

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012110571

v.

ANTIOCH UNIFIED SCHOOL DISTRICT
AND PITTSBURG UNIFIED SCHOOL
DISTRICT.

DECISION

Administrative Law Judge (ALJ) Robert G. Martin, from the Office of Administrative Hearings (OAH), State of California, heard this matter on May 6, 7 and 8, 2013 in Pittsburg, California.

Attorney Gail Hodes represented Student. Student attended on May 6 and in the afternoon on May 8, 2013.¹ Student's Mother (Mother) attended all three days of the hearing. Student's Father (Father) attended on May 6 and May 7, 2013. Attorney Jean Adams from Ms. Hodes' office attended the hearing on May 6, 2013.

Attorneys Lenore Silverman and Melissa Phung represented Antioch Unified School District (AUSD) and Pittsburg Unified School District (PUSD). AUSD Special Education Director David Wax and PUSD Special Education Director Deborah Daly attended all three days of the hearing.

¹ Student turned 18 years old before the hearing commenced. Student executed a limited power of attorney authorizing her Mother to act on Student's behalf with respect to Student's educational rights.

Student filed her initial request for due process hearing on November 19, 2012. The complaint was amended effective February 11, 2013, restarting all timelines. On March 11, 2013, for good cause shown, OAH granted the request of all parties to continue the hearing.

At the close of the hearing on May 8, 2013, the ALJ granted the parties' request for a continuance to file written closing arguments by May 24, 2013. The record was closed and the matter was submitted upon receipt of written closing arguments on May 24, 2013.

ISSUES²

- I. Did AUSD deny Student a free appropriate public education (FAPE) by failing in its child find obligations from March 2011 through the day prior to the start of the 2011-2012 school year by:
 - a. Failing to assess Student for potential eligibility for special education and related services under the category of other health impairment (OHI)?
 - b. Failing to make Student eligible for special education under the category of OHI?
 - c. Failing to provide an appropriate special education and related services to address Student's unique needs?
- II. Did PUSD deny Student a FAPE by failing in its child find obligations from the start of the 2012-2012 school year until the date of hearing by:
 - a. Failing to assess Student for potential eligibility for special education and related services under the category of OHI?

² The order and language of the issues as articulated in the Prehearing Conference Order have been changed to clarify, not modify, the issues based on the presentation of evidence at the hearing.

- b. Failing to make Student eligible for special education under the category of OHI?
 - c. Failing to provide an appropriate special education and related services to address Student's unique needs?
- III. Did AUSD and PUSD violate the procedural rights of Student and her Mother and Father (Parents) by failing to provide copies of emails and letters included in Student's education records when responding to Parents' request for Student's education records?

FACTUAL FINDINGS

1. At the time of the hearing, Student was 18 years old and a senior at Pittsburg High School in PUSD. Student was expected to graduate with a regular high school diploma on June 12, 2013.

2. Student performed well academically in elementary and middle school. Student continued to do well in high school up to Spring semester 2011 in her tenth grade year of high school. Student earned A's or B's in all subjects and achieved a 3.94 out of 4.00 grade point average (GPA) in her ninth grade Fall semester, a 3.33 GPA in her ninth grade Spring semester, and a 3.43 GPA in her tenth grade Fall semester. Student's long-standing educational goal was to attend the University of California, Berkeley (UC Berkeley), the University of California, Los Angeles (UCLA), the University of Southern California (USC), or California Polytechnic, San Luis Obispo (Cal Poly, SLO), to study architectural design. Student had never been suspected of having any disability, and was enrolled in general education without any accommodations, modifications or special education services.

3. At hearing, Student's personality, character and academic abilities were praised by all witnesses. For example, Student's 12th grade English teacher called her an "ideal student," describing Student as mature, helpful to other students, never

complaining, focused on her goals, including her long-time goal of becoming an architect, and willing to do her utmost to complete her work. In sum, Student's teacher testified, "If I could have a whole room of [Student's name], I'd be happy."

4. In late January 2011, Student began experiencing symptoms of what she at first thought was a cold. However, her illness progressed to the point where Student was hospitalized for two to three weeks in March 2011. During this initial hospitalization, the results of MRI scans and other diagnostic tests led Student's doctors to diagnose Student as likely suffering from multiple sclerosis (MS). Subsequent testing following a relapse in September 2011 confirmed a more specific diagnosis of relapsing remitting MS.

5. MS is a chronic illness caused by an immune system attack on the nerves of the brain, spinal cord and optic nerves. Damage caused by inflammation disrupts nerve impulses traveling to and from the brain, causing a wide range of symptoms that vary from patient to patient. In relapsing remitting MS, patients experience periodic flare-ups of the disease (relapses) with new or worsening symptoms, followed by relatively stable periods of remission during which symptoms may lessen or disappear.

6. Student experienced relapses approximately every three months from February 2011 through July 2012, followed by a seven month period of remission prior to her most recent relapse in February 2013. During these relapses, Student experienced upper respiratory congestion, nausea and vomiting, blurred vision, pain with eye movements, numbness and weakness of her right arm, dizziness, poor balance, general weakness, radiating spinal pain, and extreme fatigue. Student was hospitalized for varying lengths of time for treatment of her relapses, including a two week hospitalization in February 2011, and shorter hospitalizations during the school year in October 2011, March 2012 and February 2013. Following her relapses, Student's

symptoms would slowly improve over several days or weeks to the point where Student could resume normal activities, including attending school.

7. During periods of remission, Student's symptoms lessened but did not disappear. Student experienced pain, fatigue, lack of stamina, weakness, balance problems that made walking difficult, nausea, blurred vision, anxiety and panic attacks, as well as mood swings caused by Student's steroid MS medications. Student's symptoms, especially weakness and lack of balance, were typically most severe in the morning, improved around midday, and would worsen in the late afternoon as Student grew tired.

8. Student's MS caused her to be frequently absent from school. Student missed over two months of school in February to May 2011, and her attendance records indicate that she missed 58 school days in the 2011-2012 school year, and 11 school days during the 2012-2013 school year, up to the date of hearing. At hearing, there was no evidence or suggestion that most or all of Student's absences were due to anything other than her MS.

AUSD'S RESPONSE TO STUDENT'S ILLNESS

9. Student was a sophomore attending Antioch High School in AUSD when she became ill and was hospitalized in February 2011. Mother notified Antioch HS administrators of Student's MS diagnosis on or about March 23, 2011, while Student was still hospitalized. Student remained out of school until early May, 2011.

10. To better understand Student's condition and develop a plan for assisting Student, Antioch HS assistant principal Jason Murphy researched MS on the internet. He learned that MS patients may experience fatigue, pain, decreased strength, difficulty with stability when walking, and difficulty with vision focus. Mr. Murphy learned that MS is cyclical, and he understood that Student's MS might cause Student to continue to miss school following her initial flare-up.

11. While Student was out of school in the hospital and at home recovering from her initial flare-up of MS, Antioch HS considered options for assisting Student. These included enrolling Student in a program to provide individualized instruction in the home or hospital (Ed. Code, § 48206.3), or implementing accommodations for Student in her regular classes under a "504 Plan"³ that would allow Student to attend school on a partial day basis. Special education was not considered. In April 2011, Mother told Antioch HS administrators that Student did not want to be enrolled in a home and hospital instruction program because her physician had recommended that Student's adjustment to her lifelong disease should include participating as much as possible in regular classes. No concerns were raised regarding Student's cognitive functioning. As Student herself testified, "I was weak but I could think."

³ A "504 Plan" is a document created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973 (Section 504). (29 U.S.C. § 794; 34 C.F.R. § 104.1 (2006) et. seq. [implementing regulations].) Section 504 requires school districts to provide "regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." (34 C.F.R. § 104.33.) Any student with a disability may be entitled to a 504 Plan that provides accommodations and modifications ensuring the student's equal access to an education. By contrast, the IDEA applies only to a student whose disability must be addressed through special education services. Although Section 504 and IDEA eligibility may overlap, the eligibility criteria, services and procedures under the IDEA are distinct. Thus, for example, a 504 Plan may include special education services, but for a student in a wheelchair it may mean simply a ramp or elevator to give the student physical access to his or her general education classroom.

12. In April 2011, Antioch HS scheduled a 504 Plan team meeting to discuss Student's need for accommodations. Pending that meeting, Antioch HS began to implement a number of accommodations to help Student. These included instructing her teachers that Student: (i) should not be penalized for absences; (ii) should be given extended time to turn in assignments and not be penalized for late assignments; (iii) should be given modified work if required; (iv) should be given extended time to take tests; and (v) should be allowed to complete some in-class academic assessments at home.

13. On May 2, 2011, Antioch HS held a 504 Plan meeting attended by Student, Mother, Mr. Murphy and Student's teachers. The Section 504 Student Identification Report and Accommodation Plan created on May 2, 2011 indicated that Student was eligible for accommodations under Section 504 based on her diagnosis of MS and a determination that Student was substantially limited by resulting vision problems and trouble walking. Student and Parent explained at the meeting that Student was often fatigued and would be unable to get to school on some days, and Student sometimes had difficulty writing. The required accommodations identified in Student's 504 Plan called for Student's teachers to give her: (i) preferential seating; (ii) extended time to take tests; (iii) the option of taking tests in an alternative location; (iv) extended time to complete written and typed assignments; and (v) extended time to get to class. Student and her Parents were to communicate any needed changes to Student's accommodations. Student and Mother agreed to and signed the May 2, 2011 504 Plan.

14. AUSD never assessed Student for the possibility that her MS caused Student to suffer a disability requiring special education. According to Mr. Murphy, Antioch HS did not assess Student for a possible disability because: (1) Student and her Parents had not requested such an assessment; and (2) Antioch HS had not exhausted

all possible accommodations and interventions available to assist Student in the general education setting.

15. Based on Mr. Murphy's observations of Student after she returned to school, Student's MS was a disability that obviously impacted her physically.

16. From the time Student returned to Antioch HS in early May 2011 until the end of the 2010-2011 school year on June 10, 2011, Student struggled to catch up with the assignments and tests that she had missed. During this time, Student felt fatigued and overwhelmed, was having trouble walking, and found that it took her three times longer to complete assignments than it had taken her before she became sick. Student had to stop participating in the school's Model United Nations program and in her forensics class because those activities ran until 7:00 p.m. and she lacked the necessary stamina to stay in school that late.

17. On May 11, 2011, Student took and passed the California High School Exit Examination (CAHSEE).

18. On May 17, 2011, Student sent an e-mail to Mr. Murphy telling him of her difficulties and asking to be placed on independent study for her Biology class (adding this to her existing independent study in history). Student also asked that she be allowed to end her school day at noon. Mr. Murphy placed Student on independent study in all classes from May 18, 2011 to June 6, 2011. On June 6, Student was to return to school until the June 10, 2011 end of the school year, to take her final examinations, which were scheduled to end at noon each day.

19. Although Antioch HS did not offer Student 1:1 home tutoring, it did provide Student other accommodations and modifications beyond those specified in her May 2, 2011 Section 504 Plan. The exact timing of each accommodation and modification is not clear, but at some point Student's art teacher modified his curriculum to allow Student to use acting class as a study room in the final period of her

modified schedule, and offered to help Student study for other classes. Also, Student's teachers modified their tests to reduce or eliminate the amount of writing Student needed to perform, and each teacher offered individualized interventions to allow Student to demonstrate her competence in the subject matter of the class without performing all tasks required of other Students in the class. For example, Student's Spanish teacher gave Student oral tests instead of written examinations, Student was not required to attend laboratory sessions in biology, and Student's geometry teacher allowed Student to skip assignments and quizzes and perform only a final assessment to demonstrate her competency. Online tutoring in most subjects was also available to all students, including Student.

20. On May 31, 2011, Mother wrote to Mr. Murphy to tell him that, despite having experienced some physical setbacks, Student expected that a little more extra time would allow her to finish the assignments and make-up work in her Spanish, English and World History classes. Mother wrote that Student needed no extensions in her acting or biology classes, and asked whether tutoring could be provided for Geometry (to which Student's math teacher replied that he would help Student). Mother also asked whether Student's Forensics class had been dropped from her schedule.

21. On June 8, 2011, in an e-mail to Mr. Murphy, Mother wrote that Student was sick and unable to come to school that day for her final examinations in English and Geometry. Mother requested an extension for those examinations. Mr. Murphy spoke with Mother that day and told her that no grades or incompletes would be given in those classes and Student would be allowed time to make up the work.

22. Student was unable to complete all of her assignments and examinations before the June 10, 2011 end of the school year. Mother e-mailed Mr. Murphy on June 17, 2011, asking, "We tried our best, do we go for incompletes at this point?" Mr. Murphy asked Student's teachers to hold Student's grades in a "no-mark" status until

Student was able to take her final examinations and turn in her outstanding assignments.

23. Student never completed her final examinations. Based on Student's testimony that she turned in by the end of summer 2011 all of the assignments she knew of, and Mr. Murphy's testimony that he was unable to confirm receipt of those assignments, it appears either that Student did not complete all of the assignments her teachers expected of her, or that the assignments were misplaced at Antioch HS. When Student approached Mr. Murphy in August 2011 to ask about her grades, he told her that her teachers were waiting for certain assignments and final examinations before finalizing her grades.

24. Student's high school transcript dated August 22, 2011 showed the following grades for Student's Spring 2011 semester: Acting/A, Spanish/A-, Biology/C, Geometry/F, English/Incomplete, World History/ Incomplete, and Forensics Performance/No Mark. Student's grade point average (GPA) was 2.5, and she received 15 credits for classes completed out of 35 credits attempted.

25. After her conversation with Mr. Murphy in August 2011, Student did not take the remaining finals or provide Antioch HS copies of the assignments that she had turned in. Student and her Parents repeatedly requested revised grades from AUSD, but did not file a written request with AUSD challenging the grades pursuant to Education Code section 49070. Ultimately, Mr. Murphy in January 2013 instructed Student's teachers to revise her grades for the Spring 2011 semester to reflect the level of competency that Student had demonstrated based on the tests that she had taken and the work that she had turned in, with no penalties for missing tests or assignments. When this was done, Student's transcript dated January 22, 2013 showed the following grades: Acting/A, Spanish/A-, Biology/C, Geometry/C, English/B, World History/ C, and

Forensics Performance/D. Student's GPA was 2.571, and she received 35 credits for classes completed out of 35 credits attempted.

26. June 10, 2011 was Student's last day of school at Antioch HS or in AUSD.

PUSD'S RESPONSE TO STUDENT'S ILLNESS

27. In August 2011, Student withdrew from Antioch HS and enrolled in Pittsburg HS in PUSD.

28. By the end of August 2011, Pittsburg HS administrators were aware of Student's MS, had received a copy of the May 2, 2011 504 Plan developed for Student at Antioch HS that indicated that Student's MS caused her vision problems and trouble walking, and had implemented the Antioch HS 504 Plan at Pittsburg HS. Pittsburg HS also received a copy of Student's transcript from Antioch HS that showed that Student's grades had fallen severely after she fell ill with MS in Spring 2011.

29. Student suffered a relapse of her MS in September 2011, causing her to experience extreme fatigue, blurred vision, weakness in her legs, and poor balance. Student had difficulty getting to school on time and missed many days.

30. On September 15, 2011, Pittsburg HS Principal Todd Whitmire, unaware of Student's MS and her 504 Plan accommodation excusing her from arriving late for classes, encountered Student arriving late, escorted her to class, and scolded her for being late to class. Student and her Mother met the next day, September 16, 2011, with Principal Whitmore and Student's counselor, Jasreen Rai, to discuss Student's illness and needs for accommodations.

31. In addition to discussing Student's existing 504 Plan accommodations, there was a brief discussion regarding Student's potential eligibility for an Individualized Education Program (IEP). During summer 2011, Student had been treated at the University of California, San Francisco Regional Pediatric MS Center (UCSF), and she and her Mother had received and read a number of booklets intended to help patients

address aspects of their illness. One of these booklets, "Pediatric Multiple Sclerosis, Handbook for Parents With a Focus on School Issues," contained a section discussing the levels of school intervention available to help a child with MS, which included informal accommodations, a 504 Plan, and special education through an IEP. The handout described an IEP as a "very formal" level of intervention that required formal testing to determine eligibility, through which a school might assist a student by providing services including occupational therapy to help with fine motor and/or visual needs, psychological services, physical therapy, adaptive physical education, mobility services, and parent counseling and training.

32. Student and Mother testified that, having read the materials from UCSF, Mother asked at the September 16, 2011 meeting whether Student might be eligible for an IEP, and that Ms. Rai had responded that Student was not eligible for an IEP, and would continue to receive accommodations through the existing 504 Plan. In contrast, at hearing, Ms. Rai was certain that Student never asked for an assessment to determine eligibility for special education. Based on Student's and Mother's recollections, their diligence on pursuing options available to assist Student with her MS, and the presence in Student's educational record of another UCSF publication that discusses IEP's for students with MS, their testimony that they had asked about special education eligibility at this meeting was persuasive. Ms. Rai never advised Student or her Parents that Student had a right to request an eligibility assessment.

33. Principal Whitmire was aware that a student with MS, such as Student, might need services such as occupational therapy, psychological services, physical therapy, adaptive physical education, mobility services, or parent counseling and training. However, Pittsburg HS's practice was to first assist any struggling student with interventions in the general education environment, and only perform a special

education assessment if it found that the general education interventions were not working.

34. On September 30, 2011, a 504 Plan meeting was held and additional accommodations and modifications were made to Student's 504 Plan. As Student continued to struggle with relapses and absences in Fall semester 2011, two more 504 Plan meetings were held to adjust her accommodations and modifications. Ultimately, these included, a half-day schedule, no penalty for morning tardiness, permission to leave each class five minutes early to make it easier to get to the next class in uncrowded halls, access to the school elevator, preferential seating at the front of each class, an extra set of textbooks for each class, and assistance in getting notes for each class from a classmate.

35. On November 22, 2011, Student received a detailed eight-page Neuropsychological Assessment from UCSF (the UCSF Assessment). This was not a comprehensive psychoeducational assessment of Student, but was intended primarily to establish a baseline for measuring any changes in Student's cognitive functioning that might be caused by her MS. The assessment found that Student was experiencing physical symptoms, including visual symptoms, fatigue, and extremity weakness that were interfering with Student's "ability to succeed at her previous level." It also found that Student's coping skills were challenged and she was overwhelmed and stressed. The UCSF Assessment recommended that Student get the following school accommodations: an extra set of textbooks; extra time between classes; preferential seating at the center-front of each class; assistance with organizing, including being given outlines, syllabi, and other course materials for each class; and support in the form of frequent "check-ins" by teachers to confirm Student's understanding and prioritizing of her assignments. The UCSF Assessment also recommended that Student request that her medical provider provide structured cognitive behavioral therapy to assist her with

her anxiety and adjustment to the onset of her MS. Student did not provide the UCSF Assessment to PUSD until May 2013, shortly before the hearing of this matter. However, its recommended educational accommodations and modifications generally corresponded to those that were offered by Pittsburg HS in Student's 504 Plan. Student did not present evidence about, or seek reimbursement of, the costs of this assessment.

36. As a result of her MS, Student missed at least 40 days of school through January 2012. Student received F grades in Algebra, Spanish and Chemistry. Despite her 504 Plan accommodations and modifications, the teachers in those subjects told Student that she had missed too many classes to catch up, and could not, or would not, fully implement Student's 504 Plan by sending her tests or assignments so that Student could work on them when she was sick in the hospital or at home.

37. Generally, Student was able to perform well in classes in which the accommodations and modifications of her 504 Plan were fully implemented. Several of Student's teachers, including her 2011-2012 Architectural Design teacher, Andreas Kaiser, her 2011-2013 English teacher, Carolyn Williams, and her 2012-2013 Spanish teacher, Mario Mendoza, testified that she was an outstanding student, who performed well in class when able to attend, and who was able to make up missed tests and assignments she missed when absent due to illness. Each of these teachers implemented the accommodations and modifications of Student's 504 Plan, and gave Student preferential seating, extended time to complete tests and assignments, did not penalize her for absences, tardiness, or late assignments, and helped make sure that she had the opportunity to make up work she had missed. Student received A grades in all of their classes. None of these teachers observed that Student had any vision, handwriting, or memory problems that adversely affected her academic performance.

38. In Spring semester 2012, Student dropped Algebra and took the class online, earning a B grade, and was assigned new Spanish and Chemistry teachers. These

teachers implemented Student's 504 Plan accommodations and modifications and also assisted her in making up work that she had been unable to complete in Fall semester 2011. Ultimately, Student received the following grades from Pittsburg HS for Fall semester 2011: Spanish/C+, English/A, U.S. History/ B, Architectural Design/A, and Chemistry B. Student's GPA was 3.26.

39. Student performed well academically in her Spring semester 2012 (3.68 GPA) and Fall semester 2012 (3.26 GPA). These GPAs are comparable to Student's high school GPAs in the semesters prior to the onset of her MS – a 3.94 GPA in her Fall semester 2009, a 3.33 GPA in her Spring semester 2010, and a 3.43 GPA in her Fall semester 2010. As of May 6, 2013, Student's Grade Report indicated that Student was passing all of her classes in the Spring semester 2013, earning the following grades in her most recently-completed third quarter: Spanish 3/A, English 4/A, Pre-Calculus/C and Physics/B-.

40. Student was expected to graduate from Pittsburg HS on June 12, 2013, with a regular education diploma.

41. Student applied to, and was accepted by, the School of Architecture at Academy of Art University in San Francisco. Student applied to, but was not accepted by, the architecture programs at UC Berkeley and Cal Poly, SLO. Given the extremely competitive standards for admission to those schools, a prediction as to whether Student would have gained acceptance at those schools even if her attendance and grades had not been adversely affected by her MS would be speculation.

STUDENT AND EXPERT TESTIMONY REGARDING STUDENT'S NEED FOR ASSESSMENT AND SPECIAL EDUCATION

42. Student did not present any expert testimony regarding her need for assessment or special education. Student herself testified regarding her needs for assistance in a number of areas. Student testified that, in the Spring of 2011, when she

was at home recovering from her initial flare-up of MS, she was weak but able to think, and would have benefitted from the services of a home tutor to assist her in keeping current with her classes and homework. On her return to Antioch HS, Student had difficulty walking and writing, and would have benefitted from assistance in getting around the campus and in taking written or recorded notes in class to help her keep up. Student also testified that she believed that she would have benefitted at both Antioch HS and Pittsburg HS from ongoing academic tutoring, occupational therapy, physical therapy, orientation and mobility instruction, assistive counseling with respect to strategies for preparing college applications in light of her MS challenges, and from special education transition and assessment consulting services.

43. AUSD and PUSD presented the testimony of Pediatric Neuropsychologist Nancy E. Sullivan, Ph.D. on the issue of whether Student needed assessment and special education and related services. Dr. Sullivan has worked in the field of child psychology for 40 years. She earned a Ph.D. in clinical psychology from the Pacific Graduate School of Psychology in Palo Alto, California in 1995, and has 15 years' experience performing diagnostic evaluations of children with learning difficulties, including neuropsychological assessments and psychoeducational assessments.

44. Dr. Sullivan's testimony focused on the November 22, 2011 UCSF Neuropsychological Evaluation of Student. She testified that such a neuropsychological evaluation is typically a medical evaluation of a patient with a neurological condition such as a traumatic brain injury or MS, undertaken to determine the patient's functioning across the developmental domains of cognition, memory, learning, executive functioning, attention, visual perception, language and motor functioning. In her own practice with children and adolescents, Dr. Sullivan relied on such evaluations, comparing the results of such an assessment to published norms, and to the child's academic performance, as a basis for counseling children and their parents regarding

possible medical treatments and whether the parent should ask the school to consider the child's eligibility for services under a 504 Plan or a special education IEP. Dr. Sullivan testified that, based on the tests administered to Student by UCSF, and the results of those tests, Student's functioning was in the average range, except that Student was experiencing some depression, and difficulties with executive functioning in the areas of emotional control and with getting stuck on problems and not being able to complete tasks. Dr. Sullivan concluded that no further assessment of Student was necessary to evaluate her eligibility for services under a 504 Plan or an IEP, and that, based on the UCSF Evaluation results, Student's grades, and samples of Student's handwritten work, Student did not require any special education services that could not be provided through accommodations or modifications in a 504 Plan.

PARENTS' REQUEST FOR STUDENT'S EDUCATION RECORDS

45. On August 29, 2012, Mother authorized Student's counsel to request Student's education records from Pittsburg HS and PUSD. Student's counsel wrote to Pittsburg HS and PUSD on August 30 and September 6, 2012 requesting Student's educational records. Pittsburg HS and PUSD thereafter produced approximately 72 pages of education records.

46. Pittsburg HS and PUSD failed to include a number of e-mail communications between Mother and Pittsburg HS personnel in PUSD's production of Student's education records. Student did not present any evidence that the e-mails in question had been placed and maintained in Student's permanent file.

47. Student did not offer as evidence copies of the e-mails in question, or testimony concerning the particular subject matter of the e-mails. Student did not offer any evidence that Pittsburg HS and PUSD failed to produce documents other than the e-mails sent by Mother. Student did not offer any evidence that the failure of Pittsburg HS and PUSD to produce Mother's e-mail communications with Pittsburg HS impeded

Student's right to a FAPE, significantly impeded her Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or caused any deprivation of educational benefits to Student. Student did not seek to subpoena the allegedly missing e-mails prior to hearing, or suggest that they were critical to Student's presentation of her case.

48. Student did not present any evidence that Antioch HS or AUSD failed to produce requested education records.

LEGAL CONCLUSIONS

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

ISSUE ONE: AUSD'S CHILD FIND OBLIGATIONS TO STUDENT

2. Student contends that AUSD failed to meet its child find obligations during the 2010-2011 school year because, after Student became ill with MS in the Spring of 2011, AUSD failed to assess Student's potential eligibility for special education and related services under the category of OHI, failed to find Student eligible, and failed to provide Student special education and related services consisting of tutoring, including academic tutoring, occupational therapy, physical therapy, orientation and mobility instruction, assistive counseling with respect to strategies for preparing college applications in light of her MS challenges, and special education transition and assessment consulting services. As discussed below, Student did not prove by a preponderance of the evidence that AUSD had reason to suspect that Student might be an individual with exceptional needs under the category of OHI, and in need of special education. Thus, AUSD's duty to assess Student was not triggered, and Student was not denied a FAPE as a result of AUSD's failure to assess Student.

Applicable Law

3. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to “ensure that all children with disabilities have available to them a free appropriate public education (FAPE),” and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no cost, that meet the state educational standards, and that conform to the student’s individualized education program (IEP). (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) A party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

4. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and assess all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34

C.F.R. § 300.111(a); Ed. Code, § 56301, subd. (a).⁴ This duty is commonly referred to as “child find.” “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.)

5. A school district has a child find duty whether or not the parent has requested special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) A school district’s child find obligation toward a specific child is triggered when there is reason to suspect that he or she may be an individual with exceptional needs⁵ as defined under Education Code section 56026 and in need of special education, even if the child is advancing from grade to grade. (Ed. Code, § 56301, subd. (b)(1).)

6. The duty to assess for exceptional needs is broader than the duty to provide special education, and more easily triggered. In deciding whether there is reason to suspect that a student has exceptional needs, a school district’s appropriate inquiry is whether the student should be referred for an assessment, not whether the student actually qualifies for special education services. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1195 (“*Cari Rae S.*”).) Thus, the suspicion that a student has an impairment that is affecting the student’s educational performance is sufficient to trigger a need for assessment. (See, e.g., *Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1032 [“The District is not required to assess double vision or optic nerve damage if it does not affect a child’s educational needs”], citing Ed. Code, § 56320.) A school district’s duty to assess a

⁴ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

⁵ The Education Code generally uses the term “exceptional needs” instead of the term “disability” found in the IDEA.

student's eligibility for special education and related services is also triggered by any request for special education or assessment from the student's parent. (Cal. Code Regs., tit. 5, § 3021(a).) If the parent's request is verbal, the district must offer to assist the parent in preparing a written request. (*Ibid.*)

7. The relationship between the duty to assess, the duty to provide special education services, and the duty to utilize general education resources where appropriate was summarized in *Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820:

To prevent districts from 'over-identifying' students as disabled, Congress mandated that states develop effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education. (20 U.S.C. § 1400(c)(5)(f).) Schools, however, are charged with the 'child find' duty of locating, identifying and assessing all children who reside within its boundaries who are in need of special education and related services. (20 U.S.C. § 1400(a)(3); [Ed. Code, §§ 56300-56303].) If a school district suspects that a general education student may have a disability, it must conduct a special education assessment to determine whether the student qualifies for special education services. (20 U.S.C. § 1414(a)(1)(a); [Ed. Code, § 56320].) However, a student 'shall be referred for special education instruction and services only after the resources of the regular education program have been considered, and, where appropriate, utilized.' ([Ed. Code, § 56303].)

8. Although a district is required to utilize the resources of its regular education program, where appropriate, to address a student's exceptional needs, it may not delay its assessment of a student with a suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. A district may deny a request to evaluate a student if it does not suspect a disability, but it must notify the parent of the basis of the decision and that basis cannot be that the district is waiting to see how the student responds to general education interventions. (Office of Special Education Programs (OSEP) *Memorandum to State Directors of Special Education* (January 21, 2011) 56 IDELR 50.)

9. When a district's duty to assess a student is triggered, the assessment process begins with a written referral for assessment by the student's parent, teacher, school personnel, or other appropriate agency or person. (Ed. Code §§ 56302, 56321, subd. (a); Cal. Code Regs., tit. 5, § 3021.) Within 15 calendar days of referral, subject to certain exceptions, the district must give the parent a written assessment plan which explains, in language easily understood, the types of assessments to be conducted. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (b).) The parent then has at least 15 days to consent in writing to the proposed assessment. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c).) The district then has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an initial IEP, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subds. (c) & (f), 56302.1.)

10. California Code of Regulations, title 5, section 3030 provides that a pupil qualifies as an individual with exceptional needs under Education Code section 56026 if an assessment performed in accordance with Education Code section 56320 demonstrates that the pupil has an impairment described in subdivisions (a)-(j) of

section 3030, and “the degree of the pupil’s impairment . . . requires special education . . .”

11. Under California law, an impairment corresponding to the federal definition of OHI exists when a child has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, [etc.] . . . which adversely affects a pupil's educational performance. (Cal. Code Regs., tit. 5, § 3030, subd.(f).) Temporary physical disabilities are excluded. (*Ibid.*) A “temporary physical disability” is a disability incurred while an individual was in a regular education class and which at the termination of the temporary physical disability, the individual can, without special intervention, reasonably be expected to return to his or her regular education class. (Cal. Code Regs., tit. 5, § 3001, subd.(ag).)

12. If an assessment determines that the student’s impairment requires instruction and services that can be provided with modification of the regular school program, the student will not qualify for special education as an individual with exceptional needs. (Ed. Code, § 56026, subd. (b).) Where the totality of the evidence, including work samples, test scores, and classroom observations, provides a reasonable basis for determining that a student’s educational needs arising from OHI can be met in the general education environment with appropriate accommodations in a 504 Plan, a school district is not required to provide a special education. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1110.)

13. The actions of a school district with respect to whether it had knowledge of, or reason to suspect, the existence of a special need must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d at p. 1149 (citing *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031).)

14. In *Board of Education v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) (*Target Range*.)

15. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S., supra*, 158 F.Supp. 2d 1190 at p.1196); *Park v. Anaheim, supra*, 464 F.3d 1025 at p. 1031.)

16. Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award].)

17. When a student is assessed and found eligible for special education, the IDEA does not require the school district to provide the student the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p.

201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.*, *supra*, at p. 950 [Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “‘meaningful’ educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

18. Because *Rowley* requires a district to provide a “basic floor of opportunity” through specialized instruction and related services that are individually designed – that is, provided pursuant to an IEP – a district that fails to provide an eligible student an IEP cannot avoid liability for its procedural violations of the IDEA by claiming that the student nonetheless obtained educational benefit under the *Rowley* standard. (*Cari Rae S.*, *supra*, 158 F.Supp. 2d at p. 1196 [“In this case, however, the ‘some educational benefit’ standard under *Rowley* is not dispositive, especially if instruction is not provided under an appropriate IEP. No IEP; no FAPE under the *Rowley* standard”], citing *Target Range*, *supra*, 960 F.2d 1479 at p.1485 [“[b]ecause we hold that *Target Range* failed to develop the IEP according to the procedures required by [IDEA], we need not address the question of whether the proposed partial IEP was reasonably calculated to enable R.G. to receive educational benefits”].)

Analysis of Issue One

19. While it might reasonably be expected that any extended illness that causes a student to miss a significant number of classes will “adversely affect the student’s educational performance,” nothing in the Education Code suggests an intent

that all students returning from an extended illness that threatens to affect their grades should immediately be assessed for special education eligibility under the category OHI. To the contrary, the definition of OHI expressly excludes temporary disabilities incurred by a student in a regular education class, when it could reasonably be expected that the student will return to his or her regular education class without special intervention. Thus, in considering Student's potential eligibility for special education and related services under the category of OHI, the inquiry on Student's return to class from her extended illness was not whether Student's absence and missed work was threatening her grades, but whether ongoing limited strength, vitality or alertness caused by Student's MS was continuing to affect her ability to perform.

20. Here, the actions of AUSD must be evaluated in light of information that AUSD knew, or had reason to know, at the time. In Spring 2011, the information available to AUSD while Student was ill and out of school was that Student was weak and had some issues with her vision, but her cognitive functioning was unimpaired and Student and her physician believed that she should return to her regular education classes. When Student returned to school in May 2011, AUSD had only a limited time (five weeks until the end of the school year) to distinguish whether Student's difficulties in catching up with her missed schoolwork were caused by the large volume of work to be completed, or might instead be the result of continuing limited strength, vitality or alertness caused by Student's MS. AUSD had only a limited opportunity to observe whether Student's known symptoms of fatigue, and difficulties with walking, vision and writing were affecting Student's performance. Student did not attend classes from May 18, 2011 until the end of the year, but was instead on independent study at Student's request, in order to make up her missed work. Other information, such as Mother's May 31, 2011 letter to Mr. Murphy indicating that a little extra time would allow Student to finish her assignments and make-up work, indicated that Student's educational

performance was not being affected on an ongoing basis, and that her needs could be met within general education. (Factual Findings 9-23; Legal Conclusions 1, 13.)

21. Based on the information available to it in Spring 2011, AUSD acted reasonably in taking steps to learn about Student's illness and needs and, with input from Student and Mother, to develop and implement a 504 Plan that provided accommodations and modifications to Student's general education program intended to prevent Student's MS from impairing her access to education.⁶ AUSD's belief that it was only required to assess Student for special education and related services after exhausting all possible accommodations and interventions in the general education setting was incorrect. A district is required to assess a student's eligibility for special education and related services while general education interventions are being attempted, if it has reason to suspect that the student has exceptional needs. However, in the short period of time from the inception of Student's illness to the end of the school year, the information available to AUSD concerning Student's illness and her efforts to catch up on her missed work and become current in her classes was not sufficient to give rise to a suspicion that the symptoms of Student's MS were adversely affecting Student's educational performance on an ongoing basis. In the absence of a specific request from Student's Parents that Student be assessed, AUSD was not required to assess Student for potential eligibility for special education and related

⁶ This decision does not address whether PUSD and AUSD properly implemented the general education accommodations and modifications that were specified in Student's 504 Plans. That implementation issue is separate from the issue of Student's right to a special education and FAPE under the IDEA, and not within the jurisdiction of OAH.

services under the category of OHI prior to her withdrawal from AUSD. AUSD did not violate its child find duties. (Factual Findings 9-26; Legal Conclusions 1, 3-18.)

ISSUE TWO: PUSD'S CHILD FIND OBLIGATIONS TO STUDENT

22. Student contends that PUSD failed to meet its child find obligations during the 2011-2012 and 2012-2013 school years because, after Student enrolled in PUSD in Fall 2011, PUSD failed to assess Student's potential eligibility for special education and related services under the category of OHI, failed to find Student eligible, and failed to provide Student a special education and related services consisting of tutoring, including academic tutoring, occupational therapy, physical therapy, orientation and mobility instruction, assistive counseling with respect to strategies for preparing college applications in light of her MS challenges, and special education transition and assessment consulting services. As discussed below, Student proved by a preponderance of the evidence that PUSD committed a procedural violation of the IDEA by failing to assess Student's potential eligibility for special education and related services under the category of OHI. However, Student did not prove by a preponderance of the evidence that PUSD's failure to assess Student denied Student a FAPE by impeding Student's right to a FAPE, significantly impeding her Parents' opportunity to participate in the decision-making process, or causing a deprivation of Student's educational benefits. Student therefore did not establish that PUSD's failure to assess her for special education eligibility denied Student a FAPE.

Applicable Law

23. Legal Conclusions 1, and 3 through 18 are incorporated here by reference.

Analysis of Issue Two

24. When the 2011-2012 school year commenced, Pittsburg HS administrators were aware of Student's MS, had received a copy of the May 2, 2011 504 Plan developed for Student by AUSD that indicated Student's MS caused her vision problems and trouble walking, and had received a copy of Student's transcript from Antioch HS showing that Student's grades had fallen severely after she became ill with MS in Spring 2011, with Student failing Geometry and receiving incompletes in English and World History. This information was sufficient at least to put PUSD on notice of the need to watch Student for signs that limited strength, vitality or alertness caused by her MS were adversely affecting her educational performance. (Factual Findings 27-28; Legal Conclusions 1, 3-13.)

25. By mid-September 2011, Student had suffered a relapse of her MS, was having trouble making it to school on time, was missing days of school, and was struggling academically in her classes despite her half-day schedule and the other accommodations and modifications in place under her 504 Plan. On September 16, 2011, when Mother asked whether Student might be eligible for an IEP, PUSD should have treated this inquiry as a request for an assessment for special education eligibility and begun preparing a plan to assess Student. Even in the absence of the request from Mother, the downward slide in Student's academic performance, despite her 504 Plan, was sufficient to cause PUSD to suspect that Student's MS symptoms were adversely affecting her educational performance on an ongoing basis, such that Student should have been assessed for eligibility for special education and related services under the category of OHI, in accordance with *Cari Rae S.*, *supra*, 158 F. Supp. 2d at page 1195. Therefore, PUSD committed a procedural violation of the IDEA's child find requirements by not assessing Student in September 2011. (Factual Findings 29-32; Legal Conclusions 1, 3-15.)

26. PUSD's procedural violation of the IDEA would only have denied Student a FAPE if the procedural violation: (1) impeded Student's right to a FAPE; (2) significantly impeded her Parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. Regarding the issues of whether PUSD's failure to assess impeded Student's right to a FAPE or caused a deprivation of educational benefits under the IDEA, the totality of the evidence, including the results of testing and the recommended accommodations and modifications contained in the UCSF Assessment, the testimony of Dr. Sullivan, and Student's academic success once her 504 plan was fully implemented by PUSD in the Spring 2012 and following semesters, indicates that Student's educational needs arising from her MS could have been met in the general education environment with appropriate accommodations provided in a 504 Plan. Therefore, the preponderance of the evidence is that an assessment would have found that Student did not qualify under Education Code section 56026, subdivision (b) as an individual with exceptional needs requiring special education. (See also, *Hood v. Encinitas*, *supra*, 486 F.3d at page 1110). PUSD's failure to assess therefore did not impede Student's right to a FAPE or deprive her of educational benefits. (Factual Findings 31-44; Legal Conclusions 1, 9-16.)

27. Student also did not meet her burden to show that PUSD's failure to assess her in Fall semester 2011 significantly impeded her Parents' opportunity to participate in the decision-making process. Student enrolled in PUSD in August 2011. Mother requested an assessment in September 2011. If PUSD had initiated an assessment of Student within a reasonable time after school started or at Mother's request in September 2011, in accordance with the timelines set forth in Education Code section 56043 and related provisions, the information from that assessment would have been available to Parents in November or December 2011. However, the evidence showed that even though PUSD did not assess Student, Parents received information

from UCSF about MS and Student's needs in the summer of 2011 and obtained substantial information about Student's needs from the November 22, 2011 UCSF Assessment of Student. Although the UCSF Assessment was not shared with PUSD and was a medical assessment rather than an educational assessment, it provided detailed information concerning the effects of Student's illness, her needs, and recommended accommodations and modifications for Student's educational program. Moreover, Parents did, in fact, meaningfully participate in the decision-making process, and, with parental input, PUSD ultimately provided Student with a 504 Plan that included the types of accommodations that were recommended in the UCSF evaluation, and Student obtained her general education high school diploma. Student did not present evidence at hearing from which it could be concluded that if PUSD had performed an assessment, Parents would have had better information or more meaningful participation in the decision-making process, particularly when, as discussed above, Student would not ultimately have been eligible for special education. (Factual Findings 27-38; Legal Conclusions 1, 3-16.)

28. In sum, PUSD's failure to assess Student for possible eligibility for special education and related services under its child find obligations was a procedural violation of the IDEA, but did not give rise to liability for a denial of a FAPE. (Factual Findings 27-44; Legal Conclusions 1, 3-16, 24-27.)

ISSUE THREE: FAILURE OF AUSD AND PUSD TO PROVIDE CERTAIN EDUCATION RECORDS.

29. Student contends that AUSD and PUSD violated the procedural rights of Student and her Parents by failing to include copies of emails and letters in their responses to Parents' request for education records. As discussed below, Student did not prove by a preponderance of the evidence that AUSD failed to provide any requested education records, or that the e-mails and letters that PUSD allegedly failed

to provide were education records, such that no denial of a FAPE was shown as to either district.

Applicable Law

30. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing, or resolution session, and in no case more than 45 days after the request has been made. (See 34 C.F.R. §300.613(a) .) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) All parents have the right to receive copies of all school records within five business days after parents make a request. (Ed. Code, §56504.)

31. A school district's failure to timely provide copies of a student's education records in response to his or her parent's request is a procedural violation of the IDEA, and may constitute a denial of FAPE if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (See Legal Conclusion 14, above.)

32. Education records under the IDEA are defined by the Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records include “records, files, documents, and other materials” containing information directly related to a student, other than directory information, which “are maintained by an educational agency or institution or by a person acting for such agency or institution.” (20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those “recorded by handwriting, print, tapes, film, microfilm or other means.” (Ed. Code, §§ 49061, 56504.) Pupil or education records do not include “records of instructional, supervisory, and administrative personnel...which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

33. The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo*) held that not every record relating to a student satisfies the FERPA definition of “education records.” The court noted that FERPA requires educational institutions to “maintain a record, kept with the education records of each student” (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that “list[s] those who have requested access to a student’s education records and their reasons for doing so.” (*Falvo, supra*, 534 U.S. at p. 434.) Finding that “Congress contemplated that education records would be kept in one place with a single record of access,” the court concluded that “[b]y describing a ‘school official’ and ‘his assistants’ as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar...” (*Id.* at pp. 434-435.) Based on this conclusion, the court held that individual assignments handled by many student graders in their separate classrooms were not student records. (*Ibid.*)

34. In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, the Court of Appeal considered whether an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record. Finding "scant" judicial authority interpreting what constituted an education record, the court, citing *Falvo*, found that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*Id.* at pp. 751-754.) The Court of Appeal found that the investigative report, "which was not directly related to the private educational interests of the student," was not an educational record, "as the report was not something regularly done in the normal course of business," and "was not the type of report regularly maintained in a central location along with education records...in separate files for each student." (*Id.* at p. 755.)

35. In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D. Cal. Sept. 24, 2009) 2009 WL 3126322, *affd.* *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that school district e-mails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, found that Congress contemplated that educational records would be kept in one place with a single record of access to those records. Because the e-mails in question had not been placed in the student's permanent file, they were not "maintained" by the school district, and so were not educational records. The school district was therefore not required to produce them under a request for student records under the IDEA.

36. In this matter, Student failed to meet her burden of establishing by a preponderance of the evidence that AUSD failed to provide certain of Student's education records in response to Parents' request. Student presented no evidence that

AUSD had failed to provide any education record, and Student's closing brief did not argue that AUSD was liable for any failure to provide education records. (Factual Finding 48; Legal Conclusions 1, 30-31.)

37. Student also failed to meet her burden of establishing by a preponderance of the evidence that PUSD failed to provide certain of Student's education records in response to Parents' request. Student's evidence was sufficient to establish that Parents requested that PUSD provide Student's education records, and the evidence was also sufficient to establish that PUSD failed to include in their production of Student's education records a number of e-mail communications between Mother and Pittsburgh HS personnel. However, Student did not present any evidence that the e-mails in question had been placed and maintained in Student's permanent file, and there is thus no basis for concluding that the e-mails were education records that PUSD was required to produce in response to Parents' request. (Factual Findings 45-47; Legal Conclusions 1, 30-35.)

38. Even if Student had established that Mother's e-mail communications were education records, and that PUSD committed a procedural violation of the IDEA by failing to provide them, Student presented no evidence that the failure to produce the e-mails impeded Student's right to a FAPE, significantly impeded her Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or caused any deprivation of educational benefits to Student. In any event, since the e-mails in question were communications that had been sent or received by Student's Mother, their contents should have already been known to Mother, and the failure to provide them immaterial. Student thus failed on this ground to establish PUSD's liability for denying Student a FAPE. (Factual Findings 45-46; Legal Conclusions 1, 30-35.)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: 1) With respect to Student's claims against AUSD, AUSD prevailed on all issues; and 2) With respect to Student's claims against PUSD, PUSD prevailed on all issues. Specifically, as to Student's claims against PUSD, although student established that PUSD should have assessed Student's eligibility for special education and related services in the Fall of 2011, Student ultimately did not demonstrate that PUSD's failure to assess Student in the Fall of 2011 impeded Student's right to a FAPE, significantly impeded her Parents' opportunity to participate in the decision-making process, or deprived Student of educational benefits.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: July 3, 2013

/s/

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings