to address his behavioral issues in January 2009. In his opinion, the socially maladjusted behavior was the primary reason that Student got into trouble; the ADHD was a secondary cause.

73. Blakeley Johnson-Taylor, Student's school counselor during the end of Student's seventh grade year and most of his eighth grade school year, also testified that Student's conduct was intentional. She explained that Student would come into her office to talk when he was awaiting discipline. He told her that he would purposefully come late to school, sneak out of class, and hide in the bathroom. He did not care about getting good grades and did whatever he could so that he did not have to be in the classroom. He said that he wanted to get expelled and go to the Summit Court School, because the school day there was shorter, the work was not as difficult, and he had friends who attended that school. He told her that his mother and people in his home used marijuana. She did not believe that his defiant and disrespectful behavior was a manifestation of his disability.

74. Student's teachers who testified at the hearing also believed that Student's behaviors were volitional, not the result of his ADHD. Lea Van Diepen, Student's sixth grade language arts and social studies teacher, described his conduct as attention-seeking and manipulative. She recognized that he had organizational problems and

other problems related to his ADHD but explained that he would change his behavior to get what he wanted; the misbehavior was not involuntary. For example, she would have to change the consequences for his misbehavior at various times, because he would learn to deal with them. If she sent him out of the classroom as a consequence for bad behavior, eventually he would seek to be sent out of the classroom, so she would have to change to a different consequence.

75. Student was taking medication for ADHD while he was in Van Diepen's class. She saw a decrease in disruptive behaviors when he was on his medication, but he was still disruptive.

76. Susan Mitchell, Student's history teacher in the eighth grade, described Student's behavior as defiant and disruptive. He would throw papers to get the attention of his friends, walk around the room at inappropriate times to give "high fives" to his friends, and come back from lunch tardy. His conduct appeared to be deliberate, and he did not seem upset by the consequences of his actions. Upon occasion, he would refuse to do work and tell the teacher to write a referral to the disciplinary office. She believed he liked to be referred to the office. At times she noticed he was distracted or disorganized, but she would provide accommodations in those situations. In general, he did not recognize her authority and was defiant to her, although he was never defiant to her in a one-to-one situation.

77. Daniel Kelley, a special education teacher working with severely handicapped students, described Student's work as an aide in his class. He said that Student was able to work one-to-one with the children in his class and sustained attention on the activities, despite distractions from the severely handicapped children in the room. Student was compliant and very helpful in his class. He did not argue or question the teacher's directions and seemed to care about the children in the class. At times, Student's history teacher in the next-door classroom would send Student into

Kelley's class to complete history class work. On those occasions, Student did not want to work and did little or no work on the history assignment.

78. The evidence supports a finding that Student's academic and behavioral problems resulted from a combination of ADHD and social maladjustment. The legal ramifications of that finding will be discussed in the Legal Conclusions below.

LEGAL CONCLUSIONS

1. The Student, as the party filing this due process case, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. A school district is required to "actively and systematically" seek out all children with exceptional needs who reside within the district. (Ed. Code, § 56300.) All children with disabilities who are in need of special education and related services shall be "identified, located, and assessed...." (Ed. Code, § 56301, subd. (a).) A district is also responsible for "the planning of an instructional program to meet the assessed needs." (Ed. Code, § 56302.) These duties are often described as a district's "child find" obligations.

3. A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not "be determined to be an individual with exceptional needs" if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2)(D).)

4. California Education Code section 56026 defines an individual with exceptional needs as a person who, among other things, has an impairment requiring instruction and services which cannot be provided with modification of the regular school program, and who comes within the eligibility criteria set forth in regulation. Subdivision (e) of the section goes on to state:

Unless disabled within the meaning of subdivisions (a) to (d), inclusive, pupils whose educational needs are due primarily to... social maladjustment; or environmental, cultural, or economic factors are not individuals with exceptional needs.

5. A district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district is not held to a standard based on "hindsight." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).)

SHOULD THE DISTRICT HAVE FOUND STUDENT ELIGIBLE FOR SPECIAL EDUCATION UNDER THE CATEGORY OF OHI?

6. The dispute in this case centers around whether the District should have found Student eligible for special education under the eligibility category of OHI based on his ADHD.

7. The OHI category of eligibility is described in California Code of Regulations, title five, section 3030, subdivision (f) (Section 3030). That subdivision provides, in part, that a pupil may qualify for special education if the pupil has "limited strength, vitality or alertness, due to chronic or acute health problems...which adversely affects a pupil's educational performance." Like Education Code section 56026, Section 3030 also provides that simply having a disability alone does not automatically qualify a child for special education. Instead, a pupil shall qualify as an individual with exceptional needs if the results of an assessment demonstrate that "the degree of the pupil's impairment as described in Section 3030 (a through j) requires special education...."

8. The District does not dispute that Student has ADHD which causes him limited strength, vitality or alertness. Likewise, as discussed in Factual Findings 55 – 78 above, the evidence shows that Student's ADHD affects his educational performance, at

least to some degree. The District has provided Student with 504 plans to address his ADHD since he was in fifth grade. Each of those 504 plans recognized that the ADHD detrimentally affected Student's learning. Student has consistently exhibited a lack of organizational skills, inattention, and impulsive behavior throughout his school years as a result of his ADHD.

9. The real dispute in this case revolves around the question of whether Student's impairment due to his ADHD requires instruction and services which cannot be provided with modification to the regular school program. In other words, does his ADHD require *special* education, or can it be addressed through accommodations in the general education setting through his 504 plan? Is Student capable of progressing in the general curriculum without the need for special education?

10. As discussed in Factual Findings 1 – 16, 34 and 43 – 44 above, Student has a long history of failing his school classes. Although Student has occasionally received C's in individual classes at various times, and one A in the class in which he served as assistant to the teacher helping severely disabled students, the large majority of Student's grades have been D's and F's. Student has had 504 plans since fifth grade and behavior support plans for much of that time. Despite the 504 plans and the behavior support plans, Student has continued to fail his classes. However, at the same time, Student does seem to be learning, based on his achievement scores during the District's 2009 assessment.

11. Student contends that his failing grades demonstrate that his 504 plan is not sufficient to meet his educational needs and that he requires special education to address his ADHD.

12. The District contends that other factors affected Student's grades besides his ADHD. The District believes Student's 504 plan was sufficient to address any educational difficulties which Student suffered due to his ADHD, and that his failure in

school was due to social maladjustment and environmental factors. The District contends that Student's defiance, refusal to do work, and maladaptive behaviors resulting in tardiness, absences, and suspensions have caused Student to fail his classes and that he does not require special education to succeed in school.

13. Student contends that his misbehavior stems from his ADHD and that he should be found eligible on that basis. Student further contends that, even if some of Student's educational problems are due to social maladjustment and environmental factors, those factors should not exclude him from eligibility.

14. Because the District cannot be held to a standard based on hindsight, it is necessary to analyze this case in light of the information possessed by the District at the times at issue in this proceeding to see if the District was correct in its determination that Student was not eligible for special education. This case covers a two-year period, from July 21, 2008, to the date of filing the due process complaint on July 21, 2010. As discussed in Factual Finding 19 above, Student's mother first requested an assessment for special education in November 2008. The District ultimately assessed Student in May 2009 and found Student ineligible for special education at an IEP team meeting held in June 2009. Therefore, it makes sense to divide this case into two time periods for purposes of analysis: 1) the period leading up to and including the IEP team meeting in June 2009; and 2) the time between June 2009 and July 2010 when the case was filed.

SHOULD THE DISTRICT HAVE FOUND STUDENT ELIGIBLE FOR SPECIAL EDUCATION BASED ON HIS ADHD IN OR BEFORE JUNE 2009?

15. As discussed above in Factual Findings 1 – 43, the 2008-2009 school year was Student's seventh grade year. Prior to the time Student entered seventh grade, he had a long history of failing school classes stretching back to elementary school. In fourth grade, he received D's in many of his classes. In fifth grade, after the 504 plan was put into effect, he had two C's, two F's and a D in his third trimester report card. In sixth

grade, his final grades were D's and F's, except for a C in math and a C in the class in which he served as an aide to the teacher.

16. At the start of the 2008-2009 school year, the District knew about Student's history of school difficulties. The District knew that Student had ADHD and that his ADHD affected his learning. The District had given Student a 504 plan in recognition that his ADHD affected his learning.

17. The District also knew that Student had significant behavioral problems going back to elementary school. While the District possessed some evidence that the problem behaviors were caused by his ADHD – including Pourtash's manifestation determination and the 504 plans which included accommodations designed to address his behavior – the stronger evidence possessed by the District during the 2008 – 2009 school year indicated that other factors besides his ADHD caused his problem behaviors.

18. The District possessed information that factors in Student's environment, including his constant tardies and absences, his inconsistent medication regimen, and the unstable nature of his home life were causing him to exhibit socially maladjusted behaviors. As discussed in Factual Finding 27 above, Student's home life became very unstable during the winter and spring of 2009. The District was unable to contact Student's mother for much of that time, and she provided very little input to assist the District in determining whether or not Student was eligible for special education. She did not complete the BASC, did not provide information to the school psychologist conducting the special education assessment, and did not attend the June 4, 2009 IEP team meeting. She provided an incorrect address to the District, making it very difficult for the District to contact her. Even Student's grandmother told the District she was unable to contact Student's mother. Without the input of Student's mother in the assessment process and given what the District knew about the environmental situation affecting Student, it was objectively reasonable for the District to conclude that

Student's ongoing difficulties were due to social maladjustment caused, in part, by his unstable home situation, not ADHD.

19. As discussed above in Factual Finding 19, in November 2008, Student's mother requested a special education assessment.⁶ The District subsequently assessed Student in May 2009. As discussed in Factual Findings 34 – 43 above, the assessment confirmed that Student was operating in the average range in most of the areas tested, including academic achievement, supporting the District's conclusion that he did not need special education at that time. The assessment also supported the District's belief that the unstable home environment was affecting Student's behavior – during the time of the assessment when Student was living with his grandmother his problem behaviors escalated.

⁶ Student did not allege a procedural violation due to the District's failure to assess in November 2008. (See Cal. Code Regs., tit. 5, § 3021, subd. (a).) However, even if Student had done so, the failure to assess would not have caused a substantive denial of FAPE. (See *W.G. v. Board of Trustees of Target Range School District* (9th Cir.1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it: (A) Impeded the child's right to a free appropriate public education; (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (C) Caused a deprivation of educational benefits. As discussed in Factual Findings 27 – 43 above, because the District subsequently assessed and properly found Student ineligible, any procedural violation would not have caused a deprivation of educational benefits or impeded Student's right to a FAPE. Likewise, the evidence indicated that Student's mother was unavailable for much of that time, so she could not have been denied an opportunity to participate in the process.

20. As discussed in Factual Findings 17 – 43 above, the evidence demonstrates that the District correctly found Student was not eligible at the June 4, 2009 IEP meeting. The District had some evidence that Student required special education, including Student's ongoing failure in class. However, given the assessment results that he was in the average range academically and Student's unstable home situation, it was objectively reasonable for the District to conclude that Student's problem behaviors and his failing grades were due to other factors besides his ADHD.

21. Student relies primarily on two things to argue that the District should have found him eligible in or before June 2009 – the expert opinion of Dr. Kelin and the federal case law dealing with eligibility when a child's education is affected by both a conduct disorder and ADHD.

22. As discussed in Factual Findings 55 – 64, Dr. Kelin, looking at Student's educational records, would have found Student eligible for special education long before the start of his seventh grade year. The District did not have the benefit of Kelin's opinion during the 2008-2009 school year, but it did have Pourtash's opinion from the prior spring that Student's ongoing disruptive and defiant behavior might have been the result of his ADHD.

23. However, there are factors that weaken the persuasive value of Kelin's opinion. Although Kelin was well-qualified and highly credible, he never observed Student in class or spoke with any of Student's teachers. He did not conduct a formal assessment or perform any standardized testing of Student. His information regarding Student was restricted to a review of the records and a meeting with Student and Student's mother.

24. Holz, who actually worked with Student during the time in question, and Thorpe who assessed Student prior to the June IEP meeting, were more persuasive in their opinions that, as of June 2009, Student's misbehavior and difficulties with school

were primarily due to social maladjustment, not ADHD. Student's assessment results showed him to be in the average range in almost every area tested.

25. Student next contends that the District used the wrong legal standard in determining Student's eligibility in June 2009. Student does not dispute that social maladjustment and environmental factors influenced his behavior and his academic difficulties during the 2008-2009 school year. However, Student contends that, as a matter of law, a combination of ADHD and social maladjustment which affected his learning should have caused the District to find him eligible for special education.

26. Student relies upon the Ninth Circuit decision in *Capistrano Unified School District v. Wartenberg* (9th Cir. 1995) 59 F.3d 884 (*Wartenberg*), for the proposition that in a case of mixed causation between ADHD and social maladjustment "[a]ll that is required is a showing the behaviors are substantially related to the qualifying disability." However, that is not what *Wartenberg* held.

27. In *Wartenberg*, the pupil had already been found eligible for special education with a specific learning disability. The dispute involved whether the school district's IEP for the pupil was appropriate and whether the district had to reimburse the pupil's parents for their placement of the pupil in a private school. In considering the factual dispute over the appropriate placement, the court examined whether the pupil's misbehavior was a result of his ADHD or the result of causes which were not covered by special education law, such as a conduct disorder. In discussing the hearing officer's decision, the court noted:

So if, as the hearing officer found, Jeremy's learning disability was primarily caused by a covered disorder, he would not lose coverage simply because there existed a secondary cause that was not covered. Nor would the hearing officer or court be obliged to sort out percentages. Only if Jeremy's

learning problems were “primarily” caused by non-covered causes would he lose coverage.

(*Wartenberg, supra*, 59 F.3d at p. 894.)

28. Based on the language quoted above, the *Wartenberg* case looked to the “primary cause” of the child’s misbehavior. In the instant case, the District witnesses were persuasive in their testimony that, as of June 2009, the District reasonably believed the primary cause of Student’s misbehavior was social maladjustment and that his ADHD was effectively addressed through his 504 plan. The District’s failure to find Student eligible was objectively reasonable given what the District knew at the time. (See *Adams, supra*, 195 F.3d at p. 1149.)

29. Student, however, argues that the “primary cause” holding of *Wartenberg* only applies to an eligibility determination based on specific learning disability, not OHI. If that is so, it is hard to understand why Student believes *Wartenberg* is applicable to the present dispute at all, because the case never addressed eligibility under OHI. Student cites no authority to support his claim that in determining eligibility for OHI “[a]ll that is required is a showing the behaviors are substantially related to the qualifying disability.” He also provides no authority to define this “substantial relationship” standard or to discuss how it is to be applied.

30. Student is correct in his argument that a child, otherwise eligible, does not lose eligibility because he exhibits behaviors resulting from non-covered causes. However, the argument presupposes that the child otherwise qualifies for special education. In this case, Student has not met his burden of showing that the District possessed sufficient information to conclude that Student required special education due to his ADHD on or before June 4, 2009. There was no denial of FAPE.

SHOULD THE DISTRICT HAVE FOUND STUDENT ELIGIBLE FOR SPECIAL EDUCATION BETWEEN JUNE 2009 AND JULY 2010?

31. As discussed in Factual Findings 44 – 49 above, during the 2009-2010 school year, Student's situation changed. Student's home life stabilized and his mother became an active participant in his education. However, his school performance did not improve. Beginning in April 2010, the District staff began recognizing that his ADHD might be responsible for his defiant and disruptive behavior in addition to his off-task and inattentive behavior.

32. As discussed in Factual Findings 47 – 49, in April 2010, approximately a year after the District's 2009 assessment, the Section 504 team found that Student's ADHD could not be ruled out as at least being partially responsible for his defiant, disrespectful, and disruptive behaviors. At that point, when the District's own staff recognized that Student's behavior could have resulted from his ADHD, the District should have reassessed Student and found him eligible for special education. It was no longer objectively reasonable for the District to maintain that the problem behaviors interfering with Student's education were primarily the result of social maladjustment and environmental factors. The District already knew that Student's inattentive behaviors which affected his education – his lack of attention, focus and organization – were caused by his ADHD. Now the District had reason to believe that the other behavioral factors – his defiance and disruption – were also caused, at least in part, by his ADHD.

33. The findings of the manifestation team were consistent with the other information the District knew at that time. The District knew that all the prior accommodations, 504 plans, and behavior support plans had not succeeded in assisting Student in the general education environment. Student continued to fail classes. The District also knew that Student's home life had stabilized, but his school problems had

not abated. Student's mother was back in his educational life and able to provide input to the District.

34. As discussed in Factual Findings 50 – 53 above, the subsequent manifestation determination regarding the marijuana also found that his classroom disruptions and refusal to follow staff directives were "consistent with this diagnosis of ADHD." Although possession of marijuana at school was not a manifestation of his ADHD, that was apparently an isolated event – there was no evidence that Student was a habitual drug user or that drug use contributed to his school failure. Instead, his disruptive and defiant behaviors contributed to his academic struggles – behaviors which the manifestation report found to be "consistent" with his ADHD.

35. The opinions of the District's experts do not change this. Holz was not the school psychologist involved with Student during the 2009-2010 school year, so his opinions cannot speak to what the District should have objectively known in April 2010.

36. Thorpe's opinion that the primary cause of Student's misbehavior was social maladjustment is weakened by her involvement in the manifestation team meeting in April 2010 that found his disruptive and defiant conduct to be a manifestation of his ADHD. Her statements about exclusionary factors made during the manifestation determination meeting (discussed in Factual Finding 49 above) indicate that she might not have been completely clear about the standards for eligibility at the time of that meeting. If Student's ADHD caused him to require special education, there would not be "exclusionary factors" simply because part of his behavior was due to social maladjustment. At hearing, Thorpe admitted that she should have added during the meeting that Student needed to demonstrate a need for special education to be eligible.

37. Student has met his burden of showing that, given everything the District knew as of April 2010, the District should have found Student eligible for special

education. It was inconsistent for the Section 504 team to find that Student's defiant and disruptive behavior (which caused, at least in part, his academic failure) was a manifestation of his ADHD, but not find him eligible for special education when his 504 plans proved ineffective. The District's failure to do so denied Student a FAPE.

THE APPROPRIATE REMEDY FOR THE DISTRICT'S DENIAL OF FAPE.

38. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide a day-for-day compensation for time missed. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].)

39. Student seeks one-to-one tutoring to make up for his lost educational opportunity. Based on the District's failure to find him eligible, that is a reasonable request. The evidence indicated that Student works well in a one-to-one environment. The only issue is how much would be appropriate. Student requests 150 – 200 hours based on Student's contention that the District should have found him eligible as of July 2008. However, Student failed to meet his burden to show that he should have been found eligible prior to April 2010. Assuming that 150 – 200 hours would have been necessary to make up for two years of lost instruction, then approximately 32 hours would be necessary to make up for four months of missed educational opportunity between April and July 2010. If it is assumed that there are 16 weeks in a four month period, 32 hours equals about two hours per week of one-to-one tutoring. In light of the evidence, the District should provide 32 hours of one-to-one tutoring for Student, over

and above any special education services called for in his IEP. The tutoring may be provided by a District employee or an employee of a nonpublic agency, at the District's discretion, as long as the individual providing the one-to-one tutoring is a credentialed special education teacher.

40. It is also appropriate to order the District to hold an IEP team meeting for Student within 30 days of the date of this order. The purpose of the meeting will be to discuss the appropriate placement and services for Student in light of his special education eligibility. Student has requested that this Decision determine the placement for Student. However, that would not be appropriate under the circumstances. Any placement decision should be based upon the knowledge and expertise of the educators and other individuals who make up the IEP team. It would also be appropriate for the IEP team to include Dr. Kelin, if he is available and willing to attend the meeting. Kelin will be able to provide independent information for the team regarding measures to address Student's ADHD.

41. Student also requests an order requiring the District to fund independent educational assessments in the areas of academics, neuropsychology and behavior. However, as discussed in Factual Finding 54 above, the District attempted to reassess Student after this due process case was filed, but Student's mother refused to consent to that assessment. In light of the inability of the District to assess at the present time, it would be premature to order independent evaluations. If Student is unhappy with the results of the District's assessment, Student can seek an independent educational evaluation at that time.

ORDER

1. Student is eligible for special education under the category of other health impairment due to his ADHD as of the date of this Decision.

2. The District shall convene an IEP team meeting within 30 days of the date of this Decision to determine the appropriate special education placement and services for Student in light of this Decision. The District shall invite Dr. Kelin to attend the meeting, if he is available and willing to attend. Any expert fees charged by Dr. Kelin for attending the meeting will be reimbursed by the District to Kelin within 30 days of the date of Kelin's attendance at the IEP team meeting.

3. In addition to any educational services called for in the IEP for Student, the District shall, as compensatory education, provide Student with 32 hours of one-to-one educational tutoring. The tutoring can be provided during or after school, but it shall be in addition to Student's educational program. The tutoring will be completed within the 2010-2011 school year, unless the parties agree otherwise. The tutoring may be provided by a District employee or a nonpublic agency, at the District's discretion, provided that the tutoring will be funded by the District and will be provided by a credentialed special education teacher. Student's mother and the District may, if they wish, alter the provisions of this compensatory education order, provided they both agree to the change in writing.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here Student prevailed on the sole issue heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

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

DATED: November 18, 2010



SUSAN RUFF

Administrative Law Judge
Office of Administrative Hearings