

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ANAHEIM UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2011061152

AMENDED DECISION¹

Commencing on September 19, 2011, Administrative Law Judge (ALJ) Judith Pasewark, Office of Administrative Hearings, Special Education Division, heard this matter in Anaheim, California.

Michelle Ortega, Esq., represented Parents on behalf of Student (Student). Hyeman Hakimi, Student's Advocate, and Student's parents, also attended each day of the hearing on behalf of Student.

Jeffrey Riel, Esq., represented Anaheim Union High School District (District). Barbara Moore-Brown, the District's Director of Special Youth Services, also attended each day on behalf of the District. Monica Mercado, Mr. Riel's legal assistant, attended the first day of the hearing.

Student filed this request for due process hearing on June 27, 2011. OAH granted a joint request for continuance on July 7, 2011. The due process hearing took place on

¹ The Amended Decision reflects changes to the numbering within the Legal Conclusions 27 through 64.

September 19 through 23, 29, 30, and October 4, 2011. The parties submitted written closing briefs on October 24, 2011, at which time the matter was submitted and the record closed. Based upon this timeline, this decision is due as of November 30, 2011.

A total of twenty-three witnesses testified during the hearing, namely, Mother, Dr. Cantril Nielson, Dr. Jodie Knott, Dr. Arsalan Darmal, Dr. Shiren Ansari, Jerry Thamert, Megan Pomeroy, Annie Wieppert, Kathleen Wohlgemuth, Michelle Almazan, Frances Correia, Kelly Kerr, Alexandra Dortch, Alan Freeman, Rebecca Bush, Rebecca Harmon, Triena Becker, Alyson Wittman, Garrett Sabol, Aeri Kwak, Dr. Frank Donovan, Dr. Debra Martinez, and Tan Vinh.

ISSUES

Student presented the following issues:

1. Did the District deny Student a free appropriate public education (FAPE) for the 2009-2010 school year by (a) failing to comply with Child Find laws; (b) failing to properly assess Student in all areas of suspected need; (c) failing to utilize information from parents and medical professionals; (d) failing to offer Student an appropriate placement, supports and services; (e) failing to offer Student appropriate behavior interventions; and (f) failing to provide Student with goals and objectives in all identified areas of need.

2. Did the District deny Student a FAPE for the 2010-2011 school year by: (a) failing to properly assess Student in all areas of suspected need; (b) failing to utilize information from parents and medical professionals; (c) failing to offer Student an appropriate placement, supports and services; (d) failing to offer Student appropriate behavior interventions; and (e) failing to provide Student with goals and objectives in all identified areas of need.

FACTUAL FINDINGS

BACKGROUND

1. Student is a 16 year old boy who is currently attending Eagle Ranch Academy (Eagle Ranch). Eagle Ranch is a “for profit” residential therapy facility located in St. George, Utah. Student’s parents (Parents, or individually Mother and Father) reside within the District. Student attended Walker Junior High School (Walker) commencing with the 2008-2009 school year, and he remained at Walker until his unilateral placement at Eagle Ranch on May 3, 2010.²

2. In January of 2006, Dr. Aungkhin diagnosed Student as having ADHD. Dr. Aungkhin prescribed several medications including Metadate, Strattera, and Clonidine over a period of approximately one year. For a year the dosages of these medications were modified and changed, but resulted in no overall improvement for Student. Student and his family also attended family therapy once every two weeks.

3. In 2007, Parents obtained a private assessment of Student conducted by Arsalan Darmal, M.D.³ Parents sought this assessment to obtain medical diagnoses,

² For purposes of clarity, the factual findings are presented in chronological order. Some facts may initially appear irrelevant based upon the two year statute of limitations; however, they relate back and become relevant as the decision progresses.

³ Dr. Darmal received his medical degree from Kabul University School of Medicine, Kabul, Afghanistan in 1981, followed by a residency in Pediatrics at New York Medical College, Metropolitan Hospital, New York, a residency in Psychiatry at Albert Einstein College of Medicine, New York, and Fellowship in Child Psychiatry, also from Albert Einstein College of Medicine. Dr. Darmal is certified by the American Board of Psychiatry and Neurology, and the American Board of Child and Adolescent Psychiatry. He is licensed to practice medicine in California, New York and Hawaii. Dr. Darmal is

medication, as well as an effective treatment plan, to help control Student's impulses and mood swings, and lack of concentration.

DISTRICT'S CHILD FIND OBLIGATION

4. Frank Donovan,⁴ the Executive Director of the Greater Anaheim SELPA,⁵ testified regarding the District's Child Find obligations. As the SELPA Director, Dr. Donovan is responsible for special education policies, procedures and regional services utilized by the District. Dr. Donovan acknowledged that the District has a duty to seek out children who are suspected of needing special education and related services, and explained that the SELPA has procedures and programs in place to get the word out to comply with Child Find. In identifying children, however, a school district is also obligated to exhaust other means of assisting a student before assessing for special education eligibility. This arises out of an equal duty to maintain a student in the least restrictive environment. In many cases, depending upon the needs of the child, the Child

employed as an attending physician at Amen Clinics in Newport Beach, California. He also maintains a private practice specializing in neuropsychiatric disorders and brain imaging (SPECT imaging).

⁴In addition to his Ed.D from USC, Dr. Donovan also has received a B.A. in History, an M.A. in Special Education, and an M.S. in Education Administration. Dr. Donovan holds a Clear Administrative Services Credential, an Education Specialist Instruction Credential (mild to moderate) and a Clear Cross-cultural, Language and Academic Development Certificate.

⁵ A SELPA is a Special Education Local Plan Area.

Find obligation can be met with a 504 Plan.⁶ Additionally, the SELPA often needs to educate parents and others on the difference between what is medically recommended for a child (medical model) and what is educationally necessary for a child (educational model).

5. Kathleen Wohlgemuth is a Program Specialist for the SELPA who is assigned to work with the District. Part of her job encompasses fulfilling Child Find duties, and she works with the staff at Walker as a member of their Student Intervention Team (similar to SST). The District's student intervention team looks at a student's areas of need to determine whether special education is needed. Special education is not the automatic answer under Child Find. Instead, the purpose of Child Find is to look for children suspected of needing specialized services, and then determining if those needs can be met while maintaining a child in the least restrictive environment (LRE). The goal is to maintain a student in general education if possible. Further, the District maintains a menu of supports and services available to students which do not require special education eligibility. These services, or pre-referral services, may include programs such as the District's "Ramp Up" program, the learning skills class, an after-school homework club, or a 504 Plan.

2008-2009 SCHOOL YEAR (SEVENTH GRADE)

6. In the fall of 2008, Student transitioned from elementary school to junior high school at Walker. Alexandra Dortch testified on behalf of the District. She has been

⁶ Section 504 of the Rehabilitation Act of 1973 is a civil rights law which is designed to eliminate discrimination on the basis of a disability in any program receiving federal funding. Section 504 of the Act requires that school districts provide appropriate educational services to meet the needs of students with disabilities to the same extent that the needs of students without disabilities are met.

a school counselor at Walker since 2006,⁷ and, as such, she schedules meetings with students and parents, makes classroom presentations, and handles school registration. Ms. Dortch is also the “go-to” person regarding student conflicts. Teachers can refer students to her if they notice something out of the ordinary is going on with a student or if something is wrong. She believes her teachers are pretty good at understanding their students, as they see these kids every day. The teachers will report social/emotional problems as well as academic issues. Ms. Dortch also consults with other staff regarding the students, such as the school psychologist, principal, and other administrators.

7. Ms. Dortch explained that Walker has approximately 1100 students. For counselor management, the students are alphabetically divided between two counselors, Ms. Dortch being responsible for last name, L-Z, which included Student. Ms. Dortch became very familiar with Student while she monitored students during their lunch period. Student frequently talked to her. Ms. Dortch recalls Student as a “happy go lucky” kid and “little squirrely” like most seventh grade boys. He appeared to have many friends.

8. Ms. Dortch praised her teachers as being pretty good at identifying problems for individual students early on in the school year. Further, the District has a progressive protocol to address student issues. Generally, if a student is struggling, the District will first hold a parent conference, second, hold a Student Study Team (SST) meeting and, third, hold a 504 meeting. A 504 Plan can contain interventions as well as accommodations. If a 504 Plan is unsuccessful, then the District will assess for special education eligibility, and if needed, create an Individualized Education Program (IEP).

⁷ Ms. Dortch has an M.A. in Counseling and also possesses a People Personnel Services (PPS) credential. She also has an emergency credential qualifying her as a substitute teacher.

9. The District monitors students throughout the year. Ms. Dortch receives a quarterly list of those students who are receiving D's and F's. She meets with those students who are at risk for falling below a 2.0 g.p.a.⁸ The District also maintains a Visit Log Report which notes student visits and interactions at school, such as counseling visits with the Interns or visits with Straight Talk counselors who are on campus one day a week.

10. In January 2009, Jodie Knott, Ph.D.,⁹ took over Student and his family's therapy. Dr. Knott treated Student from January 2009, until he was enrolled at Eagle Ranch on May 3, 2010.

11. On March 17, 2009, Parents wrote Ms. Dortch, and requested that Student be placed on a 504 Plan due to his ADHD. Parents noted that Student's condition was creating problems for him in concentrating and completing his work (class work, homework, and tests). Parents also requested that "after creating or concurrent with creating a 504 Plan, that he (Student) also be tested for any learning disability." Parents enclosed a copy of Dr. Darmal's 2007 Evaluation Report for the District's review.

⁸ The District no longer uses the g.p.a. standard, and now utilizes multiple measures, such as test scores, reading levels and teacher recommendations to determine if a student comprehends the curriculum.

⁹ Dr. Knott earned a B.A. in Psychology, an M.S. in Counseling Family Human Services and a Ph.D. in Counseling Psychology. She is a Licensed Clinical Psychologist with a private practice in Orange County, California, in which she provides assessments and therapy for children, adults, and families; facilitates a social skills group for children ages seven to 18; and provides assessments and therapy for adults with chronic mental illness. She is currently affiliated with La Palma Intercommunity Hospital, Department of Psychiatry.

12. Dr. Darmal's Evaluation Report,¹⁰ now two years old, reported that Student exhibited difficulties with anger management, violence, stealing, lying, and concentration. Student's anger had become so intense that he was suspended from school twice (2006-2007) for calling a teacher "stupid," making racial slurs, and choking another student because he lost a tetherball game. Student also threatened to bring a knife and a gun to school. Parents reported that, at home, Student would throw objects across the room, tear up his bedroom during temper tantrums, yell, and scream that he hated his parents.

13. Dr. Darmal's assessment consisted primarily of a review of medical records, observations, and parental questionnaires and checklists.¹¹ The information obtained noted that Student's fine and gross motor coordination was excellent. His language comprehension level was below average when compared with his peers. It took a considerable amount of time for Student to comprehend a written passage. Further, Student exhibited a limited vocabulary.

14. With regard to his social development, Student's interactional style was good until something did not go his way or if he became angry. Student's behavior was often non-compliant. It was reported that Student lies, steals and breaks rules. Oddly, Student's emotional development reflected a usually happy child, who conversely tended to cycle through moods of anger, crying, unhappiness and uncontrollable anger.

¹⁰ California uses the term "assessment" in lieu of "evaluation." The terms mean the same and are often interchanged within special education.

¹¹ It is noted that Dr. Darmal did not personally obtain this information, but reviewed the information obtained by his assistant. Dr. Darmal personally performed the SPECT study and made the diagnoses and recommendations contained in the Evaluation Report.

He did not demonstrate the ability to express his feelings. Dr. Darmal reported Student's homework problem included a lack of focus and attention, yet, "Student is very intelligent when he focuses, and he can be quite analytical." Teachers also found Student intelligent, as well as adorable.

15. Student's first 504 meeting took place on April 28, 2009. Parents and Student attended the meeting along with Dr. Knott. District staff included a school psychologist, Student's school counselor, the assistant principal, and each of Student's teachers. The team discussed Student's current progress in his classes. The recurring concerns revolved around Student's lack of attention, missing assignments, difficulty staying on task, and lack of organization. The team discussed participation in after school sports, seventh period P.E., and a study skills class for the eighth grade. Parents shared information regarding Student's ADHD and medications, and also told the team that Student participated in therapy once to twice a month. In response, District staff reported that they had not seen any angry or violent outbursts from Student as had been reported by Dr. Darmal, nor had any of Student's school discipline been related to his anger or mood disorder. Parents agreed that Student controlled himself better at school than at home.

16. Based upon the discussions at this meeting, the team determined that Student's organization skills qualified as a major life activity which was impaired. As a result, the team crafted a 504 Plan which provided Student six accommodations: (1) Student would be given extra time to turn-in homework; (2) Student would fill out a daily agenda for each class, which would be signed each day by each teacher and Parents; (3) Student and Parents would clean out and organize Student's notebooks and binders every night; (4) Student would be provided preferential seating in his classes, and P.E. locker near positive peers; (5) Student would receive extra time on tests; and (6) each teacher would maintain a folder in class for Student to place and keep his

completed work. Parents and Student agreed to this plan. Additionally, at the end of the meeting, the District provided Mother with a copy of Parental Rights, which she acknowledge receipt with her signature.

17. At hearing, Dr. Darmal explained that Student's behavior at school was typical of students with ADHD. Their social skills are usually immature; they exhibit mood instability and are often in trouble. In addition, in junior high school, their hormones are beginning to wreak havoc, causing additional problems and reducing self-esteem. While not a bona fide expert in educational law, Dr. Darmal possesses sufficient experience working with the educational models and criteria necessary for special education and related services¹² to render an opinion. Dr. Darmal reviewed Student's 2009 504 Plan, and opined that, although he would have included more accommodations than the 504 team did, Student's April 2009 504 Plan was adequate to meet Student's needs at that time.

18. While Dr. Knott agreed with Dr. Darmal, that Student exhibited classic symptoms of ADHD, she disagreed with his determination that the 504 Plan was adequate for Student. Dr. Knott felt that the 504 Plan was insufficient as Student had more problems than merely "organization." He needed more supports for concentration. Dr. Knott, however, did not propose any additional supports at the 504 meeting.

SUMMER 2009

19. To further support Student, the District offered Student its 5-week "Ramp Up" program during the 2009 summer break. The District developed this proficiency skills program to assist students who were struggling with the acquisition of the

¹² Dr. Darmal has been a consultant to the Hawaiian Department of Education and has prepared Child Psychiatric Evaluations, a position he describes as similar to that of the AB 3632 mental health assessments in California.

necessary academic skills needed to complete grade-level academic classes, successfully pass the CAHSEE in the tenth grade, and graduate from high school. The program was designed for incoming eighth graders who were in need of intensive skill development and instruction in reading, writing, and mathematics. The program included three major areas of support: mentoring, developing as an individual, and academic support. The District recommended Student to the "Ramp Up" program based upon examination of student data, including the 504 Plan, and teacher recommendations. Student attended the "Ramp Up" program.

20. Also during the summer, Dr. Knott privately assessed Student, and prepared a written Psychological Report dated October 2, 2009. Dr. Knott's report includes a history, input from parents, observations, and appropriate standardized testing.

21. Parents reported that Student struggled with controlling his emotions, being organized, paying attention, hyperactivity, and impulsivity. Student would often "wake up angry" and would antagonize his siblings at times. Student struggled with feelings of worthlessness, difficulty concentrating, mood swings, irritability, and decreased interest in activities. With regard to school, Parents reported that Student was earning C's, D's and F's. Student constantly had missing assignments and could be disruptive in class. Additionally, completing homework was a stressful time of day in the family's household. Dr. Knott did not contact the District for additional information regarding Student's behavior and academic progress. Instead, she relied on the information provided by Parents, Dr. Darmal's Evaluation Report, and school report cards and progress reports.

22. Dr. Knott administered to Student the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) which measures IQ. Student's overall performance placed him in the borderline range. Dr. Knott, however, believes that Student's scores in

the Verbal Comprehension (average) and Perceptual Recognition (low average) subtests were better indicators of his true level of ability. Student demonstrated a significant relative strength in Matrix reasoning, which measures nonverbal fluid reason and perceptual organization. On the opposite end, Student demonstrated a significant relative weakness in Coding, which measures visual-motor coordination, speed of mental operation, attentional skills, visual acuity, visual scanning and tracking, short-term memory, and cognitive flexibility.

23. Dr. Knott administered the Woodcock-Johnson Tests of Achievement (WJ-III), which measures Student's achievement when compared to others at his grade level. Student's performance on the WJ-III suggests that his Oral Language Skills are in the average range. His academic skills and his ability to apply academic skills are in the average range, while his fluency is in the low range. Student's performance is average in math calculation skills, low average in broad reading, and mathematics. He scored low average in written language and low in written expression. No discrepancies were found among Student's achievement areas.

24. Dr. Knott administered the Connors' Continuous Performance Test (CPT) and the IVA Continuance Performance Test, which are both computerized tests that measure attention and impulsivity. The tests were given while Student was on his medication, Lexapro and Respirdal. Student's performance on the CPT was significantly impaired in the moderate to severe range. His performance reflected inconsistent responding, and slower responses toward the end of the test, which indicates inattention and poor perceptual sensitivity. Student's performance on the IVA was not valid on a portion of the test; therefore, his results, which indicate significantly impaired auditory attention deficits, must be interpreted with caution.

25. Dr. Knott administered the Rey-Osterrieth Complex Figure Drawing Test which tests visual-motor ability. The results suggested that Student was mostly

successful at copying a complex figure and recreating the drawing from memory after a delay. Student, however, appeared to have trouble crossing midline.

26. Dr. Knott administered the Rey Auditory Verbal Learning Test to assess Student's auditory processing and verbal memory. Student's performance was almost all in the average range, except for the free recall trial, in which Student scored in the first percentile, which suggests that Student struggles with information retrieval when he has to engage in free call versus a recognized task.

27. In her written report, Dr. Knott determined that Student's level of learning and attention difficulties substantially limited his performance in several areas of major life activities including attention, concentration, and the processing of both auditory and visual information. Student's struggles with attention, concentration, and mood dysregulation affected him greatly in several areas including the speed at which he can gather, synthesize, and retain information that is presented either auditorally or visually, in addition to how quickly he can complete exams, especially in times of stress. Therefore, it was not uncommon for Student to struggle in these major life activities more than what is typical when compared to others in the general population. Dr. Knott further determined that Student was trying hard to be successful at school and at home, and was responding well to therapeutic interventions. She concluded by stating that Student would benefit from accommodations that help him to compensate for his attention difficulties and his anger and anxiety since these difficulties can negatively impact him in major life activities.

28. Dr. Knott recommended accommodations to assist Student in addressing his attention problems: (1) extending time on tests and flexibility in deadlines; (2) taking tests outside of the classroom to minimize distractions; (3) providing note taking support to assist in many classroom situations, such as lectures; (4) providing academic support services, such as tutoring across subjects; (5) presenting new information

through a variety of stimulating methods, such as auditory and interactive approaches; (6) sending weekly progress reports home; and (7) breaking tasks into small components, as Student tends to get overwhelmed at times.

29. Dr. Knott also indicated that Student might respond well to behavioral interventions such as self-monitoring, behavioral charts, self-reinforcement and school/home contracts. Student would also likely benefit from having a school counselor or psychologist to meet with when his emotions related to academic and social concerns negatively impacted him academically. Lastly, she indicated that Student would likely benefit from a school occupational therapy assessment to rule out any difficulties in that area. Parents reviewed Dr. Knott's written report, felt the information was accurate and agreed with the recommendations. They did not immediately provide a copy to the District.

2009-2010 SCHOOL YEAR (EIGHTH GRADE)

30. It is District policy to review 504 Plans early in each new school year to see if they need adjusting. Student's second 504 meeting was held on October 28, 2009. While Student's fourth quarter grades were not stellar, they had improved from the third quarter. Student attended the "Ramp Up" Program during the summer. His school attendance was good, and he was currently enrolled in the Learning Skills class. Student had a positive relationship with Mr. Freeman, who conducted the Learning Skills class. Other teacher comments were positive as well. Student's behavior at school was good. Based upon the totality of things happening at school, it appeared that Student was responding to the District's interventions and 504 Plan. As stated by Ms. Wohlgemuth, everyone at the 504 meeting felt good about Student's progress and felt that the 504 Plan was working at school. Parents requested that Student remain in the Study Skills class for another nine weeks, as it allowed Student to have free time at home because he had finished his work in class. The District explained that the Study Skills class was

specifically intended to last only one quarter, to give Student the opportunity to apply what he learned in other classes. The 504 team explained that Student could return to the class at a later date, should he need it. Additionally the District agreed to give Student a Teacher's Assistant position with Mr. Freeman as an elective class. Again, Parent's did not share information regarding Student's home behaviors, nor did they provide the District a copy of Dr. Knott's assessment report until after the completion of the 504 meeting.

31. Rebecca Bush,¹³ a School Psychologist for the District, reviewed Dr. Knott's report and discussed the recommendations with Ms. Dortch. Upon review, she believed that Student's 504 Plan was generally in line with Dr. Knott's report. Ms. Bush indicated that she considered the possibility of a learning disorder but ruled it out at the time of the 504 meeting for several reasons. Although Dr. Knott had administered the WJ-III and the WISC IV, relying on percentiles was not the best way to interpret Student's scores.¹⁴ Rather, the best practice was to report the results by standard scores, which could be compared cross assessments. Further, it would not be uncommon for ADHD to influence

¹³ Rebecca Bush is a School Psychologist and Program Specialist for the District. Ms. Bush has a B.S. in Psychology and an M.A. in Psychology. She is currently assigned to the Bridges Day Treatment program where she provides individual and group counseling to students with a variety of disabilities.

¹⁴ In the battle of the experts, it is noted that Dr. Knott is a clinical psychologist, while Ms. Bush is an educational school psychologist. Neither party disputes the validity of Dr. Knott's WJ-III or WISC-2 assessments, as they were used again by the District in its own assessment of Student. Given that Ms. Bush is interpreting the data from an educational standpoint, more weight is given to her elimination of SLD as an area of suspected need.

a student's Fluency scores. Student did not show consistent discrepancies. She noted that a low sub-test score alone cannot determine a learning disability as the assessor cannot use only one measure to determine outcome. An assessor must consider the assessment in its totality to determine cognitive ability. As such, Student did not show a consistent discrepancy. Furthermore, Student's grades did not support a specific learning disability.

32. Student clearly benefited from the Study Skills class. The class, which lasted only one quarter, was designed to get students more motivated with school. Mr. Freeman considered Student to be the poster boy for success. When Student entered the class he was struggling academically and disorganized. Student worked hard in the class, and met all of its requirements. By the end of the first quarter, Student's grades had improved, his organization improved, he worked diligently on his assignments and took school more seriously. His teachers continued to find him a personable, pleasant, and cordial little boy who sought positive attention and was always willing to help.

33. By the second quarter of 2009, the information available to the District regarding Student began to subtly change. Student's grades began to drop again, and as of his second quarter progress report, he was earning two D's and one F. Teacher comments again carried a common theme noting a problem with missing assignments and tests. Overall, however, Student retained a 2.0 g.p.a. for the first semester (August 31, 2009 to January 28, 2010).

34. Mother maintained her e-mail dialogues with Student's teachers to continue tracking Student's missing school work. As the school year progressed, Mother's communications became more frequent and more intense. As example, in her January 14, 2010 e-mail to Student's teacher, Mother reports that Student's missing assignment list is out of control. By February 2010, it is apparent that Student is lying about completing his work. As example, in a February 22, 2010 e-mail, Mother informed

a teacher that Student said he had made up a missing test. The teacher responded that Student had not taken the test. It also became apparent that Student was forging teacher signatures. As example, in another e-mail on February 22, 2010, Mother wrote a teacher to inquire about her signature on Student's Agenda Planner, as her signature looked different. The teacher confirmed that she had not signed the Planner, and when she asked Student about it, he confessed that he had forged her initials.

35. These incidents of lying, forging signatures, and failure to complete work at school continued to escalate throughout Student's third quarter of eighth grade. Further, Student's third quarter progress report, noted that Student was at risk for failing four of his seven classes, and was earning two F's and two D's. Student ended the third quarter with a 1.71 g.p.a. Teachers again reported missing work, but this time, their reports also began to note that Student's citizenship and effort in class was declining. Additionally, during the spring of 2010, Student took the State mandated California Standardized Testing (STAR), and performed exceedingly low. Student scored Far Below Basic in English Language Arts, and Below Basis in Mathematics. As of March 17, 2010, Ms. Dortch had noted the drop in Student's grades, and had already prepared to re-enroll him in the Study Skills class for the fourth quarter of the school year.

36. Student also required hospitalization in College Hospital, a psychiatric facility, for approximately two weeks at the end of January to early February 2010. Parents provided little information regarding this hospitalization, other than to say they hospitalized Student after a violent episode. Clearly the District was notified that Student was hospitalized, and again when he returned to school, as is evidenced by Student's attendance records. No other information was forthcoming from Parents. The only timely information available is an inter-office e-mail from Ms. Becker which indicates that on February 9, 2010, she met with Student to discuss his behaviors and the strategies that the school could do to support what he learned while in the hospital.

Student indicated that he didn't have the same feelings of frustration at school and he was going to try really hard in all of his classes. If he began to feel like he needed a time-out he would get up and leave Ms. Becker's business card on the desk and would then come to the office to meet with an administrator or counselor. The e-mail continued by reporting that Student was also exaggerating his hospitalization with a number of his classmates. He felt this would help him look better in the eyes of his peers, when in reality it did just the opposite. No additional information regarding what specifically led to the hospitalization, what happened while hospitalized, what was diagnosed, or what treatment was recommended for Student was presented at hearing. Whatever happened, it didn't help.

37. Also during this time, Student had a meltdown in a therapy session with Dr. Darmal. The specifics of this incident were not reported to the District at the time it occurred, and information regarding the incident was not shared until the District received Dr. Knott's amended Psychological Report and Treatment Summary prepared on May 9, 2010. Dr. Darmal confirmed at hearing that by March 2010, Student's lying and stealing was increasing. Student's level of aggression was also escalating and he was making threats of violence. Combined with Student's meltdown in his office, he believed it was time to begin considering a residential placement for Student. He discussed the possibility with both Dr. Knott and Parents in March 2010. Dr. Darmal also made it clear that in considering a residential facility, he was anticipating that Student would require more of a long-term therapy program. He did not view Student's behaviors as an emergency, or he would have immediately sent Student back to an acute psychiatric hospital such as College Hospital.

38. Outside of school, Student continued to spiral downward at an alarming rate. Parents were aware that Student was stealing as Student had extra money, unfamiliar clothing and other new items. Student was caught shoplifting at a

department store. He was disciplined at school for stealing two cell phones from the gym locker area. Further, Student was now expressing desires to get even with other kids at school who teased him, and was threatening to kill them. Parents took these escalating behaviors seriously and reported them to the Vice Principal at Walker. Receiving no assistance from the staff at Walker, Parents also sought help from Orange County Department of Social Services, and Orange County Health Care Agency (OCHCA, commonly known as Mental Health), to no avail. The last straw occurred on April 16, 2010, when Parents discovered a knife and other weapons in Student's room.

39. On April 20, 2010, Parents wrote the District and requested a comprehensive assessment to determine whether Student should be eligible for special education services and what accommodations might be required in his educational program. Parents also requested that the District make an AB 3632¹⁵ referral to the OCHCA. The letter did not report any specific behaviors nor indicate a reason for a mental health referral. Parents ended their request for evaluation by indicating they would look forward to receiving an assessment plan within 15 days.

40. On April 29, 2010, Mother e-mailed Ms. Dortch to inform her that April 30, 2010 would be Student's last day at Walker. Parents were enrolling Student in the residential treatment program (RTC) at Eagle Ranch as of May 3, 2010.

41. The District held a 504 meeting on May 10, 2010. Parents attended with Dr. Knott. District staff attended, including the Program Specialist, the School Psychologist and School Psychology Intern, Student's School Counselor, as well as six of

¹⁵ A referral for county mental health services is commonly known as an AB3632 referral. AB3632 refers to the Assembly Bill delineating interagency responsibility for providing services to students with disabilities, under Chapter 26.5 of the Government Code.

Student's teachers. The meeting notes reflect that the purpose of the meeting was to determine if Student needed a special education assessment and a concurrent referral to OCHCA.

42. Dr. Knott prepared a Supplemental Psychological Report and Treatment Summary, dated May, 6, 2010, which accurately reflect Parents' concerns. Dr. Knott reflected that when Parents originally requested her to assess Student in 2009, they were seeking the assessment as a means to learn more about Student's academic and emotional needs. Things had significantly changed since then.

43. Dr. Knott's Supplemental Report provided the District with significant and previously unknown information. Student has been in treatment with Dr. Knott since January 2009, and typically attended both individual and family therapy sessions once a week. In addition, Student enrolled in a therapeutic group in January 2010, also with Dr. Knott. Student's treatment had largely focused on assisting Student with managing his emotions, complying with house rules, controlling his impulsivity, establishing behavior plans regarding homework completion, and improving relationships with his sisters, including a large emphasis on not having contentious arguments on a daily basis regarding others' behaviors.

44. During recent months, Student's behavior escalated significantly with both Student and his parents reporting that he was repeatedly stealing, despite negative consequences. In addition, on several occasions, Student became fairly agitated and was unable to calm down for several hours. One of these agitated events occurred at Dr. Darmal's office, which resulted in a consultation between Dr. Darmal and Dr. Knott to discuss the possibility of placement for Student if he was unable to have better control over his emotions and behaviors. Since that consultation, Student's level of impulsivity, emotional control, and school success had not improved. Student continued to struggle to complete school work and demonstrate passing grades at school despite significant

interventions occurring through Student's 504 Plan and through several systematic interventions in place at home. Student's impulsivity had increased to a level that connected him with stealing from peers at school, in his home, and repeatedly in the community at a restaurant and a clothing store.

45. Dr. Knott concluded that the foregoing difficulties led to Student being placed at Eagle Ranch, a long-term RTC. This decision was made by Parents in connection with consultations with both Dr. Darmal and Dr. Knott, since the level of Student's emotional difficulties were currently compromising his safety in the community and affecting his ability to achieve academically. Further, Student would likely benefit from continued individualized and family services through long-term placement to address his attention difficulties, impulsivity, and feelings of anger, sadness, loss, and worry. A program that is highly structured, with clear expectations, rewards, and consequences would be beneficial.

46. Upon receiving this information, Student's teachers were surprised to learn that Student had been placed in a RTC. None of the behaviors reported by Parents or Dr. Knott had been observed at school. Student's math teacher reported that Student's interaction in the classroom was always positive. He was responsive and respectful in class. Student's English teacher reported that towards the end, Student was missing assignments. The quality of Student's work, however, was not the issue. Student's bigger problem was turning in work. She also reported no behavior problems with Student. Student's science teacher reported there were no behavior problems with Student, although he would not always do his work in class. Student's history teacher reported no behavior problems in class, but noticed that during the third quarter, Student stopped doing anything academically. Student's Study Skills teacher reported that Student had no behavior problems at all, but he did not use his time well. Further, Student stopped doing his work as soon as he knew he was leaving school.

47. Michelle Almazan, the Athletic Director at Walker has known Student since he was in the seventh grade. Student attended her eighth grade P.E. class. She was aware of his 504 Plan. Ms. Almazan's testimony reflected the consensus of teacher opinion of Student, and presented the most insight to Student's behavior at school. Like other teachers, she recalled that Student was always helpful and friendly. He wanted to please and sought positive reinforcement. Overall, Student was a happy and compliant kid, who enjoyed class and did well. Behaviorally, Ms. Almazan noted that Student was somewhat competitive and engaged in some heated discussions with other students. She did not find Student depressed or badly behaved. She did not see any bullying. Rather, Student had a strong sense of what was right and became frustrated when others cheated or did not follow the rules. Student would then become a tattletail and report cheaters to her. This, in turn, would alienate the other kids, hence Student's perception of bullying. Ms. Almazan did not believe Student was a violent child. She was surprised at Student stealing cell phones. It was not in his character to do so. She was surprised when she heard Student had been hospitalized in January 2010, as she had never seen any real anger or behavior problems with Student.

48. As with his other classes, Student's grade in P.E. dropped due to his hospitalization in January 2010. Ms. Almazan explained that when a student missed a class, for injury or illness, he could not make up the actual P.E. class participation; therefore, the student was given a writing assignment to complete and turn in. Student's P.E. grade went down because he did not turn in his written work before being withdrawn from school.

49. Parents confirmed the information reviewed in Dr. Knott's report. Student had recently been suspended for the theft of two cell phones at school. Of greatest concern to Parents, was finding matches, knives, and other weapons hidden under Student's mattress. As later recalled by Ms. Harmon, who attended the meeting, there

was no discussion of learning disabilities or any other areas of need to be assessed. Neither Parents nor Dr. Knott brought up any additional areas of need or requested additional assessments. Their focus was explicitly on obtaining Emotional Disturbance eligibility for special education.

50. The District agreed that Student required a psychoeducational evaluation in order to assess Student for Emotional Disturbance (sometimes "ED"). The District also agreed to make a concurrent AB 3632 referral to OCHCA. The meeting notes indicated that the needs with which Student is currently presenting are not able to be addressed by the services provided within the school district. The level of severity is of concern, as he is being bullied in school and recently began to fail most classes. Student has made a marked decline since the first semester. Student has been placed in a RTC by his parents and their decision was supported by Student's psychologist and psychiatrist. The parents finally shared that Student had been placed in College Hospital for two weeks at the end of January 2010, due to his anger being out of control.

51. The language used above in Paragraph 50 was both specific and graphic. Ms. Bush explained that the wording was carefully chosen, specifically referencing the District's inability to address Student's needs, and was intended as key phrase or "magic words" for OCHCA. Generally, OCHCA will not accept an AB3638 referral until a student has been deemed eligible for special education and had received one or more interventions through the District. In this case, the District was requesting an AB3632 referral concurrently with Student's initial psychoeducational assessment, and prior to determining Student's eligibility for special education as ED.

52. Rebecca Harmon,¹⁶ then a School Psychologist Intern, administered Student's psychoeducational assessment under the supervision of Ms. Bush, a veteran

¹⁶ Ms. Harmon is now a School Psychologist under contract with the District. She currently holds a B.A in Human Services, and an M.A in Marriage Family Services and

School Psychologist. The Assessment Report is dated June 2, 2010. Student did not return to California as anticipated to participate in the assessment. As a result, the logistics of administering a thorough assessment were complicated as Student participated in the assessment by telephone from Utah. This limited the District's ability to administer several preferred standardized tests as well as to observe Student's non-verbal or body language. In order to present as much information as possible, Ms. Harmon incorporated much of the information contained on the Eagle Ranch Intake documents, and relied heavily on the findings in Dr. Knott's 2009 Assessment Report. In addition, Ms. Harmon conducted a review of Student's records, disciplinary reports and teacher reports, administered standardized testing and conducted a clinical interview with Student by telephone. At hearing, Student raised no issues regarding the procedural components of the assessments, the protocols used, or the scoring results and conclusions.

53. As part of the assessment Ms. Harmon administered the Connors, Third Edition, which is a rating scale used to obtain information regarding Student's behavior in school and at home. The Connors is designed to assess ADHD and its most common co-morbid problems. Mother, Student, and Student's English teacher completed the rating scale. Ms. Harmon also gave Student the Reynolds Adolescent Depression Scale-Second Edition (RADS-2), a self-report measure that evaluates the reporter's current level of adolescent depressive symptomology along four basic dimensions of

School Counseling. She is a certified School Psychologist and holds PPS certification. At the time of Student's assessment, Ms. Harmon was completing her required internship of a one year placement as a school psychologist under the supervision of a certified School Psychologist. During her internship, she completed approximately 10-15 assessments, and she attended 504 meetings and IEP meetings.

depression. Student also took the Piers-Harris Self-Concept Scale, Second Edition (Piers-Harris 2) in which self-esteem is measured by self-perceptions. Ms. Harmon also utilized the Behavior Assessment System for Children, Second Edition (BASC-2), an integrated system designed to facilitate diagnosis and classification of a variety of emotional and behavioral disorders and to aid in the design of treatment plans. The BASC-2 was completed by Student, his parents, and his history teacher. Lastly, the Scale for Assessing Emotional Disturbance (SAED) was given to Parents, Student's Study Skills teacher, and his Science teacher. The SAED is a rating scale that assists in understanding the emotional and behavioral disorders of children and it assists in identifying students who may meet the criteria for ED.

54. Ms. Harmon summarized her assessment by acknowledging Dr. Darmal's and Dr. Knott's diagnoses of ADHD, ODD, Mood Disorder NOS and RAD. Pursuant to Dr. Knott's previous cognitive assessments via the WISC-IV, Student had average cognitive abilities. Ms. Harmon indicated that the portions of Dr. Knott's 2009 Assessment Report still presented accurate and valid scores for Student, although she would have reassessed Student in those areas, had he been available. Nonetheless, Ms. Harmon concluded that Student was not SLD. In making that determination, Ms. Harmon reviewed the scatter in Dr. Knott's scores, and compared them with other information to see if there was a problem or pattern. She concluded there was no discrepancy in his scores.

55. During his clinical interview, Student acknowledged many aggressive, impulsive, quick to anger, and depressive symptoms. Student acknowledged that he sometimes says he wants to kill himself or other people, but he does not really mean it. Additionally, he indicated that, at times, he might not realize when he had done something that might hurt others.

56. On the RADS-2, Student rated himself within the severe clinical depression range for dysphonic mood, and within the normal range in all other areas, suggesting mild clinical depression. On the Piers-Harris, Student's total score fell within the low range. Low scores are characteristic of children with serious doubts about their own self-worth. Further, such children are likely to evaluate themselves negatively in several specific areas of functioning. For Student, these areas included Intellectual, and School Status and Popularity.

57. On the BASC-2, completed by Student's history teacher, Student fell into the Average range in most areas. His mother's scores placed Student in the At-Risk range for Internalizing Problems and Adaptive Skills. Mother also scored Student in the Clinically Significant range for Externalizing Problems and Behavioral Symptoms Index. On the self-report, Student rated himself in the At-Risk range for School Problems and in the Clinically Significant range for Internalizing Problems, Inattention/Hyperactivity, Emotional Symptoms and Personal Adjustment.

58. The two teachers who completed the SAED indicated that it was Unlikely that Student has an emotional disturbance in the areas of Inability to Learn, Relationship Problems, Inappropriate Behavior, Unhappiness or Depression, or Physical Symptoms or Fears. His parents' scores indicated an emotional disturbance in each of those areas. Parents indicated that Student displayed an extreme number of emotional and behavioral problems. In addition, Parents indicated that Student may also be Socially Maladjusted, which indicates that Student may also have problems of an antisocial and delinquent nature.

59. In determining whether Student qualified for special education under the eligibility of Emotional Disturbance, Ms. Harmon concluded that Student demonstrated a general pervasive mood of unhappiness or depression, which was pervasive throughout his day, in all settings, and was severe enough to produce significant

distress. Student's level of distress had existed over a long period of time, and this disturbance adversely affects Student's educational performance. Based upon the totality of information obtained through the assessment, Ms. Harmon determined that Student appeared to meet the eligibility criteria for ED as his primary eligibility. Student also met the eligibility criteria for OHI as a result of his diagnoses of ADHD. As a result, in addition to Student's need for accommodations and modifications in his classes, he now also required specialized instruction and other interventions to be developed by an IEP team.

60. Ms. Bush reviewed Ms. Harmon's assessment of Student, and concurred with Ms. Harmon's test results, conclusions, and determination of ED eligibility. Ms. Bush did note that there was a clear discrepancy between how Student's teachers and Student's parents viewed Student, and that the District's determination of ED was more heavily weighed on the home situation. She concluded, however, that in the totality of circumstances, Student's school behaviors demonstrated some educational impact.

61. Ms. Bush prepared the Student's AB3632 referral to OCHCA. The request was sent to OCHCA on May 14, 2010. Ms. Bush explained that a concurrent referral for an AB3632 assessment is an exception to the rules of procedure for a mental health assessment. Usually a referral to OCHCA is made when a school district believes a student needs more than DIS counseling. Typically, problems which exceed a district's ability to serve a student revolve around home issues which are inappropriate for school counseling or mental illness. Except where a serious problem exists, OCHCA requires that (1) the student has already been assessed by the District and made eligible for special education and related services; and (2) the District must provide documentation of the other interventions and related services, such as counseling, which have already been tried as part of the student's IEP.

62. Not completely unexpectedly, on May 18, 2010, OCHCA rejected Student's referral, indicating in a standard form letter that required documents were missing from Student's referral package. The District resubmitted Student's referral on May 27, 2010, and on June 4, 2010, and received an identical rejection letter from OCHCA. On September 22, 2010, the District again sent Student's referral to OCHCA, this time with a copy of Student's proposed initial IEP dated September 15, 2010. Finally, on October 19, 2010, OCHCA accepted Student's referral for an AB3632 assessment. The letter from OCHCA also indicated that Student's assessment had been assigned to Tan Vinh, LCSW, and instructed the District to set an IEP meeting no later than December 2, 2010, to review the Assessment Report. The delay created by Mental Health in accepting Student's referral is unfortunate as the District was unable to place a student at in a RTC without first having obtained OCHCA's mental health assessment, and OCHCA's recommendation that a RTC placement was necessary.

63. In the meantime, the District conducted Student's initial IEP meeting on September 15, 2010. Both Parents attended, along with Dr. Knott. By this time, Student had been at Eagle Ranch nearly four months, and the District's information regarding Student's present levels of performance was limited as of May 3, 2010. The IEP team reviewed Ms. Harmon's psychoeducational assessment report. Given the information available at the time, the District found Student eligible for special education placement under the eligibility of ED with a secondary eligibility of OHI.

64. Although the IEP team was acutely aware that Parents strongly desired to have Student remain in his RTC placement at Eagle Ranch, the IEP team was unable to even consider RTC placement as Student's AB3632 referral and assessment had not yet been accepted or completed by OCHCA. Based upon the continuum of placements available to the District at that time, the District offered placement in the Special Day Class (SDC) for ED students at Kennedy High School (Kennedy). The IEP notes reflect

that the SDC provided a very structured learning environment where emotional as well as academic needs could be addressed. Individualized counseling for one hour per day was also offered as a DIS service, and was available on the Kennedy campus. Clearly, Parents did not consent to the District's offer of placement at Kennedy. Student had made progress at Eagle Ranch, and Parents did not want to jeopardize his progress by bringing him back home early.

65. The proposed IEP contained three goals for Student. Two of the goals addressed Student's prevocational needs which required Student (1) to complete class assignments within class time, and (2) to attend to a specific task for 30 minutes without teacher prompting or self-interruption. The third goal addressed Student's social/emotional needs by requiring Student to (1) identify and manage his feelings by expressing anger appropriately by using words, and (2) identify signs of self-frustration and seek adult staff for assistance. Mother stated in her testimony that while she agreed with the determination of eligibility, she believed Student needed additional goals to deal with social skills and aggression. The IEP signature page, however, indicated that Mother agreed with the goals and objectives as contained in the IEP.

66. Frances Correia,¹⁷ the District's case manager for residential placements joined the IEP meeting to address Parents' frustrations regarding the District's refusal to place Student at Eagle Ranch. Ms. Correia first explained the procedures by which a student obtains a residential placement. Once a pupil's AB3632 assessment is

¹⁷ Ms. Correia has been employed as a School Psychologist for the District for 17 years. She has a B.A in Psychology and an M.A. in Counseling. Ms. Correia is licensed in Educational Psychology, and has a School Psychology Credential, a Pupil Personnel Credential, a Learning Handicapped Credential and Multiple Subject Teaching Credential.

completed, OCHCA is still required to consider lesser interventions, such as out-patient counseling, family counseling, and psychiatric services, before it can arrive at a recommendation of a RTC. Further, until OCHCA completed the student's assessment, the District was powerless to place a pupil in any RTC.

67. As Ms. Correia was aware that Student was already at Eagle Ranch, she explained to Parents that, even with a recommendation for a RTC, due to state law, OCHCA could only make recommendations to RTC's which were certified by the State of California and were operated on a non-profit basis. While many out-of-state residential placements qualify under California law, Eagle Ranch does not, as it is operated on a "for profit" basis.¹⁸ As a result, even if OCHCA and the District agreed that Eagle Ranch provided Student with appropriate treatment, they would be unable to place or keep Student there.

68. Dr. Debra Martinez,¹⁹ also joined the IEP meeting to further describe the Kennedy placement to Parents. Dr. Martinez coordinates and supervises the District's ED population and is the "gatekeeper" of the District's ED students and their learning/educational environments. As such, she supervises the ED program at Kennedy.

¹⁸ Government Code, section 60100, subdivision (h), mandates that out-of-state placement shall be made only in residential programs that meet the requirements of Welfare and Institutions Code sections 11460, subdivisions (c) (2) through (c) (3).

¹⁹ Dr. Martinez received her Psy.D specializing in Marriage and Family Therapy. She received her B.A. in Liberal Studies concentrating on Psychology and her M.S. in School Counseling. Dr. Martinez is a licensed Clinical Psychologist, as well as a Registered Psychologist, and also holds two Pupil Personal Services Credentials (in Psychology and School Counseling), and a Multiple Subject Teaching Credential.

69. The SDC/ED program at Kennedy services anywhere between nine and 13 pupils. The SDC is highly structured, is Applied Behavior Analysis (ABA) based, and emphasizes positive reinforcement on behavior. No more than six students are usually present in the classroom at any given time. The SDC also has two aides who are PROACT trained.²⁰ Additionally, a School Psychologist works with the ED program and is accessible to the SDC classroom and the students each day. The SDC also provides breakout rooms and computers for the students.

70. The ED program has a social skills curriculum which is based upon the Boys Town Model. A major focus of the program relates to social, coping and life skills, as well as career goals which are embedded in the program. The methodology is intended teach social skills and apply them to life and school each day. A Behavior Specialist is also part of the ED program. A Reward/Reinforcement System, which is a behavior level or merit system program, is utilized, whereby students can measure and viscerally see their progress. Additionally, some outside therapists come to the classroom to provide additional therapy services if indicated in an IEP. The ED program at Kennedy also uses grade level curriculum. With such a small number of pupils, there is abundant opportunity for one-to-one academic assistance. Homework is monitored in the classroom and direct contact is maintained with parents. Additionally, having the program on the Kennedy campus, which is also Student's home school, provides opportunities to interact with peers and participate in general education venue.

²⁰ PROACT is a training designed to teach staff how to deescalate situations and evade problem behaviors.

71. Garrett Sabol,²¹ the ED teacher, is quite proud of the ED program. He acknowledged that the transition to high school is difficult for ED students; however, in the ED class, the older students mentor the new kids and “show them the ropes,” which reduces the anxiety of the transition. He collaborates with parents and maintains an open door policy with all students and parents. As emphasized by Mr. Sabol, the goal of the ED program is to correct and then support positive behavior in order to get the kids back out to the general education program. While in the SDC, students have a chance to mature in structured support before they move back to the general education placement. The ED pupils are “out and about” on campus, but can return to the SDC when needed. Further, the students from the Kennedy ED program have a very good graduation record.

72. Aeri Kwak, another District School Psychologist, also attended the September 15 IEP meeting. She reported that the IEP team had little current information on Student with which to determine his placement. It is extremely difficult to develop an IEP without meeting the student. The District’s offer of placement at Kennedy also had additional IDEA procedural safeguards. Once Student returned from Eagle Ranch, the District was required to conduct a 30-day IEP meeting to adjust his IEP if needed. By that time, the District staff would have worked with Student, been able to develop additional goals, and consider new information, which could be presented at the 30-day IEP meeting. Further, the District was still waiting for OCHCA to complete its assessment, at which time, the IEP team would then consider any additional placement recommendations.

²¹ Garrett Sabol has taught the ED program at Kennedy for nine years. He has a B.A. in Journalism and an M.A. as an Education Specialist, in addition to his teaching credential.

73. Tan Vinh is the Licensed Clinical Social Worker (LCSW) who was assigned by OCHCA to perform Student's AB3632 assessment. Mr. Vinh received the referral on October 14, 2010, and completed his Assessment Report on November 30, 2010, thereby complying with the regulatory timelines for assessments. Mr. Vinh's written report was sent to the District on December 1, 2010. The cover letter from OCHCA notified the District that the Assessment Report was ready to be presented to the IEP team; however, due to the suspension of the AB3632 mandate,²² a representative of OCHCA would not attend the IEP meeting.

74. As of December 1, 2010, Parents had already reviewed the OCHCA report and discussed it with Mr. Vinh. As part of the assessment, Mr. Vinh interviewed both Parents on three separate occasions. He also interviewed Student, in person, on November 3, 2010. Additionally, Mr. Vinh reviewed the District's Mental Health Pre-Referral documents, the District's June 2, 2010 Psychoeducational Assessment, and Student's IEP and Attendance Records. The background information contained in the assessment is similar to that which has already been reported. Mother did include in her interview that in addition to lying to them, Student played with matches, got a tattoo on

²² On October 8, 2010, the California Legislature sent then Governor Arnold Schwarzenegger, its 2010-2011 Budget Act (Ch. 712, Stats. 2010), which provided for full funding of for Chapter 26.5 mental health services. On that same day, the Governor signed the Budget Act after exercising his line-item veto authority with which he vetoed the appropriation for Chapter 26.5 mental health services. Subsequent litigation ensued, and on February 25, 2011, the California Court of Appeal for the Second Appellate District affirmed that the Governor had the authority to veto the funding for a statutory mandate. As a consequence of the Court's ruling, OCHCA retained no obligation to provide mental health services under AB 3632 after October 8, 2010.

his arm, pierced his ears with safety pins, forged his teachers' initials on documents, and refused to do his homework.

75. Student, during his interview, reported that Parents placed him at Eagle Ranch because of his behavior. Student acknowledged that he had been disrespectful, dishonest, violent, abusive, fought with his sisters and peers, stole, and had poor anger management skills. Student further reported that while he was living with his biological parents, he saw his biological father hold a gun to his biological mother's head. Student also reported that he got teased at school because he is small for his age and has red hair and a freckled face. He additionally admitted to having attempted to run away from Eagle Ranch twice; however, he had no intention to run again. Student referenced the behavior program utilized by Eagle Ranch. Student was currently working his Accountability packet, intending to advance to his Honesty packet in a week. Academically, Student reported that he earned A's in both English and Social Studies and would complete the eighth grade by December 31, 2010.²³

76. According to Mr. Vinh, Student displayed fair insight, judgment and motivation by stating that he has no choice but to continue working his placement program at Eagle Ranch. Student indicated that he doesn't have mood swings, his appetite is much better than before, and he sleeps well. Student believes that the Eagle Ranch program really helps him. He can talk to staff and peers. Further, he can relate to peers and they can relate to him.

77. Megan Pomeroy, who accompanied Student to his interview with Mr. Vinh, reported that Student has come a long way and is not the same kid. Student is still struggling, however, with the structures of the facility because he comprehends, but

²³ Student would have completed the eighth grade in June of 2010, had he remained at Walker.

does not yet know how to apply his social and coping skills and strategies. It was noted that while Student may still erupt, it takes him longer to do so.

78. Based upon the totality of the assessment, Mr. Vinh concluded that given Student's serious emotional and behavioral problems, such as repeated stealing incidents, playing with matches, and hiding knives and weapons, which might make Student a danger to himself and others, compounded by his marked decline in his academic performance in his last semester at Walker, RTC treatment is recommended for Student in order for him to become appropriate (sic) to transition to the SDC/ED program at Kennedy, as offered by the IEP team in the September 15, 2010 IEP.

79. Mr. Vinh met with Parents several times in order to complete this assessment. He recalled that during his intake interview with Parents in October 2010, he informed them that neither OCHCA nor the District could keep Student at Eagle Ranch.

80. The District scheduled an IEP meeting for Student on December 15, 2010, to review the OCHCA assessment report. Parents and Dr. Knott attended this meeting. As expected, no one attended from OCHCA. The IEP team reviewed Mr. Vinh's assessment report. However, it was decided that in order to determine Student's least restrictive environment and the recommendations of the OCHCA report, the IEP team needed to reschedule the IEP meeting in order to invite additional ED support personnel to participate in the IEP meeting. The IEP meeting was rescheduled and canceled on several dates between December 17, 2010 and January 25, 2011, for various reasons such as availability of staff and the winter school break. During this period, OCHCA entered into an interim agreement with the Orange County Department of Education which extended AB3632 funding until February 28, 2011.

81. On January 25, 2011, the District finally held Student's IEP meeting to discuss the OCHCA mental health assessment. Mr. Vinh was present for this IEP meeting.

Additionally, Anne Wieppert, Megan Pomeroy, and Jerry Thamert, each a staff member at Eagle Ranch, participated in the IEP meeting by telephone.

82. The Eagle Ranch staff shared with the IEP team that Student often chose to do other things than school work. While some assignments are satisfactory, others are poorly done. Student is often off-task, becomes angry when confronted, denies being off-task, then becomes threatening towards staff, escalating to a homicidal reaction toward staff. On occasion, Student has needed to be restrained. As of the January 2011 IEP date, Student's medications had been readjusted, and his episodes, which last 15 minutes to an hour, occurred two to three times per month. Student still had difficulty picking up on social cues, and difficulty with peer interaction. On the positive side, Student was more motivated and his academic skills and performance had increased and improved.

83. The Eagle Ranch staff did not recommend a transition home at the time of the January 25 IEP meeting. Family therapy was still required to prepare for Student's return home. Further, Student had strong attachments to Eagle Ranch staff, and a premature transition might be detrimental. Due to those issues, the IEP team noted concerns regarding continuity of care. The IEP team members, as well as Mr. Vinh, recognized that moving Student might be problematic. Nonetheless, Eagle Ranch remains a for-profit program and the school is not California certified. Therefore, Eagle Ranch may not be utilized by OCHCA or by the District.

84. The IEP team, however, did agree to OCHCA's recommendation of a RTC placement. Further, OCHCA indicated its willingness to do a search for an appropriate RTC. Understandably, the IEP meeting, as reported by Mother, got extremely heated. Parents were very upset that the District appeared to be more concerned with the law than with helping Student. Parents made it very clear that the District and OCHCA could do whatever they wanted, but they (Parents) were unwilling to move Student from Eagle

Ranch. Parents were also unwilling to provide consent for OCHCA to complete a search²⁴ for an appropriate and allowable residential placement. Mr. Vinh attempted to obtain consent from Parents even after the IEP meeting; however, Parents remained steadfast, and would not allow Student to be moved from Eagle Ranch.

THE EAGLE RANCH ACADEMY

85. Jerry Thamert, Jr. is the Clinical Director at Eagle Ranch.²⁵ Through telephonic testimony at hearing, Mr. Thamert described the Eagle Ranch program. Eagle Ranch is very selective on who qualifies for admission. The program does not accept schizophrenics, gang-bangers, self-mutilators, or others who will rock the boat with the program or present bad influences for other students. Eagle Ranch does take students with multiple disabilities and chemical dependency issues. At times, Eagle Ranch's review and acceptance of a student can take a year, other times it may occur within a few days.

²⁴ Procedurally, once the District adopts OCHCA's recommendation for a RTC placement, OCHCA is then required to obtain the parent's consent to search for and contact potential placements. The determination of whether an RTC is appropriate is basically left to the RTC itself. Once OCHCA contacts the RTC, the RTC reviews the student's information packet, and determines whether the student will benefit from its program. Likewise, an RTC can "divorce" a student if the student fails to adapt to the RTC's program.

²⁵ Mr. Thamert holds a B.A. in Sociology and completed his M.S.W. Social Work Program at the University of Utah. Mr. Thamert is licensed Clinical Social Worker in Utah. He also possesses a Certificate of Criminology and Corrections from the State of Utah.

86. The Eagle Ranch program primarily addresses social/emotional problems, and is suited to those students who are not doing well in school. As with many behavior-based programs, Eagle Ranch deals with emotional issues first, and later incorporates academics. In completing the program, a student must be fully engaged in school before he is discharged. Although the structure of the program is the same for all students, each student has an individualized therapy plan.

87. Eagle Ranch is a "value" based program. Students work on each of eight "values" with work packets, and then generalize the value by showing accountability and demonstrating responsibility. In order to graduate from the Program, a student must complete the eight values. There is no daily point or level system as utilized by OCHCA and the District.

88. Residential students are housed in cottages, in what is described as a "family pod," which consists of one therapist and three staff members for each of three shifts around the clock. The students eat, sleep, and attend school together. Students at Eagle Ranch have a highly structured schedule, from morning to night, seven days a week. Even school is scheduled for each student seven days a week. School is conducted in a self-contained classroom. Mr. Thamert described the learning environment as controlled, structured, and repetitive. A Master Plan was created for Student which covers his areas of need. Mr. Thamert believes Student's Master Plan is appropriate and that he has received educational benefit. Student has reengaged in school and is now applying himself. Mr. Thamert reports that Student's greatest benefits have been seen in therapeutic areas. Student will always have ADHD, and may require help. Now, Student can ask for help.

89. Annie Wieppert is a Licensed Clinical Social Worker and is Student's therapist at Eagle Ranch. She reported that when Student was admitted to the program, he was very angry about being sent to Eagle Ranch. He had violent outbursts daily, was

defiant, and expressed suicidal and homicidal ideations. Ms. Wieppert admits that, at first, Student was extremely oppositional and difficult to manage. Ms. Wieppert prepared Student's initial Treatment Plan. The Plan created baselines on where to start treating Student, and included both long and short term goals. The treatment plan was directed at Student's defiant, anger, and non-compliant behaviors. Ms. Wieppert acknowledged that Student often plays the victim and claims he is bullied. He has lots of peer issues, but he is also an antagonist and is quick to blame others. At the time of her testimony, Ms. Wieppert reported that Student has responded amazingly well to therapy, and that he has developed coping skills, trust, and responsibility. He has met some but not all of his initial goals. Student still has difficulty with criticism. He is working on his family relationships. While Student still struggles with motivation and focus, he has improved and was doing well in classes. Student's reading has improved, and Student has more confidence and an improved attitude towards school

90. Megan Pomeroy²⁶ testified as the Academic Coordinator at Eagle Ranch. Her duties include coordinating students' educational programs with WiloStar 3D Academy (WiloStar), the online academic program used at Eagle Ranch. Janet Hale, the President and Director of WiloStar, explained in a letter that Eagle Ranch students are supervised in the online educational setting by an exceptional needs teacher certified by the State of Florida. Eagle Ranch utilizes WiloStar's accredited online program for the academic component of the school. Further, WiloStar teachers are fully accredited in the subjects they teach and supervise. Additionally, any special education students who take WiloStar courses through Eagle Ranch are evaluated for appropriate educational plans and IEP implementation. WiloStar's one teacher, who is certified in specific learning

²⁶ Ms. Pomeroy is currently seeking her B.A. degree in Behavioral Science. She is also seeking a credential in Substance Abuse Counseling.

disabilities, does not teach in the program. WiloStar is fully accredited by the Southern Association of Colleges and Schools. Ms. Hale also indicated that each student receives an educational plan that is designed to maximize student success while enrolled at Eagle Ranch.

91. The documents referenced by Ms. Pomeroy were written by Ms. Hale, and indicate that Student came to WiloStar with a poor academic attitude coupled with significant behavioral challenges which impeded his academic progress. Student's individualized learning plan was targeted to address and improve key skills necessary to succeed in both the online classroom as well as a face-to-face classroom. It was noted that Eagle Ranch students also supplement their online coursework with face-to-face elective classes. Ms. Hale also emphasized that it was important to understand that Student's academic progress was particularly contingent on his success in this therapeutic program. Thanks to a working partnership between Eagle Ranch's therapeutic program and Student's academic program, Student has demonstrated solid academic progress which is demonstrated in both his overall grades in the integrated courses, as well as his classroom performance in the face-to-face classes.

92. Ms. Pomeroy also indicated that the curriculum used at Eagle Ranch is accredited, and course credits are transferrable and qualify for graduation in California. Eagle Ranch students access the WiloStar program on computer. Students usually are scheduled for computer studies approximately two hours per day, based upon a seven day schedule. Access to computers is monitored to ensure that students stay on task.

93. Although not a teacher herself, Ms. Pomeroy works with Eagle Ranch's only on-site teacher, Mr. Slaw. Mr. Slaw is credentialed as a secondary education teacher. He does not hold a special education credential. The on-site teacher oversees the students' academics, and teaches elective classes. Ms. Pomeroy confirmed that Eagle Ranch began giving Student accommodations in December 2010. Although she has

never seen an IEP or 504 Plan for Student, he is now receiving tutoring, one-to-one help and more classroom time.

STUDENT'S EXPERT WITNESS

94. Shirin Ansari, Ph.D., testified as an expert witness for Student.²⁷ Dr. Ansari is a neuropsychologist currently employed as the founder and CEO of Center for Learning and Behavior Solutions, Inc., in Orange County. Succinctly put, Dr. Ansari works with children and adolescents with learning and processing issues. She is highly qualified as an expert in special education, and presented as a thorough, meticulous, and highly informative practitioner and witness.

95. Dr. Ansari initially consulted with Parents to determine whether Eagle Ranch was providing educational benefit to Student. In preparation to answer Parents' questions, Dr. Ansari reviewed Student's records and discretely researched Eagle Ranch and WiloStar. She has never met Student. In order to maintain her objectivity, she did not speak with Dr. Knott or Dr. Darmal, to avoid their individual spins. Dr. Ansari did conduct a telephone interview with Janet Hale at WiloStar and reviewed the reports of Dr. Darmal and Dr. Knott, along with Student's educational file. To support her opinions, Dr. Ansari obtained information from multiple sources.

96. Based upon her own research, Dr. Ansari confirmed that WiloStar is a nationally accredited program which employed a credentialed special education teacher who collaborates with Eagle Ranch to create appropriate special education programs

²⁷ Dr. Ansari possesses a Ph.D. in Clinical Psychology, with a specialty in Neuropsychology. She also has an M.S. in Special Education-School Psychology, and a B.S. in Psychology. Dr. Ansari holds a School Psychology Credential, a Resource Specialist Certificate, Special Education Teaching Credential and a Multiple Subject Teaching Credential

and accommodations for students. She further confirmed most of the information provided by Ms. Pomeroy, described above. Dr. Ansari concluded that WiloStar was an appropriate source to provide Student's academic program, and that Student was receiving academic benefit from his individualized program. Dr. Ansari explained there is a significant correlation between therapeutic treatment and academics. The ability to control one's behaviors is needed for academics, and managing behaviors will result in increased academic productivity. With this in mind, Dr. Ansari was not surprised that Student had fallen behind and was just finishing the ninth grade at Eagle Ranch. Upon arrival at Eagle Ranch, Student had gaps and reactive behaviors. He was completely noncompliant, and it took time for him to respond to therapy.

97. Parents also requested that Dr. Ansari provide a second opinion of Student's educational records and the assessments obtained over the years. Commencing with Student's sixth grade year, Dr. Ansari noted that Student clearly had serious issues and lots of symptoms. At that time, she would not have necessarily assessed Student for special education, but she would have called a Student Study Team (SST) meeting to determine if interventions were needed.

98. In the seventh grade, the range in Student's grades and his inconsistent performance was consistent with behaviors associated with ADHD. Further, the e-mails between Mother and teachers indicated that Student was struggling and missing assignments. Dr. Ansari believes these events were significant enough to trigger the District's Child Find duties, and, at minimum, the concerns were sufficient to merit an SST meeting. Dr. Ansari would have assessed Student at this point as requested by Parents. On this point, Dr. Ansari was very clear. In her opinion, if the District received a request for assessment, the District has an obligation to review the student's cumulative file, and history to determine why an assessment is NOT needed. In Student's case, there was significant information to support Mother's request to assess. Later, when Student's

grade point average fell below 2.0, and teacher comments continued to reflect inattentiveness and disorganization, she would have definitely assessed Student.

99. While the 504 Plan addressed Student's needs to some extent, Dr. Ansari opined that Student had more significant issues than organization. Further, based upon Student's cumulative file, the District had to be aware that Student was not meeting educational expectations, as evidenced by his STAR scores.

100. Dr. Ansari reviewed Dr. Knott's assessment. She explained that Student's WISC-IV scores indicated that in non-verbal areas, such as working memory, and executive functioning, Student scored very low. These processing issues are co-morbid with ADHD. Student's WJ-III scores revealed fluency and processing speed difficulties. Dr. Ansari believes that these scores possibly represented a significant learning disability in written language. Further, cognitive abilities are affected by defects in processing. Dr. Ansari concurred with Dr. Knott's recommendations, and further concluded that by October 2009, Student's 504 Plan was not appropriate because Student's organizational problems were a bi-product of his processing deficits. Further, general education could no longer address Student's other significant needs, such as his mood swings.

101. Dr. Ansari reviewed the District's assessment and believes the District had adequate notice that an assessment was needed much earlier than June 2010. Further, the information discussed in Dr. Knott's report, combined with continuing concerns about Student's organization, and failure to complete work, indicated that Student should have been assessed for a learning disability, even though Mother did not renew her request for one. It is noted that Dr. Ansari had the luxury of reviewing files, without the chronology of when the District actually obtained much of the information. As such, when Student's files and reports are reviewed in the context of the total picture, rather than as individual pieces, Dr. Ansari's opinions are easy to follow and accept. Her opinions, however, are expressed in hindsight, and are therefore weighed accordingly.

102. With regards to the District's offer of placement at Kennedy, Dr. Ansari indicated that she was familiar with a self-contained classroom, but did not observe the SDC at Kennedy. Nonetheless, she did not think the SDC would be appropriate for Student. First, Student was already at Eagle Ranch and responding to his therapy there. Further, an unexpected change in placement would be counter-productive, given Student's issues such as abandonment and trust. She would discourage a change in placement from a clinical view. Additionally, she did not believe that the DIS counseling offer was sufficient, as Student was too far out of control. Dr. Ansari opined that Student needed ongoing therapeutic services from a licensed clinical psychologist which the District could not provide. Again, Dr. Ansari's conclusions were made in hindsight and without input from the District describing the ED program.

REQUESTS FOR REIMBURSEMENTS

103. Mother concluded her testimony by identifying the invoices, and payment records of the expenses incurred for Student's placement at Eagle Ranch and related expenses, entered into evidence as Student's Exhibits C3 and D3. Mother provided the invoices and payment records of each tuition payment, each payment to Dr. Nielsen for therapy, and all additional costs claimed for transportation and expenses. Additionally, Mother provided copies of receipts for medical insurance payments which were made directly to Eagle Ranch.

LEGAL CONCLUSIONS

PRELIMINARY ISSUES

1. This special education administrative due process proceeding is brought under the authority of the Individuals with Disabilities Education Act (sometimes IDEA). (See 20 U.S.C. § 1400 et seq.) The primary goal of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that

emphasizes public education and related services.” (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*).)

2. Under the IDEA, the petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, Student is the petitioning party and therefore has the burden of persuasion.

3. OAH does not have jurisdiction to decide claims based upon alleged violations of Section 504 of the Rehabilitation Act of 1973. (Ed. Code § 56501, subd. (a); 29 U.S. § 701 *et seq.*) In this matter, Student’s 504 plans are not at issue. The testimony and evidence presented regarding Student’s 504 Plans, however, are relevant to Student’s issues of Child Find, whether the District should have assessed Student for special education, and whether the District assessed Student in all area of suspected need.

4. The term “free appropriate public education” means special education and related services that the local educational agency provides at public expense, under public supervision and without charge, that meets the standards of the state educational agency, that includes an appropriate preschool, elementary school or secondary school, and that is provided in conformity with the disabled child’s individualized education program. (20 U.S.C. § 1401(8); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

5. 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, 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).) In the context of the IDEA, “special education” refers to the highly individualized educational needs of the particular

student. (*San Rafael Elementary v. California Education Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160 (*San Rafael*).)

6. 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)(A); 34 C.F.R. § 300.34(a)(2006).) In California, “related services” are referred to as “designated instruction and services” or DIS. (Ed. Code, § 56363, subd. (a).)

7. In 1982, the United States Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*).) At that time, the Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially in regards to the development of the disabled child’s IEP, then the assumption is that the child’s program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that a school district must provide the disabled child with a “basic floor of opportunity.” (*Id.* at p. 200.) The Court further noted that an appropriate education under the IDEA does not mean a “potential-maximizing education.” (*Id.* at p. 197, fn. 21.) Instead, school districts are only required to offer a program that “confers some educational benefit upon the handicapped child.” (*Id.* at p. 200.) This remains the law today.

8. The Court further established a two-part test to determine whether a school district has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) The criteria are (1) has the State complied with the procedures set forth in the IDEA, and (2) is the individualized education program developed through the IDEA’s

procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.) As a result, the assistance that the IDEA mandates is limited in scope. The IDEA does not require that school districts do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Instead, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals with that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

9. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*)). To constitute a denial of a FAPE, procedural violations must result in one of the following: the loss of educational opportunity; a serious infringement of the parents' opportunity to participate in the IEP process; or a deprivation of educational benefits. (*Ibid.*) A substantially similar standard was codified in the IDEA. (20 U.S.C. § 1415(f)(3)(E)(ii).)

CHILD FIND

10. Under the IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries, who, either have or are suspected of having disabilities and need special education as a result of those disabilities. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 *et seq.*) This obligation is commonly known as "Child Find." Local educational agencies or school districts are generally responsible for conducting Child

Find activities. A school district's Child Find duties are not dependent on any action or inaction by parents. (34 C.F.R 300.111(a) (2006); Ed. Code, § 56301). Further, Child Find must include children who are suspected of being a child with a disability in need of special education, even though they may be advancing from grade to grade. (34 C.F.R. 300.111(c)(2006).)

11. A school district's Child Find obligation toward a specific child is triggered where there is knowledge of or reason to suspect a disability and reason to suspect that a student may need special education and related services. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F. Supp.2d 1190, 1194.) The "need" for special education and related services, does not include every disabled child or every child who would benefit from special education and related services. While a State may take a broad approach in designating those students who may be suspected of needing special education, the referral requirement is narrower. Federal law, as well as California law, define an individual with exceptional needs as one, who, because of a disability requires instruction and services which cannot be provided with the modification of the regular school program in order to ensure that the child is provided a FAPE. (Ed. Code, § 56026, subd. (b).) It follows, therefore, that a school district is required to refer a student with a disability for special education and related services only after the resources of the regular education program have been considered, and where appropriate, utilized. (Ed. Code, § 56303.) Therefore, when determined on a case-by-case basis, a school district may attempt pre-referral interventions before referring a child for a special education assessment.

12. Nonetheless, the threshold for suspecting that a child has a disability is relatively low, and a school district may still violate its Child Find duties by continuing to provide unsuccessful interventions rather than evaluating the child's need for special education and related services. When there is reason to suspect a child may have a

disability and need special education and related services, the IDEA's initial evaluation provisions kick in, regardless of whether the school district plans to or is currently using RTI (general education interventions strategies) with the student. (*Letter to Zirkel* (OSEP 2011).)

13. A school district's unawareness of a child's possible disability and need for special education will not relieve it of its Child Find obligation if it should have suspected that a child might have a disability, which required special education and related services. A school district's failure to meet its Child Find obligations is a serious matter which can deprive a child of FAPE, if the child should have been identified as needing special education and related services. (*Newman-Crows Landing Unified Sch. Dist.*, 6 ECLPR (SEA CA 2008); OAH Case No. 2007080681.) On the other hand, school districts are not required to "guess" which children have disabilities. (*Independent Sch. Dist. No. 625*, 22 IDELR 920 (SEA MN 1995).)

14. The Child Find regulations under Section 504 and the IDEA are similar, but not identical. Nevertheless, as with the IDEA, Section 504, also requires that a school district must conduct an evaluation of students "who, because of handicap or need, are believed to need special education and related services." (34 C.F.R § 104.35(a)(2006).)

ASSESSMENT AND ELIGIBILITY

15. Child Find does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process which is used to identify those children who are potentially in need of special education and related services. Once a child is identified as potentially needing special education and related services, the school district must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R § 300.301 (2006); Ed. Code, § 56302.1.) Further, a screening is not an evaluation to determine a child's eligibility for special education. (34 C.F.R § 300.302 (2006).)

16. A request for an initial evaluation to determine whether a student is a child with a disability in need of special education and services can be made by either the parent or a public agency. (34 C.F.R. § 300.301(b) (2006).) Further, the IDEA requires that parents be provided with a copy of the procedural safeguards upon the initial referral for evaluation. (34 C.F.R. § 300.504(a)(1) (2006); Ed. Code, § 56301 subd. (d)(2)(A).) While neither the IDEA nor Section 504 require school districts to assess all children for whom evaluations are requested, the school district must give parents notice of the school district's decision not to evaluate their child. (34 C.F.R. § 300.503(a)(3)(2006).)

17. In order to receive special education and related services under the IDEA, a student must meet the definition of one or more of the identified disability categories. As stated above, a student may have a disability, but that disability may not hinder his academic performance in a general education setting. Under the IDEA, a child with a disability is defined as a child who has been evaluated as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities AND who, by reason thereof, needs special education and related services. (34 C.F.R. § 300.8(a)(1)(2006); see *D.R. v. Antelope Valley Union High School Dist.* (C.D. Cal. 2010) 746 F.Supp.2d 1132, 1141-1142.)

18. Further, if a child has one of the identified disabilities, but only needs related services and not special education, the child is not a child with a disability under the IDEA (34 C.F.R. § 300.8 (a)(2)(i)(2006).) However, if the related service that the child requires is considered "special education" under state standards, the child will be eligible under the IDEA. (34 C.F.R. § 300.8(a)(2)(ii)(2006).)

19. "Other Health Impairment" (OHI) is defined as having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that

results in limited alertness with respect to the educational environment, that (1) is due to chronic or acute health problems such as ...attention deficit hyperactivity disorder....*and* (2) adversely affects a child's educational performance. (34 C.F.R. § 300.8 (c)(9)(2006) emphasis added.)

20. Attention Deficit Hyperactivity Disorder (ADHD) is not a specific disabling condition under the IDEA; however, a student with ADHD may be eligible for special education as OHI or by reason of another specific disability. (34 C.F.R. § 300.8 (c)(2006); Ed. Code, § 56339.) Eligibility for ADHD depends upon the manifestation of the disorder in an individual student and must be determined on a case-by-case basis. A student whose educational performance is adversely affected by suspected or diagnosed ADHD and who demonstrates a need for special education by meeting the eligibility criteria in other categories such as OHI, Emotional Disturbance (ED) or Specific Learning Disability (SLD), is entitled to special education and related services. (*Capistrano Unified Sch. Dist.*, 106 LPR 63886 (SEA CA 2006).) In cases where a student's ADHD does not meet the eligibility criteria under the IDEA, a student may still be covered under Section 504 if ADHD substantially limits a major life activity, such as learning.

21. Pursuant to 34 Code of Federal Regulations, section 300.7(c)(4)(i) and California Code of Regulations, title 5, section 3030, subdivision (i), eligibility for special education under the classification of serious emotional disturbance requires that the student exhibit one or more of the following characteristics over a long period of time and to a marked degree, which must 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 relationship 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; or (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

22. A school district determines whether a child has a disability and his educational needs through the evaluation process. "Evaluation" means prescribed procedures "to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." (34 C.F.R. § 300.15 (2006).) California law uses the term "assessment" to describe such procedures. (Ed. Code, § 56302.5.)

23. With regards to the assessment process, special education law references "initial evaluations" (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301 (2006); Ed. Code, § 56320), and "reevaluations." (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (a)(1).) "An initial evaluation is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of that child would constitute a reevaluation." (71 Fed.Reg. 46640 (Aug. 14, 2006).)

24. In performing an assessment, a school district must assess the special needs child in all areas of suspected disability. (Ed. Code, § 56320, subd. (f); see also 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4)(2006)), and must follow the procedures for assessments set forth in Education Code sections 56320-56331. Specifically, a school district: (1) must use testing and assessment materials and procedures that are not racially, culturally or sexually discriminatory. (Ed. Code, § 56320, subd. (a); see also 20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1)(i) (2006).); (2) must provide the student with materials and procedures in the student's native tongue, unless it is clearly not feasible to do so. (Ed. Code, § 56320, subd. (a); see also 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii) (2006).); (3) must provide and administer tests and other

assessment materials in the language and form most likely to yield accurate information on what the student knows and can do academically, developmentally and functionally, unless not feasible. (Ed. Code, § 56320, subd. (b)(1); see also 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii) (2006).); (4) must use tests and other assessment materials for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(2); see also 20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii) (2006).); (5) must have trained and knowledgeable personnel administer tests and other assessment materials in accordance with any instructions provided by the producer of the assessments. (Ed. Code, §§ 56320, subd. (b)(3), 56322; see also 20 U.S.C. § 1414(b)(3)(A)(iv)-(v); 34 C.F.R. § 300.304(c)(1)(iv)-(v) (2006).); (6) must include evaluation materials that are tailored to assess specific areas of educational need and are not merely evaluation materials designed to provide a single intelligence quotient. (Ed. Code, § 56320, subd. (c); see also 34 C.F.R. § 300.304(c)(2) (2006)); and (7) cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2) (2006).) When performing an assessment of a child with impaired sensory, manual or speaking skills, a school district must select and administer tests that best ensure that the test results accurately reflect the child's aptitude, achievement level or whatever other factor the test purports to measure, rather than reflecting the child's impaired sensory, manual or speaking skills. (Ed. Code, § 56320, subd. (d); see also 34 C.F.R. § 300.304(c)(3)(2006).) Additionally, California requires that a school district must have a credentialed school psychologist administer individual tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).) Further, a credentialed school psychologist must conduct the psychological assessment of a student. (Ed. Code, § 56324, subd. (a).)

THE INDIVIDUALIZED EDUCATION PLAN AND ITS REQUIREMENTS

25. Once a child is assessed, a school district is required to hold a meeting to determine if the child is eligible for special education and related services. If the child is eligible, then the team must create and individualized educational plan for the child. An IEP is a written documents that includes a statement of the present levels of performance of the student; a statement of measurable annual goals designed to meet the student's needs that result from the disability; a description of the manner in which the progress of the student towards meeting the annual goals will be measured; the specific services to be provided; the extent to which the student can participate in regular educational programs; the projected initiation date and anticipated duration; and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414(d)(1)(A)(i)(II), (III); 34 C.F.R. § 300.320 (a)(2), (3) (2006); Ed. Code, § 56345, subd. (a)(2), (3).)

26. As part of the IEP meeting, the IEP team, and other qualified professionals, as appropriate, must review existing evaluation data on the student, including (1) evaluations and information provided by the parent of the child; (2) current classroom-based, local or state assessments, and classroom-based observations, and (3) observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1)(A)(i)-(iii); 34 C.F.R. § 300.305(a)(1)(i)-(iii) (2006); Ed. Code, § 56381, subd. (b)(1).)

27. An IEP team is composed of the parents of the child with a disability; at least one of the child's regular education teachers if the student is or may be participating in the regular education environment; at least one of the child's special education teachers or, if appropriate, at least one of the child's special education providers; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the student's needs, and is knowledgeable about the general education curriculum and the availability of resources;

a person who can interpret the instructional implications of evaluation results; other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, whenever appropriate. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321 (a) (2006); Ed. Code, § 56341, subd. (b).) A school district is responsible for determining which of its personnel will fill the roles for the district's required participants at an IEP team meeting. (71 Fed.Reg. 46674 (Aug. 14, 2006).) The regular education teacher who is a member of the IEP team need not be the child's current regular education teacher. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 939.) The requirement that the IEP team include a regular education teacher if the student is or may be participating in a regular education classroom is a mandatory, not discretionary, requirement. (*M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394F.3d 634, 643.)

PARENTAL PARTICIPATION:

28. The IDEA considers parental participation a fundamental part of the IEP development process. A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*); *W.G. v. Board of Trustees of Target Range School Dist., No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) The IEP process provides that the parents and school personnel are equal partners in decision-making, and the IEP team must consider the parents' concerns and the information they provide regarding their child. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed.Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J., supra*, 267 F.3d at p. 890.)

29. Procedural violations that interfere with parental participation in the development of the IEP “undermine the very essence of the IDEA.” (*Amanda J.*, *supra*, 267 F.3d at p. 892.) An IEP cannot address the child’s unique needs if the people most familiar with the child’s needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Target Range*, *supra*, 960 F.2d at p. 1484.) A school district cannot refuse to provide services requested by the parents without considering the child’s unique needs or potential effectiveness of the program. (*Deal v. Hamilton County Bd. of Education* (6th Cir. 2004) 392 F.3d 840, 857.)

30. According to the Education Department, being an equal participant is defined as participating in the discussion of their child’s need for special education and related services, and joining with the other members of the IEP team to decide what services the school district must deliver in order to provide a FAPE. (*Notice of Interpretation, Appendix A to 34 C.F.R. Part 300*, Question 5 (1999 regulations).)

31. The IDEA does not contemplate voting or majority rule in developing a student’s IEP. Instead, the goal is to discuss the recommendations of all team members, and reach consensus about the program that should be provided to the student. (*Notice of Interpretation, Appendix A to 34 C.F.R. Part 300*, Question 9 (1999 regulations).) In cases of no consensus, the school district is ultimately responsible for ensuring that a student is offered an appropriate program. Therefore, if all team members do not agree, it is up to the school district to determine the appropriate program. (*Letters to Richards*, 55 IDELR 107 (OSEP 2010).)

BEHAVIOR PLANS

32. An IEP team must consider whether a child’s behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) If an IEP team determines that it does, the team must consider

the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).) There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. (See Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).)

33. In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) A school district must consider implementation of a BIP prior to changing a student's placement to a more restrictive setting. (*Oberti v. Board of Education of Borough of Clementon School Dist.* (3rd Cir. 1993) 995 F. 2d 204.) The only time a school district can opt for removal without trying a BIP is when the student's behavior is "extreme and dangerous to himself and others." (*Bonita Unified Sch. Dist.*, 27 IDELR 248 (SEA CA 1997).) Further, an IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028 (*Neosho*); *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

34. A BIP is designed to assist a student whose behavior impedes his own learning or the learning of others. (34 C.F.R § 300.324(a)(2)(i)(2006).) Its purpose is to

assist a student with behavioral problems remain in his least restrictive environment (LRE). Although the IDEA requires school districts to consider the need for a BIP when a student exhibits problem behavior, the type of behavior required to trigger a BIP is not specified in the IDEA, nor does the IDEA provide any requirements for the BIP format or contents. While the failure to develop a BIP where required can deny FAPE, the lack of a written or formal plan, specifically called a BIP, is not a per se denial of FAPE. (*Neosho, supra*, 315 F.3d at p. 1028; *E.H. v. Board of Education of Shenendehowa Central School District*, 53 IDELR 141 (2nd Cir, cert. denied, 130 S. Ct. 2064 (2010).) Further, a school district is not required to address behavior problems which occur outside of school, if the student demonstrates educational progress in the classroom. (*San Rafael, supra*, 482 F. Supp.2d at pp. 1160-1164).

PROVISION OF GOALS

35. Each IEP must include a statement of measureable annual goals designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from his disability. (34 C.F.R § 300.320 (a)(2)(i)(2006).) In essence, annual goals are statements that describe what a student with a disability can reasonably be expected to accomplish within a 12 month period in the student's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988).) The IDEA, however, does not identify the amount of specificity that is required for IEP goals. Vague or immeasurable goals may be deficient; however, a goal is sufficient when it contains simply enough information for service providers and the IEP team to determine whether the student is making progress.

36. An IEP is not required to include goals and objectives for related services, unless the student receives instruction during the provision of a related service. Excluded services are those only necessary to allow the student to attend school, and

are not intended to provide an educational benefit in itself. (*Letter to Hayden*, 22 IDELR 501 (OSEP 1994); *Letter to Smith*, 23 IDELR 344 (OSEP 1995).)

PLACEMENT AND THE LEAST RESTRICTIVE ENVIRONMENT

37. Compliance with the LRE requirement is an important part of determining appropriateness of placements for students with disabilities. The school district must ensure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of student's with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. (34 C.F.R. §§ 300.115 through 300.120 (2006).) A child with a disability shall not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e)(2006).) In determining the program placement of the student, a school district shall ensure that the placement decisions and the placement are made in accordance with federal requirements regarding placing the child in the LRE. (Ed. Code, § 56342, subd (b).)

38. The LRE requirement is a statutory presumption, not a mandate. (*OSEP Memorandum 95-9*, 21 IDELR 1152, (OSEP 1994).) Although the IDEA expresses a strong preference for mainstreaming, a school district must nonetheless provide a student with a FAPE in which placement on the continuum is based upon the individual needs of the student. As example, inclusion in regular education classroom is not required in situations where the student will not receive a sufficient educational benefit, even with the provision of supplementary aides and services.

39. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced:

(1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Vashon Island, supra*, 337 F.3d at pp. 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

40. Generally, a placement is deemed more restrictive the less it resembles a regular classroom environment. Although the IDEA requires the school district to ensure a continuum of alternative placements, each individual student with a disability must be provided an appropriate placement in his LRE. The LRE begins in the regular classroom and placements become progressively more restrictive as one moves along the continuum.

RESIDENTIAL PLACEMENT:

41. The IDEA does not define a therapeutic placement; however, both day schools and residential facilities can qualify as therapeutic placements. By their very nature, therapeutic placements require a student's removal from the general education environment. As a result, a therapeutic placement is one of the most restrictive placements on the LRE continuum. (34 C.F.R. § 300.115(2006).) Given their restrictive nature, removal of a student with disabilities to a residential setting complies with the LRE mandate in only extremely limited situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area Sch. Dist. v. Scott P.*, 22 IDELR 1017 (3rd Cir. 1995).) Further, some residential placements are considered to be more restrictive than others. Generally, the further a residential placement is located from a student's home and community, the more restrictive it is considered to be. (*Todd D. v. Andrews*, 17 IDELR 986 (11th Cir. 1991).)

42. A school district must provide a residential placement to a student with a disability, if such a placement is necessary to provide the student with special education and related services. (34 C.F.R. § 300.104 (2006).) The fact that a student exhibits emotional or behavioral difficulties outside of school will not in itself demonstrate a need for a residential placement. (see *Ashland School. Dist. v. Parents of Student R.J.*, 109 LRP 76642 (9th Cir. 2009).) If a student's social, emotional and mental health problems are distinct from the learning process, and the student is able to achieve a reasonable educational benefit and make meaningful educational progress in spite of these problems, therapeutic placement will not be considered educationally necessary. On the other hand, if the student's educational needs are inseparable from his emotional needs, and an individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to benefit from special education, the therapeutic and habilitation services may qualify as related services under IDEA. In such cases, the LEA is responsible for ensuring that the entire cost of that child's placement is without cost to the parents. (*Vander Malle v. Ambach*, 559 IDELR 164 (S.D.N.Y. 1987).)

43. When it comes to the procedures and mechanisms used to fund residential placements, the Education Department has recognized that they are state-specific and may include cost-sharing arrangements between the LEA, SEA, and other local or state agencies, such as Mental Health. Regardless, the LEA or school district is ultimately responsible for providing a disabled child with residential placement at no cost where that placement is deemed educationally necessary. (*Letter to Lever*, 211 IDELR 185 (OSEP 1979).)

44. School districts are not required to pay for a unilateral residential placement that does not contain an appropriate educational component. In order for a parent to be reimbursed for a unilateral residential placement, the placement selected

by parents must provide the student with an appropriate educational program. In order to be appropriate under the IDEA, the residential placement must address the child's unique needs. (*Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 16 IDELR 944 (9th Cir. 1990).)

45. A placement decision is a determination of where a school district will implement a student's IEP in the least restrictive environment. An IEP must be capable of being delivered in the placement. Therefore, school districts must formulate the IEP before making a placement decision. (34 C.F.R. § 300.116 (b)(2)(2006).) The mantra is, IEP first, placement second.

REQUIREMENT OF WRITTEN OFFER OF PLACEMENT AND SERVICES

46. The placement offer must be in writing, consistent with the IDEA's requirement of prior written notice. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1526.) A formal written offer is necessary for the parents to understand exactly what the school district is offering so that the parent can determine whether the offer is appropriate. (*Ibid.*) The requirement of a specific, formal written offer serves an important purpose that is not merely technical. (*Ibid.*) The requirement must be enforced rigorously. (*Ibid.*) A school district must provide a parent a clear, coherent written offer that the parent can reasonably evaluate in order to decide whether to accept or appeal the offer. (*Glendale Unified Sch. Dist. v. Almasi*, (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107.)

47. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149.) An IEP is a snapshot, not a retrospective. (*Ibid.*, citing *Furhmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

REIMBURSEMENT AND COMPENSATORY EDUCATION

48. Federal law provides that a local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i).)

49. Under California law, a residential placement for a student with a disability who is seriously emotionally disturbed may be made outside of California only when no in-state facility can meet the student's needs and only when the requirements of subsections (d) and (e) have been met. (Cal. Code Regs., tit. 2 § 60100, subd. (h).) An out-of-state placement shall be made only in residential programs that meet the requirements of Welfare and Institutions Code sections 11460, subdivisions (c)(2) through (c)(3).

50. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374, [105 S. Ct. 1996, 85 L.Ed.2d 385]; 20 U.S.C. § 1415.) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.*) The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (6th Cir. 1986) 790 F.2d 1153, 1161.) However, the parents' placement still must

meet certain basic requirement of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361, 126 L.Ed.2d 284].)

LEGAL ANALYSIS

51. Student contends that the District failed to provide Student with a FAPE for the 2009-2010 school year. The crux of this issue lies in the determination of whether the District ignored its Child Find obligation and failed to assess Student for special education and related services. Dr. Frank Donovan, the Executive Director of the Greater Anaheim SELPA, acknowledged that a school district has an affirmative and continuing obligation to locate and evaluate those children who are suspected of having a disability and are in need of special education. (Legal Conclusion 10; Factual Finding 5.) Both Dr. Donovan and Kathleen Wohlgemuth provided credible testimony, confirming that the District, through the SELPA, had appropriate procedures and programs in place to inform the public about Child Find. Both also indicated that the school district has an equal obligation to exhaust other means of assisting a student before assessing for special education eligibility. Therefore, compliance with a school district's Child Find duty does not necessarily result in an assessment for special education, if the child's special needs can be met while remaining in the LRE. (Legal Conclusion 11.) The District maintains a menu of supports and services which are available in general education and do not require special education eligibility. One of these supports is a 504 Plan. The District had appropriate Child Find procedures in place, and was aware of its legal obligations to identify and assess. (Legal Conclusions 11 and 12; Factual Findings 5 and 6.)

52. The issue narrows to a determination of whether or not the District complied with its Child Find obligations in relation to Student specifically. In other words, at what point, if any, in the 2009-2010 school year was there sufficient reason to

suspect that Student might have a disability which would require special education and related services. This determination is based on subjective interpretations, which, at a specific time, would reasonably lead one to suspect Student might have a disability which could not be serviced or supported in general education. (Legal Conclusions 11, 12, and 13.) Given the information presented in this matter, it is important to emphasize that the parties cannot be judged in hindsight, and the issues cannot be considered retroactively. (Legal Conclusion 47.)

53. At the beginning of the 2009-2010 school year, Student had a 504 Plan which was developed on April 28, 2009. In a practical sense, the information exchanged at the 504 meeting addressed the District's Child Find obligation at that time, as the 504 Plan evidenced that the District believed it could address Student's problems in the LRE of general education supports. (Legal Conclusions 10 and 11; Factual Findings 15, 16, and 17.) Subsequent to the creation of this 504 Plan, Student participated in several general education support programs and interventions such as the "Ramp Up" Program and the Study Skills class. Student was successful in these programs, which was reflected in his first quarter grades. (Factual Findings 19 and 32.) Given Student's positive response to the 504 Plan, the District reviewed and renewed the 504 Plan on October 28, 2009. (Factual Findings 30, 31 and 32.) At this time there was no reason to suspect that Student's ADHD and organization difficulties could not be addressed through the 504 Plan, without specialized instruction.

54. Dr. Knott assessed Student over the summer of 2009. (Factual Finding 28.) While Dr. Knott attended Student's October 28th 504 meeting with Parents, she did not provide the District with a copy of her assessment report until after the conclusion of the meeting. As a result, the information contained in her assessment was not made available to the District for consideration as part of the 504 meeting. Dr. Darmal, Dr. Knott, and Dr. Asari's testimony regarding the appropriateness or the

inappropriateness of the 504 Plan is not relevant in a due process hearing, since OAH does not have jurisdiction to determine such claims. (Legal Conclusion 3.) Due to the Student's success in general education programs and interventions, the District had no further reason to suspect that Student had additional issues which required special education and related services.

55. Once the District received Dr. Knott's assessment report, the District had an obligation to consider its contents and conclusions. Ms. Bush reviewed the report and discussed it with Ms. Dortch. (Factual Finding 31.) Ms. Bush considered Dr. Knott's assessment results, found them valid, but disagreed with their interpretations. (Factual Finding 31.) After administering the WISC-IV and the WJ-III, Dr. Knott found significant weaknesses in several areas which suggested possible processing deficits. Dr. Knott concluded that Student's level of learning and attention difficulties substantially limited his performance in several areas of major life activities, including attention, concentration, and the processing of both auditory and visual information. To Dr. Knott, her findings suggested that Student may have a specific learning disability. (Factual Findings 22, 23, and 27.) Dr. Ansari, who reviewed Student's scores of the WISC-IV and the WJ-III, agreed with Dr. Knott, and added that Student's ADHD was co-morbid with his processing deficits. (Factual Findings 100 and 101.) The District disagreed with Dr. Knott's interpretation of Student's scores and believed that, in the totality of the assessment, Student did not show a consistent discrepancy and his grades did not reflect a learning disability. (Factual Finding 31.) Dr. Knott's conclusions are more persuasive in relation to the Child Find issue. During the second and third quarters of the 2009-2010 school year, Student's grades began to creep downward. (Factual Finding 33.) When compounded with Student's once again spiraling low grades, his extremely poor scores on the STAR testing, and his apparent failure to retain what he learned in the Study Skills class (Factual Findings 34 and 35), it becomes more than mere suspicion

that Student's continuing decline might be connected to a processing deficit or learning disability. The threshold for suspecting that a child has a disability is relatively low, and a school district may violate its Child Find obligation by continuing to provide an unsuccessful intervention rather than assess the child. (Legal Conclusion 12.) Student's rapid decline in the third quarter also suggests that the 504 Plan was no longer working and that he might require services and supports not available outside of a special education program. As of March 17, 2010, the date Ms. Dortch noted the drop in Student's grades, (Factual Finding 35), it was clear that Student was academically struggling, despite his 504 supports. The District Child Find obligation should have triggered at that time, as the District had sufficient information to reasonably suspect that Student might have a learning disability which required special education and related services.

56. The District's Child Find failure, along with its accompanying failure to assess Student for a suspected learning disability are procedural violations of the IDEA. However, not every procedural violation is sufficient to make a finding that Student has been denied a FAPE. (Legal Conclusion 9.) The Child Find trigger date is on or about March 17, 2010. On April 20, 2010, only one month later, Parent requested that Student be given a comprehensive psychoeducational assessment. The District agreed to do so. On April 29, 2010, Parents unilaterally removed Student from school. (Factual Findings 39, 40, and 41.) Student has not demonstrated that he suffered a loss of educational opportunity or was deprived of educational benefits during this short period of time. As such, the District's failure to assess Student pursuant to its Child Find obligation did not rise to a denial of FAPE. (Legal Conclusion 9.)

57. It bears repeating, that the requirements relating to an initial evaluation are separate and distinct from a school district's child find obligation under the IDEA. Child Find is the screening process used to identify those children who are potentially in

need of special education and related services. Neither Child Find nor an initial assessment guarantees eligibility for special education. (Legal Conclusions 15 through 18.) While Dr. Knott's assessment may have provided sufficient information to *suspect* a learning disability, the District's initial assessment of June 2, 2010, which included Dr. Knott's assessment scores, did not result in a determination of eligibility of SLD. Student did not dispute the validity of the WISC-IV or the WJ-III scores contained in the District's assessment or any other procedural facets of the assessment (Legal Conclusion 24), as the scores were those reported in Dr. Knott's assessment. (Factual Finding 52.) Further, by the time of the initial IEP meeting on September 15, 2010, Parents and Dr. Knott had all but abandoned the SLD eligibility issue. (Factual Findings 22, 23, 27, 31, 49, 52, 53, 54, 59, and 60.) Although Dr. Ansari opined that Student should have been assessed more fully and qualified as SLD, her opinion was based retrospectively on her review of all of Student's assessments. (Factual Finding 101.) The IEP team found Student eligible for special education as ED and OHI, and the IEP presented on September 15, 2010, addressed both areas of Student's identified needs. The District did not fail to assess Student in all areas of suspected need. Further, the District did not fail to provide Student with goals in all areas of need.

58. Student also contends that for the 2009-2010 school year, the District failed to offer Student appropriate behavior interventions. A Behavior Intervention Plan is designed to assist a student whose behavior impedes his learning or the learning of others. The purpose is to assist a student with behavior problems to remain in the LRE. (Legal Conclusion 34.) It is clear from the assessments of both Dr. Darmal and Dr. Knott that Student experienced extreme behavioral problems throughout his life. Student manifested these behaviors of extreme anger, hostility, and violence exclusively outside of school. Student's affect at school was that of a happy-go-lucky kid, who was compliant in class, well-liked by teachers, and eager to please. (Factual Finding 47.)

Further, Student's teachers were surprised to learn that Student had been placed in a RTC. (Factual Findings 46 and 47.) Student's lying, stealing, and forging signatures only became evident at school, shortly before he was removed to Eagle Ranch. (Factual Finding 35.) Given Student's generally compliant and cooperative behavior at school, there was no reason for the District to prepare a BIP. Further, the District is not required to develop a behavior plan where the behaviors occur outside of school, if the Student is demonstrating some educational progress in the classroom (Legal Conclusion 34.) The District did not deny Student a FAPE by failing to create a behavior plan.

59. In summary, during the 2009-2010 school year, the District failed in its Child Find obligation when it failed to assess Student for suspected learning disabilities; however, given the short period of time between the date the District should have suspected that Student might have a learning disability, and the date when the District agreed to assess Student, the District's procedural violation did not rise to a denial of FAPE.

60. Student's primary issue in this entire matter revolves around Student's placement at Eagle Ranch. As previously reported, the District agreed to assess Student pursuant to Mother's request April 20, 2011. On April 29, 2010, Parent notified the District that they were removing Student from Walker, and placing him at Eagle Ranch. Parents' selection of Eagle Ranch was a unilateral decision, and Student was placed at Eagle Ranch prior to being assessed, or determined eligible for special education and related services. (Factual Findings 39 and 40.) At the meeting held on May 10, 2010, Parents and Dr. Knott finally provided the District with a clear history and description of Student's dangerous behaviors. (Factual Findings 42, 43, 44, 45, and 49.) Having been presented with significant new information, the District attempted to make an AB3632 referral concurrently with the District's assessment of Student. It is undisputed that the

District completed its assessment of Student and scheduled Student's initial IEP meeting on September 15, 2010, in a timely manner pursuant to statutory timelines.

61. Despite the District's attempts to have OCHCA prepare a concurrent AB3632 assessment, OCHCA rejected Student's assessment packet, and refused to process Student's AB3632 referral until the District provided additional information, including Student's IEP. (Factual Findings 61 and 62.)

62. Compliance with LRE requirements is an important part of determining the appropriateness of a student's placement. The IEP team is required to consider a continuum of possible placements for a student when selecting a placement for a student. Residential placement, by its very nature, is one of the most restrictive placements on the LRE continuum. (Legal Conclusions 37 through 45.) As of the September 15 IEP date, OCHCA had not yet assessed Student. Therefore, in considering the continuum of placements available for Student, the IEP team was unable to consider an RTC. (Legal Conclusions 40 and 41.)

63. The District argues that, based upon Student's present levels of performance as the District knew them to be in April 2010, the IEP offer of placement in an ED special day class at Kennedy High School with DIS counseling and goals which addressed Student's ADHD needs was reasonably calculated to allow Student to receive educational benefit. (Legal Conclusions 7 and 8.) Admittedly, the IEP must be evaluated in light of the information available at the time it was developed. (Legal Conclusion 47.) In doing so, however, the District cannot ignore the information provided on May 10, 2010, by Dr. Knott, which clearly defined Student's violent and destructive behaviors. (Factual Findings 42 through 45.) The severity of Student's behaviors was no secret to the District, and the District's actions to obtain a concurrent assessment from OCHCA, further belied an assumption that the District considered Student's situation to be serious enough for RTC placement. (Factual Findings 42, through 46, 50, and 51.) The

fact that the District could not offer an RTC placement in September, does not equate to a determination that Student did not *need* an RTC placement. Based upon the information from Parents, Dr. Knott, and the staff at Eagle Ranch, and the District's own notes, it was clear that Student was not ready to return home to attend a day program at Kennedy, no matter how impressive the ED program at Kennedy might be. (Factual Findings 69 through 72.) Therefore, the September 15, 2010 IEP offer of placement in the ED SDC Program at Kennedy was not reasonably calculated to enable Student to obtain educational benefit. (Legal Conclusions 7 and 8.) The District did not make an appropriate offer of placement for Student, and thereby denied Student a FAPE as of September 15, 2010.

64. Once OCHCA completed its AB3632 assessment which recommended RTC placement, and its representative attended the January 24, 2011 IEP meeting, the District had sufficient information to determine Student's needs versus the LRE considerations, (Legal Conclusions 40 through 42), and appropriately revised its placement offer to an RTC, (Factual Findings 52 through 63, 73 through 84, and 102.). This offer was made in consideration of all relevant information available to the District at that time. The fact that Parents insisted on placement at Eagle Ranch has no bearing on the validity of the District's placement offer. It is undisputed that Eagle Ranch is an out-of-state RTC which is operated for profit. It is undisputed that Eagle Ranch is not credentialed with the State of California. Further, neither the District nor OAH may make a prospective placement of a student in an RTC which violates California law. (Legal Conclusion 49.) The District fulfilled its obligation to provide Student a FAPE when it offered an RTC placement, the offer of which, was reasonably calculated to enable Student to make some progress in that program. (Legal Conclusion 8.)

65. In summary, the District's September 15, 2010 offer of placement at Kennedy failed to provide Student an appropriate placement, and denied Student a

FAPE from the date it was offered, on September 15, 2010, until it was amended to an RTC placement at the IEP meeting on January 25, 2011. Parents are not required to accept the District's offer of RTC placement, and may elect to maintain Student at Eagle Ranch as a privately placed student.

66. When a school district denies a child with a disability a FAPE, the child is entitled to compensatory relief that is appropriate in light of the purposes of the IDEA, (Legal Conclusion 50.). On the other hand, school districts are not required to pay for unilateral RTC placements that do not contain an appropriate educational component. In order to be appropriate under the IDEA, the RTC must address the child's unique needs, (Legal Conclusion 44.). However, the placement selected by Parents is not required to be an exact proper placement (Legal Conclusion 44.).

67. Admittedly, Eagle Ranch does not favorably compare to other more sophisticated RTCs. Eagle Ranch, however, presents a program which primarily addresses social/emotional problems, and is suited to those students who are not doing well in school. (Factual Finding 88.) Eagle Ranch provides a highly structured and controlled environment. The therapeutic methodology of the Value System may not be a traditional point system, but Student appears to be benefiting from his placement, (Factual Findings 86 through 89.). Academically, Eagle Ranch's association with WiloStar is plagued with educational concerns, which may well be one of the reasons Eagle Ranch lacks certification with California. It is clear that the educational component is not providing Student with a special education program, (Factual Finding 93.). Student's progress in completing the eighth grade has been very slow. Nonetheless, the WiloStar program is an accredited educational program and course credits are transferrable to California school. This information was independently confirmed by Dr.Ashiri, (Factual Findings 90, 91, 92, 93, and 96), and Student is receiving some educational benefit from the program. As a result, Student's placement at Eagle Ranch sufficiently addresses

Student's unique needs to qualify for some reimbursement of the costs of Student's education at Eagle Ranch.

68. Parents invoices for the Student's expenses for tuition, counseling, and transportation and related costs have been entered into evidence as Student's Exhibits C3 and D3. Based upon those invoices and payment receipts, the District shall reimburse Parents for Student's placement at Eagle Ranch for the period of time the District maintained its offer of placement as the SDC at Kennedy which denied Student a FAPE from September 15, 2010 to January 25, 2011. Parents are entitled to reimbursement of Student's monthly tuition at Eagle Ranch for the period of October 1, 2010 to February 1, 2011, in the amount of \$24,000.00. Parents are entitled to reimbursement of Student's counseling sessions with Dr. Nielsen for the period of October 1, 2010 to February 1, 2011, in the amount of \$480.00. Parents are entitled to reimbursement for Student's therapy related visits expenses for December 24 and 28, 2010, in the amount of \$710.00. Based upon these specific reimbursement amounts, the District shall reimburse Parents in the total amount of \$25,190.00.

ORDER

1. Student has failed to establish that the District denied Student a FAPE for the 2009-2010 school year;
2. The District's offer of placement in the SCD/ED Program at Kennedy High school denied Student a FAPE for the period of September 15, 2010 to January 25, 2011;
3. The District is ordered to reimburse Parents for Student's RTC placement for the period of October 1, 2010 to February 1, 2011, in total amount of \$25,190.00

PREVAILING PARTY

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

1. The District prevailed on Issue 1;
2. Student prevailed on Issue 2.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: January 20, 2012

_____/s/

JUDITH PASEWARK

Administrative Law Judge

Office of Administrative Hearings