

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014071037

DECISION

On July 16, 2014, Student, through his Parent, filed a due process hearing request with the Office of Administrative Hearings, State of California, naming the Oakland Unified School District (Oakland). No continuances have been granted.

Administrative Law Judge Theresa Ravandi heard this matter in Oakland, California on September 9 through 11, and 26, 2014, and in a final telephonic day of hearing in Sacramento on September 29, 2014.

Natashe Washington, Attorney at Law, represented Student and Parents, with the assistance of Attorney Hee Kim. Parent attended each day of hearing.¹

David Mishook, Attorney at Law, represented Oakland, with the assistance of Attorneys Maria Asturas and Lenore Silverman. John Rusk, Oakland's compliance coordinator attended the hearing daily.

At the conclusion of the hearing, the matter was continued to October 16, 2014, at the request of the parties, to submit their written closing arguments. The record

¹ When used in the singular, Parent refers to Mother.

closed on that date with the parties' submission of closing briefs and the matter was submitted for decision.

ISSUES²

1. From July 2012 to July 2014, did Oakland deny Student a free appropriate public education by: (a) failing to assess him in the area of mental health; and/or (b) failing to offer appropriate mental health services?

2. Did Oakland deny Student a FAPE for the 2013-2014 school year by failing to: (a) offer a legally compliant transition plan and transition goals; and/or (b) implement the plan it offered?

3. Did Oakland fail to offer Student a FAPE for the 2014-2015 school year by failing to offer a placement that could meet his unique needs?

SUMMARY OF DECISION

This Decision finds that by October 29, 2013, when Student was in ninth grade, Oakland had reason to suspect that Student may have needs in the area of mental health such that it was required to assess him in this area. Oakland failed to timely assess Student's mental health needs and its subsequent failure to offer and provide mental health services denied Student a FAPE. Oakland developed an individual transition plan with appropriate post-secondary goals based upon an assessment of Student's interests and needs. However, this Decision determines that Oakland failed to

² Student's issues as set forth in the Order Following Prehearing Conference have been reframed and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

offer required transition services, identify the individual responsible for implementation and oversight, or implement the plan. Even so, Student did not establish that, under the facts of this case, these procedural violations resulted in substantive harm. Oakland's offer of a general education placement with resource support and a behavior support plan continued to deny Student a FAPE from the start of the 2014-2015 school year through the time of this Decision by failing to offer and provide services to meet his mental health needs.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 16-year-old young man who lived with Parents within Oakland's boundaries until March 11, 2014, when they unilaterally placed him first at Open Sky Wilderness Therapy Program in Colorado, and then at Ashcreek Ranch Academy, a residential treatment center in Utah, on June 4, 2014. Parents continue to reside in Oakland's boundaries.

2. This case primarily concerns Student's mental health functioning which was impacted by his unique life history. Student was born in Africa and lived there until he was eight years old. His birth parents died; he was separated from his younger brother; and he lived at an orphanage until he was adopted by Parents and moved to California in the summer of 2006. Student struggles academically, exhibits limited social and emotional responsiveness, and has marked difficulty establishing close, trusting relationships, especially with Parents. Since the 2010-2011 school year and continuing through the time of hearing, Student was diagnosed with depression and reactive attachment disorder, a condition which impedes his ability to form stable, reciprocal relationships due to disruption in a primary attachment during the first five years of life.

3. Student had no formal education until he moved to California. He did not speak English and was immersed in language-based learning. He attended several schools, including a Montessori school, Oakland's Kaiser Elementary School, Claremont Middle School, and North Oakland Community Charter School (Community) which provided the support of a small school setting. During his elementary and middle school years, Parents assisted Student with his studies and arranged for tutoring. Student began to resist their assistance during the 2010-2011 school year, and also experienced a serious depression. During this time, Student attended therapy with Virginia Keeler-Wolf, a licensed marriage and family therapist, who treated him for post-traumatic stress disorder, major depressive disorder, and reactive attachment disorder. He also started a trial of Prozac. By the end of the academic year, Student refused to continue in counseling and eventually stopped his psychotropic medication.

4. In November 2011, during seventh grade, Oakland found Student eligible for special education due to a specific learning disability in the area of mathematics, written expression, and reading fluency. Student remained at Community through eighth grade and then attended Oakland Technical High School (Oakland Tech) for the 2013-2014 school year. Student last attended Oakland Tech on March 3, 2014, when Parents placed him in private programs.

NOVEMBER 2011 IEP

5. Oakland held an IEP meeting on November 14, 2011, at which Student's IEP team reviewed his initial assessment and made him eligible for special education. The initial assessment determined that Student had a significant visual processing disorder and considerable deficits in executive functioning. Based on a September 9, 2011 letter from Ms. Wolf, Oakland was aware of Student's mental health diagnoses which stemmed from his early trauma and loss which caused Student to lose focus, become unduly reactive to criticism, and experience being forced to work harder than

he feels he is able. This letter provided insight as to Student's low self-confidence and a rationale for why he may withdraw at school. At hearing, Oakland dismissed this letter as a medical diagnosis from an individual who was not a licensed educational psychologist, had not observed Student at school, and did not apply educational criteria for related services.

6. As part of the initial assessment, Oakland explored Student's social-emotional functioning. On behavior scales, Parent rated Student with clinically significant difficulties with anxiety, attention, adaptive and social skills, and functional communication, and being at-risk in the area of depression. Student's teacher identified several at-risk areas. Even so, Oakland did not refer him for further testing and concluded that Student did not have social-emotional or mental health needs.³ Student's key strengths included his positive attitude towards school and desire to achieve, although his self-confidence interfered with his academics.

7. The IEP team developed goals in the areas of academics (writing and math) and organization. Pursuant to this initial IEP, Oakland provided Student academic accommodations, and weekly push-in and pull-out special education resource support services as well as monthly consultation, all within a general education setting. This November 2011 IEP was Student's operative IEP at the start of his eighth grade year.

STUDENT'S EIGHTH GRADE YEAR, THE 2012-2013 SCHOOL YEAR AT COMMUNITY

8. Student alleges that Oakland's denial of a FAPE due to a failure to address his mental health needs reaches back to July 2012. However, the parties stipulated that Student completed his seventh grade year at Community prior to July 2012. As Student

³ The legal sufficiency of the November 2011 assessment is not at issue.

was not offered and did not attend an extended school year during the summer of 2012, his claim is analyzed beginning with the 2012-2013 school year.

9. Student's annual IEP team meeting convened on October 30, 2012. At that time, the IEP team had concerns with Student's emotional stress, behavior, writing, and math. In his English and social studies classes, Student displayed low motivation, struggled with homework completion, and had poor engagement which earned him office referrals. Although Oakland attributed his struggles to a personality clash with the teacher, Parent more persuasively established that Student did not believe that he was capable of completing the required work due to his low self-esteem and reading skills. The IEP team considered a behavior plan, but Oakland decided to wait and re-visit Student's need for assessment or behavior support at a later date. Student was organized, prepared, and keeping up with his class work in math and science. He had no trouble connecting with peers and forming friendships, had good attendance, and displayed overall increased work completion. Student met his writing, spelling, and organizational goals and made progress on his math goals. Although Student began to show some academic struggles arguably related to his emotional challenges, Student did not establish that Oakland had reason to suspect he had needs in the area of mental health at that time.

10. By November 2012, Oakland was aware that Student may have been using drugs, and placed him on a five day in-house suspension due to reports that he was planning on purchasing marijuana at school. Oakland required Student to comply with a general education behavior contract beginning November 1, 2012. This contract required Student to participate in mandatory counseling, at Parents' expense, and complete a research paper on the effects of drugs and legal ramifications of drug use. Student attended eight counseling sessions from November 2012 through January 2013.

11. By the end of the winter trimester in February 2013, Student improved and showed better attendance, organization, focus, and note taking skills, and increased effort, perseverance, maturity, and independent work. He remained constant in all core academic areas with some areas of improvement. Based on his progress and no further reported behavior or social-emotional concerns, Student did not require a mental health assessment or services, or the previously recommended behavior support plan.

12. At Parent's request, Student's IEP team met two additional times in April of 2013. No team member identified any concerns as to Student's mental health functioning or need for assessment. On April 11, 2013, the team discussed Student's avoidance of his math class by arriving late. Concerned with his math struggles, Parent arranged for a new tutor. On April 23, 2013, the team discussed Parent's request to reduce Student's resource pull-out sessions to support his academic progress. Student no longer wanted an IEP. Although Parent did not support Student in this regard, she agreed that reducing or eliminating his pull-out sessions would be of benefit, given his resistance. The IEP team agreed that Student would receive one 45-minute resource push-in session each week. Since Student did not display any significant change in his behaviors at school, Oakland was not required to offer a mental health assessment or services during eighth grade.

STUDENT'S MENTAL HEALTH FUNCTIONING AND NEEDS DURING THE 2013-2014 SCHOOL YEAR

13. For the 2013-2014 school year, Student started ninth grade at Oakland Tech, a high school with a large student body size and an open campus, where students enjoyed the freedoms of leaving school during the lunch period. Although Parents and Oakland staff were concerned that Student would have difficulty transitioning to Oakland Tech, they recognized that Student's interest in playing high school sports provided a powerful incentive.

Efforts to Support Engagement

14. By the end of the first six-week grading period, Student was struggling academically in all classes and did not complete his homework. The evidence established that Oakland artificially inflated Student's grades so he could play football, stay engaged in school, and not get discouraged by failing grades. Oakland resource specialist, Brooke Rocke,⁴ told teachers that they were to award Student, at a minimum, a grade of C- or a "P" for passing.⁵ For example, Ms. Joanne Langhill, Student's algebra teacher, recalled Ms. Rocke asking her to ensure that Student received a passing grade despite having earned an F. To justify such a change, Ms. Langhill helped Student correct his mistakes on a recent exam. Even so, Student did not demonstrate understanding of the subject matter.

15. Student's academic struggles at the beginning of ninth grade could not solely be attributed to his specific learning disability. By modifying Student's grades to

⁴ Ms. Rocke has a mild to moderate special education teaching credential and a preliminary administrative services credential. She has worked for Oakland for five years.

⁵ Teachers have discretion in awarding a grade that may not reflect true ability or mastery level of the material. In addition, grading is normally impacted by poor attendance, with five unexcused tardies or absences from a class, in one grading period, resulting in an automatic F. During the first grading period, Student had five unexcused tardies or absences in fifth period, seven for the second grading period, six for the third, and 12 for the fourth grading period. Also during the fourth grading period from January 27, 2014, to March 7, 2014, Student was absent or tardy nine times to his first period class and six times to his third period. Oakland did not assign failing grades for Student's absences.

encourage him to stay motivated, Oakland acknowledged more than just an academic need, and began to address Student's disengagement and low motivation. Student now required supports to increase his attendance and engagement at school. This was a marked change in his orientation toward schooling. For the second grading period beginning October 7, 2013, Oakland also modified Student's work load and determined that he would only be graded for the work he turned in. This was an additional attempt to prevent Student from becoming discouraged about poor grades and further support his engagement in the learning process, as the work he did complete was good.

Teacher Observations

16. Several teachers expressed concern about Student's atypical presentation in class from the start of the school year. In his art class, Student was withdrawn and depressed, never interacted with anyone and was non-verbal, did not engage in learning, and was non-compliant daily including using his phone, wearing his headphones and listening to music, and throwing papers around the class. In his algebra class, Student was emotionally distant, disengaged, quiet, off-task, and in need of constant prompts. Ms. Langhill found his lack of responsiveness to her one-on-one efforts to engage him as "atypical." He was frequently late to her fifth period algebra class which began after lunch, sometimes arriving past the halfway point. Student often smelled of marijuana and appeared to be under the influence with glassy eyes and a lost look.

17. Ms. Rocke did not meet with Student every day. It was her experience, in interacting with Student outside of class, that he was socially engaged. However, he was not completing the required work, was shut down, and was not achieving his potential. Based on her discussions with Student, she believed he was not motivated academically because he did not like being accountable to Parents and was displaying teenage rebellion. She attributed his disengagement in class to drug use.

STUDENT'S USE OF MARIJUANA

18. During the fall of 2013, Student was often under the influence of marijuana at school. His drug use negatively affected his learning by causing him to miss class as well as impeding his ability to access the work when he was present. The IEP team did not address this in the fall of 2013. Ms. Rocke justified Oakland's silence testifying, "It's a delicate, tricky subject," as Parents were aware of Student's drug use and, in her opinion, did nothing to prevent it. This approach was at odds with Oakland's disciplinary action one year prior when it placed Student on a behavior contract for his suspected drug involvement.

19. While Oakland was clear that it had no duty to provide a special education student with substance abuse treatment, it ignored its responsibility to discuss Student's use of marijuana during an IEP team meeting and consider his social, emotional, or behavior needs, as well as supports and strategies to curb his behavior, such as revoking off campus privileges in support a drug-free environment. Because Oakland attributed Student's class behaviors to his marijuana use, and because it was not responsible for offering the medical service of drug treatment, Oakland expected Parents to address Student's withdrawal, reduced work, and disengagement by treating his drug use. There is a difference between providing drug treatment, and assessing and addressing environmental issues and internal distress of a student with a disability that may be contributing to the use of controlled substances. Oakland was responsible for the latter.

20. Program Coordinator Melissa Williams has never found substance abuse issues to be related to a student's special education needs.⁶ This evidences Oakland's

⁶ Ms. Williams was the program coordinator of Oakland's secondary special education programs last year and has worked with Oakland since 2004 as both a teacher

position that drug use relieved Oakland of a duty to explore further the source of Student's self-defeating behaviors. Oakland Tech coordinator of psychological services, Dr. Valerie Lopes, testified unpersuasively that even if Student's marijuana use stemmed from his depression, Oakland would not be responsible to provide any services.⁷ However, she admitted it would be important to complete a thorough assessment if Student had first been diagnosed with depression and later began to use drugs. This was precisely Student's situation as Oakland had been informed in 2011 that he had been diagnosed with a major depressive disorder and post-traumatic stress disorder. Further, although Dr. Lopes maintained that substance abuse issues must be addressed first before Student could begin to address mental health issues, she admitted that once in counseling, both areas would be addressed concurrently.

21. Student's expert witnesses, including independent evaluator, Dr. Alex Peterson, and therapists Richard Snyder, Kirsten Bolt, and Ilene Yasemsky, persuasively established that Student's use of marijuana and other controlled substances was a symptom of his underlying psychological distress and an attempt to self-medicate his

and administrator. She holds an administrative credential and a level two special education mild to moderate teaching credential.

⁷ Dr. Lopes served as a school psychologist for 18 years before becoming a coordinator of psychological services for Oakland in 2008. She has a master's degree and a Ph.D. in clinical psychology, and master's degrees in school and child psychology and international administration.

depression or otherwise modulate his mood.⁸ Student's mental health issues fueled his substance abuse and needed to be addressed in order to break his addiction. Ilene Yasemsky is the clinical director of Willow Rock Psychiatric Health Facility, an acute adolescent inpatient psychiatric facility, and has provided weekly therapy to Parents since March 2013, to address Student's attachment issues.⁹ Although she reviewed his educational records, she only worked with Student for one session, in February 2014, as he refused to attend. Ms. Yasemsky has extensive experience in the area of whether an adolescent's condition and behavioral manifestations are a result of substance abuse, or whether substance abuse is a result of his mental health condition. Her testimony persuasively established that Student's substance abuse disorder is a function of his co-occurring mental health conditions and both must be treated for Student to be able to function in the school setting.

22. Oakland's expert, Dr. Sherry Burke, testified unpersuasively that Student's substance abuse must be treated first, outside the special education arena, before the district could assess and address mental health needs. Ms. Yasemsky established that Dr.

⁸ Student also used ecstasy and other drugs though Oakland was not aware of this.

⁹ Ms. Yasemsky became licensed as a clinical social worker in 1984 and has been a therapist since 1991. She served as a consultant to Oakland for 10 years and helped create counseling-enriched special day class programs. From 1991-1997, she was the clinical and then associate director of a residential treatment program for seriously emotionally disturbed teens, and created the first school-based day treatment program with Oakland.

Burke's opinion reflects an outdated, compartmentalized approach to treatment.¹⁰ In addition, Dr. Burke's opinion was contradicted by Dr. Lopes' admissions. Dr. Burke faulted Student's expert, Dr. Peterson, for not administering the Substance Abuse Subtle Screening Inventory, a tool she characterized as being able to differentiate whether a mental health or substance abuse issue were primary.¹¹ Ms. Yasemsky was more persuasive in her testimony that there is no tool with that level of sophistication. Regardless, Dr. Burke agreed that whether Student's substance abuse was a symptom of a mental health condition warranted more assessment. A clinical interview with Student and discussions with those familiar with him would have been critical for any assessment. Oakland never took these steps and failed to conduct a mental health assessment of Student.

¹⁰ Dr. Burke has a doctorate in education, has been a licensed educational psychologist and marriage family therapist since 1997, and holds pupil personnel services credentials in school psychology and counseling. She has served as the associate director of a private mental health agency that provides educationally related mental health assessments and services, and has also worked as a behavior consultant for Alameda County mental health.

¹¹ Dr. Peterson is a licensed clinical psychologist and pediatric neuropsychologist. He earned a Ph.D. in clinical psychology in 2001, completed a practicum at a substance abuse residential rehabilitation treatment program, and worked at Children's Hospital Oakland providing neuropsychology assessment services. Beginning in 2006, he provides private neuropsychological assessments for children

The October 2013 IEP Team Meeting

23. Student's IEP team met for his annual meeting on October 29, 2013. As found above, Student at times was refusing to attend class, and by that date, had a total of seven unexcused absences and 11 tardies. This was a material change from the previous school year when attendance was not an issue. To encourage and support Student, Oakland modified Student's grades to maintain his eligibility for football. Even so, by the time of the IEP team meeting, Student showed a reduced effort. Student had not met any of his prior goals which consisted exclusively of writing and math goals. Student regressed on his two writing goals, which he had previously met for the March 2013 reporting period. The IEP team determined that Student had needs in the areas of social-emotional functioning, behavior, and academics. The team developed two study skills goals calling for Student to maintain a 2.0 grade point average and complete 30 semester credits, a goal to support regular and timely class attendance, a self-help goal calling for Student to request assistance when he did not understand class assignments, and a writing goal.¹²

24. Prior to this IEP team meeting, Oakland had agreed to fund an independent evaluation by Dr. Peterson due to Parents' concerns about Student's emotional well-being. The October 2013 IEP team agreed that a behavior support plan might be needed to support Student's attendance and engagement, depending on the results of the independent evaluation. The October 2013 IEP noted that a special day class might be more appropriate to meet Student's needs. Still, Oakland continued to offer a general education setting with one 45-minute push-in session of resource

¹² While it is unclear why Oakland did not offer a math goal, the ninth grade goals are not at issue in this case except for transition goals.

support weekly, and 20 minutes per month of resource consultation. Parents consented to this IEP.

25. Despite Student's significant change in orientation towards school manifested by reduced attendance, effort, and engagement, its own staff reports of Student's depression and atypical presentation, and Parents' concerns, and without the benefit of a comprehensive assessment, Oakland assumed that Student was displaying age-appropriate teenage rebellion and experimenting with marijuana and the new freedoms of a comprehensive, open high school campus. However, given its knowledge of Student's mental health conditions, it had sufficient notice that Student's mental health functioning was likely contributing to his self-defeating behaviors and use of marijuana. Therefore, Oakland was required to assess Student to determine if his depression or other mental health issues were impeding his access to his education, ability to engage and attend, or otherwise preventing him from receiving educational benefit.

26. Given legal timelines, Oakland was required to complete an assessment of Student's emotional and mental health needs and hold an IEP team meeting to review the results within 75 days, on or about January 24, 2014.¹³ Oakland's failure to offer an assessment in a suspected area of need procedurally denied Student a FAPE. Although Oakland abdicated its duty to assess, there was no substantive harm, at this point, as it

¹³ This date allowed a full 15 days for Oakland to draft an assessment plan following the October 29, 2013 IEP meeting, presumed that Parents would have provided immediate consent, and accounted for vacation days over winter break.

agreed to fund Dr. Peterson's assessment which he presented to the IEP team in January 2014.¹⁴

The January 21, 2014 IEP Team Meeting

27. Oakland convened an IEP team meeting on January 21, 2014, to review the results of Dr. Peterson's independent evaluation. During this meeting and at hearing, Oakland minimized Student's struggles with attending class and completing his work. By this time, Student had been absent from a class period 14 times and tardy 32 times. Student's science teacher Sadie Skiles credibly testified that she informed the team that Student's attendance had declined, he was associating with negative peers, and his classroom behavior was abnormal.¹⁵ For instance, Student presented as not wanting to interact with other students, to work, or to learn. His level of disengagement was not normal, and his struggle to fit in and be motivated went beyond being shy. In Ms. Skiles' words, Student needed to "speak up, stand up, and interact."

28. Dr. Peterson presented the IEP team with the results of his independent neuropsychological evaluation of Student. The purpose of his assessment was to provide a comprehensive understanding of Student's academic functioning and psychological and emotional status for academic and treatment planning. He met with Student three times, two hours each session, in November 2013, followed by a one hour feedback session. He also interviewed Parents, Ms. Yasemsky, and Ms. Rocke, collected

¹⁴ Dr. Burke established that Dr. Peterson was qualified to conduct an educationally related mental health assessment.

¹⁵ Ms. Skiles attended the October 2013, and January and April 2014 IEP team meetings. The meeting notes do not reflect her statements of concern for Student's abnormal presentation. Even so, Oakland is attributed the knowledge of its staff.

questionnaires from several of Student teachers, reviewed records, administered numerous tests, and had Student and Parents complete rating scales. Though cooperative, Student was extremely withdrawn with flat affect and limited response. He was difficult to engage and denied all symptoms of any distress, which was incongruent with his affect and Parents' report.

29. Teacher questionnaires revealed that Student was often distracted, had difficulty following along, put forth limited effort, did not turn in homework, and fell asleep in class or listened to music against class rules. Ms. Rocke informed Dr. Peterson that Student struggled with internal emotional distress, had difficulty expressing his emotions, and that despite her efforts, she had difficulty connecting with Student. This information was consistent with Ms. Yasemsky's insights from her sessions with Parents that Student had limited emotional reciprocity stemming from his early childhood traumas. Overall, his teachers painted the picture of Student as capable but underperforming, and who struggled to pay attention and apply himself.

30. Based upon his assessment, Dr. Peterson diagnosed Student with reactive attachment disorder, inhibited type, characterized by difficulty developing close relationships; dysthymia, a pervasive low-level depression characterized by feelings of sadness, flat affect, and a negative self-image; attention deficit hyperactivity disorder, inattentive type; and a specific learning disability in reading, in which Student experienced this academic task to be a slow, frustrating, laborious process. Dr. Peterson noted that Student had engaged in an increasingly problematic pattern of cannabis use to cope with his negative mood and gain acceptance, and this might further decrease his motivation and ability to access his feelings. Dr. Peterson established that Student experienced a complex constellation of cognitive and psychological issues which significantly impacted his academic performance and overall life experience.

31. For instance, Student's weakness with pragmatic language prevented him from understanding the perspective of others which further impaired his ability to interact and form relationships. Student had significant difficulties with both sustained attention and multiple facets of executive functioning which adversely impacted his educational performance. Similarly, in the area of mental health, Student's negative self-image caused him to see himself as less capable than his peers, to avoid putting himself in situations where he could fail, and to prevent him from asserting himself. While Student's eligibility is not at issue here, Dr. Peterson's recommendation that Student met the qualifying criteria for the educational disability category of emotional disturbance is relevant to the issue of Student's mental health needs. Emotional disturbance requires a student to exhibit specified characteristics such as depression or an inability to form relationships, over a long period of time, to a marked degree, and which adversely affect educational performance.

32. Dr. Peterson concluded, and persuasively established at hearing, that Student required mental health counseling due to his chronic underlying feelings of anger and sadness, negative self-image, challenging relationship with Parents, and his highly defended presentation. Dr. Peterson specifically recommended individual therapy for Student to gain insight into his feelings, learn to cope with negative emotions, and develop self-confidence, something his teachers previously reported as impeding his academics. The evidence established that by January 2014, Student required mental health services in order to benefit from his education, due to the interplay of his learning, attention, attendance, and engagement issues, stemming from his emotional difficulties.

33. Oakland's contention that Student did not require counseling to benefit from his education because he was still doing the work, but simply not coming to class all the time, was not convincing. Student was struggling academically. He was not doing

his school or homework, and his grades, which were either modified or based simply on the work he decided to turn in, were not meaningful indicators of educational benefit. Further, that Student did not attend class regularly directly resulted in an adverse educational impact. Ms. Williams admitted at hearing that Student struggled to be at school and to attend when present due to many factors including that he found the work challenging; he had attention deficit hyperactivity disorder; and his own unique life history of early childhood loss, the process of coming to America, attending multiple schools, and now adjusting to high school. Student's social-emotional and mental health functioning negatively impacted his education in that they impeded his attendance and engagement.

34. At the January 2014 IEP team meeting, Oakland continued to offer a general education high school placement, but increased its offer of special education resource support from one to two 45-minute push-in session each week, along with two 45-minute pull-out sessions weekly. This IEP again acknowledged that a special day class setting might be more appropriate to meet Student's needs, but Oakland did not offer it.

35. By January 21, 2014, based upon the results of the independent assessment, Oakland had sufficient knowledge that Student required mental health services in order to access his curriculum. Having delegated its assessment responsibility to Dr. Peterson, Oakland could not credibly disregard his findings. Based upon the results of the independent assessment, had Oakland itself timely assessed Student it would have identified a need for mental health intervention by this time. Oakland's failure to timely conduct its own assessment, or to rely on Dr. Peterson's assessment, led to a failure to offer mental health services which denied Student a FAPE. Student's remedy is addressed below.

OAKLAND'S OFFER OF A BEHAVIOR SUPPORT PLAN

36. After considering Dr. Peterson's findings, the January 2014 IEP team discussed a referral for an educationally related mental health services assessment but the district members decided to wait and focused instead on offering a behavior support plan. Ms. Rocke presented a draft behavior support plan to the IEP team. There was no evidence that this plan was based on formal assessment, formal observations and data collection, or Dr. Peterson's assessment. The behavior support plan indicated that the following class behaviors prevented Student from accessing his educational program: disengagement as manifested by use of cell phone and headphones, sleeping in class, failing to turn in homework, and arriving to class late. The plan identified multiple functions of these behaviors including task avoidance, protesting perceived demands, or gaining acceptance. The plan attributes Student's behaviors to his lack of self-efficacy, lack of self-advocacy skills, and an inability to express his needs. This further evidences that his behaviors stemmed from a deeper mental health issue, such as his depression or reactive attachment pattern, which impeded his ability to develop self-confidence and self-expression.

37. Dr. Lopes, Oakland's own witness, established that a behavior plan could be effective if Student was exhibiting avoidant behaviors, but if his behaviors stemmed from substance abuse or were fueled by mental health issues, such a plan was unlikely to have any measureable impact. Most of Oakland's proposed behavior strategies and environmental changes, such as preferential seating, cues, and organizational supports, had already been instituted to no avail. The behavior plan called for Student to attend class, develop self-advocacy skills, stop using marijuana, and for staff to encourage him to take emotional risks. This plan lacked key elements including Dr. Peterson's recommendation for counseling, and a clear strategy to address the behaviors with the

assistance of mental health professionals who could help Student access the underlying issues which fueled the behaviors and impeded his education.

REFERRAL FOR GENERAL EDUCATION COUNSELING

38. In response to Parent's question of how the team would address Student's emotional issues which were making his studies more challenging, Oakland prepared a referral to the Coordination of Services Team, a multi-disciplinary team of school-based experts including licensed therapists, positive behavior intervention specialists, and substance abuse mentors from the Tobacco Use Prevention Education unit. This was a general education service available to all students.

39. Oakland noted on the referral form that Parents wanted Student engaged in a therapeutic relationship at school as he was not willing to participate outside of school. Oakland identified a need for counseling due to Student's in-class behavior and issues with self-esteem, possible depression, trauma, loss and grief, and substance abuse stemming from early life trauma and adoption. This referral did not discharge Oakland's duty to offer and provide necessary related mental health services as part of Student's IEP. It is irrelevant whether Parent followed through with this referral or provided Oakland her insurance information. The fact that Parents had been unable to encourage Student to attend family counseling did not relieve Oakland of its duty to offer counseling as a related service. It was uncontested that Student had a challenging, complex relationship with Parents. Oakland's speculation that Student would probably not participate in school-based counseling did not excuse it from offering school-based mental health services.

40. Parents did not consent to the January 2014 IEP offer. Shortly after the meeting, Parent met with Ms. Rocke to share her concerns that Oakland did not understand the extent of her son's needs and that the IEP offer did not incorporate Dr. Peterson's findings. Student did not receive any supports.

Downturn from January 2014 through March 3, 2014

41. Without any mental health interventions, Student's attendance and engagement continued to decline. He was absent from class an additional 25 times and tardy 12 times from the date of the January 21, 2014 IEP team meeting through March 3, 2014, his last day of attendance. Ms. Skiles noted a "complete downturn" in Student's ability to produce class work and his failure to complete homework continued. Student was involved with a negative peer group and detained for stealing and possession of stolen goods. Dr. Burke found Student's decline to be expected, given the lack of interventions. She acknowledged that at this stage, Oakland should have conducted an educationally related mental health services assessment and offered mental health counseling, due to Student's worsening behavior and Parents' failure to consent to the behavior support plan.

42. In the late afternoon of March 3, 2014, neighbors found Student passed out and bloody on his front lawn. He was taken by ambulance to Herrick Hospital, intoxicated, delusional, and screaming that he did not want to live because his friend had committed suicide. Student had a blood alcohol content of .29 percent and was suffering from alcohol poisoning. Due to his suicidal statements and aggressive behaviors, Student was placed on a 72-hour involuntary psychiatric hold commonly called a "5150 hold" and transferred to the adolescent psychiatric unit at Alta Bates Medical Center.¹⁶

¹⁶ Under Welfare and Institutions Code, section 5150, police and other designated professionals may upon probable cause place an individual who, as a result of a mental disorder, is a danger to himself or others, or who is gravely disabled, in an approved health care facility for treatment and evaluation for up to 72 hours.

43. Dr. Peterson persuasively testified that Student's alcohol binge was both an acute reaction to a perceived trauma and reflective of a pattern of increasingly problematic behaviors resulting from his mental health issues. This pattern included truancy, failure to complete work, reduced class effort, and increased anti-social behaviors such as stealing. Student was experiencing high levels of distress and exhibiting poor coping skills by drinking to that level of self-harm. Student was placed on a 5150 hold because he was a threat to himself or others.

44. Student remained hospitalized for an additional five days pursuant to a voluntary hold at Parents' request. During his stay, the treating psychiatrist diagnosed Student with depression as the primary problem and cannabis dependence, attention deficit hyperactivity disorder, post-traumatic stress disorder, and reactive detachment disorder as additional active problems. Student presented with grossly impaired judgment and insight, and shared that he had recently been involved in an altercation with a peer, was currently failing all his classes, began to use marijuana last year, and had increased his use to four or five times weekly. At the hospital, Student's response to therapy was poor and he refused any medication trials. He was angry, but accepting, of his Parents' decision to transfer him directly to Open Sky. On discharge, Student was not a suicide risk or in need of acute care, although his stress level and withdrawal were rated as high and his emotional pain as moderate. Student was discharged from the hospital to Open Sky on March 11, 2014. Oakland received written documentation of Student's hospital stay at the April 22, 2014 IEP team meeting discussed below.

The April 22, 2014 IEP Team Meeting

45. Parents first informed Oakland of Student's circumstances leading to his school absence in an April 4, 2014 letter, which discussed Student's suicidality, alcohol poisoning, 5150 hold, hospital stay, and placement at Open Sky. Parents requested an IEP team meeting to change Student's primary eligibility to emotional disturbance with specific learning disability as a secondary eligibility along with other health impairment. They asked Oakland to consider Student's self-defeating behaviors as a consequence of his emotional disability. As of April 4, 2014, Oakland was placed on even higher notice that Student required related mental health services to access his education.

46. Student's IEP team met on April 22, 2014. Parent provided the following documentation: an April 21, 2014 letter from Open Sky therapist Kristen Bolt¹⁷ and records from Student's hospital stay at Alta Bates.¹⁸ Based on Ms. Bolt's letter, Oakland was on notice that upon enrollment at Open Sky on March 11, 2014, Student endorsed several behavioral and mental health symptoms including depression, post-traumatic stress, substance abuse, school challenges, and reactive attachment patterns. He was making slow but noticeable progress in weekly therapy developing healthy coping skills to deal with challenging emotions, and discovering his self-worth. To support his continued treatment, upon his anticipated discharge date of May 20, 2014, Ms. Bolt

¹⁷ Ms. Bolt is a licensed marriage and family therapist in Utah and Colorado. She has provided therapy services since 2008, and has worked at Open Sky since May 2011. She was a special education paraprofessional in the public school system for two years.

¹⁸ Although the IEP notes state that Parent *will* provide copies of the Open Sky letter and hospital records, the evidenced established that the team received these documents at the meeting.

recommended that Student transfer directly to a residential treatment program with an experiential and relationship-based therapeutic component, given his resistance to traditional talk therapy. The evidence showed that Student was likely to continue to struggle academically and use substances to medicate his mental health issues as long as his therapeutic issues remained untreated.

47. At the April 2014 IEP team meeting, Oakland changed Student's primary eligibility to that of emotional disturbance, thereby acknowledging that his emotional functioning impacted his education, as opposed to social maladjustment such as drug use. Oakland added a secondary disability category of other health impaired. Further, Oakland requested the opportunity to conduct its own educationally related mental health assessment to determine whether Student required therapeutic services or a therapeutic placement in order to receive educational benefit. Parent provided immediate consent and signed a release for Oakland to contact and receive records from Open Sky. Oakland was required to complete this assessment and convene an IEP team meeting within 60 days, not counting summer vacation, on or about September 2, 2014. As determined above, Oakland had a duty to provide services to meet Student's known mental health needs pending its assessment.

48. The IEP team determined that Student's diagnoses of depression, reactive attachment disorder, and attention deficit hyperactivity disorder impacted his ability to engage in academic tasks across curricular areas and school settings. Even so, Oakland did not offer any mental health services or supports at the April 2014 amendment IEP team meeting, and continued to offer placement at Oakland Tech with resource support and the January 2014 behavior support plan. Oakland's insistence that it had the right to conduct its own assessment prior to offering any mental health services or a therapeutic placement, was not supported by the facts of this case or the law.

49. On May 14, 2014, Parents sent written notification to Oakland that they were rejecting its continued offer of placement and planned to enroll Student at Ashcreek at public expense beginning May 30, 2014, due to his need for daily, round-the-clock, intensive treatment and academic services. On May 16, 2014, Oakland provided Parents with prior written notice that it had offered a FAPE and would not fund Ashcreek based on its opinion that the placement would not provide Student with the least restrictive environment. Upon his discharge from Open Sky on June 3, 2014, Parents transferred Student directly to Ashcreek.

Efforts to Conduct Mental Health Assessment

50. As part of its educationally related mental health assessment, Oakland had Student's teachers complete teacher reports and behavior rating scales. Dr. Lopes collected this information by the beginning of May 2014, but simply held onto the data while she waited for Parents to make Student available for assessment. Common themes of significant concerns emerged from the teacher reports including that Student seemed depressed, withdrawn and quiet; did not interact with peers or engage in learning; and kept his emotions inside.¹⁹ Both Ms. Langhill and Ms. Rocke expressed concern with Student's substance abuse with Ms. Rocke blaming Parents for setting too few limits with Student and allowing too many freedoms. She reported that Student, "seems to have a reasonable sense of reality but perhaps few tools to cope with it."

51. These teacher reports, reflecting observations of school staff when Student was enrolled, are important evidence that Oakland knew of Student's mental health challenges as manifested in the classroom. Regardless of the fact that Dr. Lopes did not timely review these reports or score the rating scales, Oakland is attributed this

¹⁹ Ms. Rocke was the only teacher to report that Student had many friends.

knowledge of Student's functioning. These reports further support Student's need for educationally related mental health services.

52. Oakland never completed its mental health assessment of Student. On May 29, 2014, it requested records from Open Sky and in response received a treatment plan and documentation of services on June 12, 2014. That evening, Dr. Lopes emailed Parent and informed her that in order to complete the mental health assessment, a school psychologist needed to conduct behavior observations of Student and interview him. Dr. Lopes asked Parent if Student would be available for assessment in the next week or so. June 20, 2014, was the last day of work for Oakland's school psychologists.

53. On June 18, 2014, Parent replied to Dr. Lopes' inquiry and informed her that Student had moved directly from Open Sky to Ashcreek on June 3, 2014, after she provided 10-day notice to Oakland. She wrote that Student was unable to come home but invited Dr. Lopes to travel to Ashcreek for the assessment and request that she let Parent know how she planned to proceed. Oakland did not reply until August 20, 2014.

54. In a letter dated August 20, 2014, Mr. Rusk requested that Parents provide records from Ashcreek and a release of information, and asked that they reconsider their decision to not have Student return for assessment. He informed Parents that Student had not been made available and that the mental health assessment "was conditioned on your making [Student] available for assessment." At no point did Oakland ask about Student's physical, emotional, or mental status or Ashcreek's policy of releasing Student to travel home for assessment.

55. Dr. Lopes was not aware of Oakland's policy regarding traveling out of state to complete an assessment. Oakland staff claimed that it is only required to do what is feasible when conducting an assessment, and that traveling "across the country" would not be feasible. While Oakland established the importance of assessing Student in a school setting to determine educational impact, it failed to account for the fact that

its staff had already observed Student at Oakland Tech, and had an additional opportunity to do so by going to Ashcreek, which was providing Student a full educational program run by certified teachers. Student did not establish that it would be unsafe for him to return for assessment. However, Oakland did not establish that it was legally entitled to assess Student locally. On these facts, Oakland was not excused from timely assessing Student, and Parent is not prohibited from seeking reimbursement.

STUDENT'S TRANSITION NEEDS AND PLANNING, THE 2013-2014 SCHOOL YEAR

56. In preparation for Student's October 29, 2013 IEP team meeting after his entry into ninth grade, Ms. Rocke developed a draft individual transition plan and presented it to the team. Student's 16th birthday was in the spring of 2014, so this was his initial transition plan to consider his post-secondary goals and needs for transition services. In developing the plan, Ms. Rocke interviewed Student about his goals, interests, strengths, and needs over the course of several informal discussions. She knew she would get more information and more accurate information through unstructured natural conversations as opposed to a formal interview given Student's reluctance to engage with adults. Ms. Rocke spent time gaining Student's trust to be able to best understand him. She routinely uses this interviewing technique and process and considers it to be an age-appropriate assessment.

57. From her assessment, Ms. Rocke learned that Student was not sure about his post-secondary desires and had not considered any goals beyond high school. Therefore, she proposed general goals to be refined as Student considered his future and shared his thoughts on transition goals. After developing the initial transition plan, Ms. Rocke's practice is to use numerous tools to help students focus their plans such as formal surveys, inventories, and questionnaires to see if there are particular courses of study or colleges, or careers in a particular field that interest the students.

58. Ms. Rocke did not administer any formal assessments. For instance, she did not believe Student was ready for a pre-vocational skills assessment, and she did not assess his independent living skills as his adaptive and daily living skills were age appropriate. By April 2014, when Student turned 16, he would have been eligible for Oakland's workability program, and when he is a senior he would be able to participate in the Transition Partnership Program. Student did not establish any violation because Oakland did not utilize formal assessment measures at this stage.

59. While formal assessments may not always be required when developing an initial transition plan, a district must adequately identify and address a student's transition needs. The October 2013 IEP team notes identify areas of need related to Student's transition planning such as his lack of follow-through with his homework, his lack of study skills, and the possibly he did not know how to tell time. Oakland also knew of Student's struggle to form relationships and participate in groups. None of these areas of need are addressed in his transition plan despite their clear relevance to a successful post-secondary transition and life after high school. Oakland needed to prepare Student, even while a ninth grader, for meaningful employment or college after high school, especially given its belief that Student struggled with his transition to a comprehensive high school campus.

60. The transition plan delineated the courses and the number of credits required for Student to graduate from high school. It offered a post-secondary goal which called for Student to pursue higher education or job skills training. The identified activity to support this goal was for Student to consider academies to which he would like to apply. In terms of related community experience, the plan provided that Student could access career fairs, clubs, and presentations at school as well academy presentations at the beginning of the second semester. The plan offered an employment goal for Student to seek part-time employment. This goal was supported

by Student's opportunity to participate in workability at age 16, and his access to nonprofit job training opportunities. His independent living goals were to open a bank account and obtain his driver's license. The supportive activity called for Student to obtain written materials from the Department of Motor Vehicles to study for his driver's license test, and to apply for a bank account. These goals were reasonable and capable of being implemented to some extent in ninth grade. Student did not establish that the transition goals were not sufficiently individualized at this initial stage.

61. Student's transition goals were appropriately linked to his annual IEP goals of maintaining his grade point average and credit load, improving his written organization, arriving on time and attending class regularly, and asking for assistance as needed. Even so, this linkage and the requirement to consider the entire IEP document when determining whether it offers a FAPE, did not discharge Oakland of its duty to offer and provide transition services based upon Student's identified transition needs.

62. Ashcreek teacher Sue Ann Staheli testified persuasively that a transition plan must delineate what "actions" the school will take to assist and train a student.²⁰ Oakland identified a few general transition services it would provide such as hosting career fairs and a job training program. However, it failed to identify any transition services targeting Student's needs and supporting his independent living goals. For instance, Oakland could have designated a teacher to help Student organize study materials from the department of motor vehicles and set a plan for taking and discussing practice tests, or offer a skills class that taught him how to use a bank and compare terms and rates. Oakland's failure to offer transition services for Student's independent living goals constitutes a procedural violation.

²⁰ Ms. Staheli has her administrative licensure and special education teaching certificates in Utah and Nevada and has taught special education for 15 years.

63. The transition plan listed the person responsible for implementing and monitoring progress for each goal as the "IEP team." Ms. Rocke recognized that as Student's resource specialist and sole special education provider, she was the primary person responsible for implementing and monitoring Student's transition plan. However she expected Parent to implement his independent living goals. While Parent may be a key player in some aspects of Student's transition activities such as opening a bank account, it is Oakland which must teach and support Student, monitor his progress, and offer and provide adequate transition services related to his transition needs and goals. Student's transition plan did not provide Parent with a clear understanding of who would be held accountable for implementing Student's goals, and there was no evidence that Oakland asked Parent to be responsible for implementing his independent living goals or informed her that Oakland expected her to play a key role. Oakland's failure to identify the person responsible for Student's transition goals and services resulted in a procedural violation because Oakland did not provide Parent a clear offer.

64. In terms of implementing Student's transition plan, and whether he made progress on his independent living goals, Ms. Rocke acknowledged that by the time Student left Oakland Tech in March 2014, he had not begun to study for his driver's license or open a bank account. Oakland's main priority for Student, by the end of the first six week grading period, was to encourage him to regularly attend school on time, and be functioning, engaged, and sober. Therefore, his transition goals were placed on hold. Ms. Rocke did not elicit Parent's assistance to work on his goals because she knew Student was not receptive to communicating with Parent. Because Oakland delegated the implementation of the independent living skills goals to Parent, it did not offer or provide Student any related transition services. Even so, the law does not require

Oakland to ensure that Student met his annual transition goals, especially here where Student left school as of March 4, 2014.

CONTINUING DENIAL OF FAPE FOR THE START OF THE 2014-2015 SCHOOL YEAR

65. With the start of the 2014-2015 school year, Oakland continued to offer placement at Oakland Tech with resource support pursuant to Student's annual October 29, 2013 IEP, as amended in January 2014, with increased resource support and a behavior support plan. As determined above, Oakland's January 2014 amendment IEP did not constitute a FAPE as it failed to offer mental health services to address Student's known mental health needs which were adversely impacting his education. Through April 2014, Student's mental health needs became even more prominent and were acknowledged by Oakland at the April 2014 amendment IEP team meeting with an eligibility change to emotional disturbance and an offer of a mental health assessment. Still, this further amendment did not address Student's known mental health needs, and Oakland had not completed its assessment at the time of hearing. The evidence showed that Student's need for mental health services continued through the time of hearing.

66. Richard Snyder, Student's therapist at Ashcreek, established that Student required a mental health component in order to access his educational program.²¹ Because Student's mental health needs remained and Oakland failed to offer any related services to meet these needs, there was a continuing denial of FAPE. That it was Oakland's policy to not offer therapeutic services or a therapeutic placement without conducting its own assessment, did not relieve it of its ongoing duty to meet Student's known mental health needs pending any further assessment.

²¹ Mr. Snyder has a master's degree in clinical social worker and has provided counseling services to residentially placed youth for more than 15 years.

67. Oakland's offer of placement was an amendment to the annual offer dated October 29, 2013. Student was due for his triennial assessment and annual IEP team meeting by the end of October 2014. It is the role of Student's IEP team to determine a current offer, based upon any updated assessments and information then known. At the time of hearing, Oakland had not made an annual offer of placement and services for the 2014-2015 school year. Therefore, whether Oakland denied Student a FAPE for the remainder 2014-2015 school year was not ripe for adjudication.

68. A determination of the level of placement that Student required at the time of hearing, including whether or not he was in need of residential treatment or a nonpublic school, is not required in order to adjudicate Student's claims. Oakland's failure to offer mental health services constituted a continuing denial of a FAPE and, as discussed below, Parents are entitled to reimbursement for Student's private placement at Ashcreek.

REQUESTED REIMBURSEMENT

Open Sky

69. Open Sky is a residential wilderness treatment program in Colorado serving teenagers and young adults with a variety of mental health conditions. It provided Student mental health treatment in a non-traditional living environment. Open Sky did not provide a formal educational component and did not employ any credentialed teachers. Student did not continue his studies or receive any instruction. However, he was given weekly writing assignments which he completed to a minimal degree and had the opportunity to earn school credit. Ms. Bolt was his primary therapist and established that Student made progress in terms of beginning to trust the therapeutic process. He committed to quit his drug use, and over time, he was able to

express his emotions, although he was not able to address his deeper, underlying issues during his stay.

70. Parents waited one month before informing Oakland of why Student stopped attending school. Their April 4, 2014 letter was the first notice Oakland had of the fact that Student was now privately placed at Open Sky and had been there since March 11, 2014. Believing Student would follow-through on another suicide attempt upon his release from the hospital, Parents focused their attention on working with an educational consultant to secure a safe placement. Parents sent Student to Open Sky due to his increased behavior problems such as staying out late with friends, stealing, using drugs, oppositional and verbally aggressive home behavior, withdrawal, and school struggles. Even so, Student had mental health needs which adversely impacted his education, and Open Sky was able to address Student's needs in this area. Parents paid a total of \$42,360 for Student's program at Open Sky which included a \$2,000 enrollment fee and tuition from March 11 through June 3, 2014. Student did not introduce any evidence of travel costs for transportation or visits.

Ashcreek

71. On May 14, 2014, Parents provided Oakland advance notice of their intent to place Student at Ashcreek, at public expense. On June 3, 2014, Student transferred to Ashcreek where he remained at the time of hearing. Ashcreek serves young men with a variety of mental health difficulties often co-occurring with addiction issues, and includes both an educational and therapeutic component. Oakland contended but did not prove that Ashcreek was simply a substance abuse treatment program. Ashcreek runs a school fully accredited by AdvanceEd, a national accrediting entity, although it is not certified by the California Department of Education. It offers Student a full educational curriculum taught by certified teachers, including certified special education teachers. Student enrolled in English 9, Algebra 1, French, World History, Biology,

Physical Education and Study Skills. The largest class consists of five students, allowing Ashcreek to individualize each student's educational program and provide individual instruction as needed. Student is able to work at his own pace. His curriculum is not modified but he is provided accommodations such as pacing, having instructions or questions read aloud, extended time, and checking for understanding.

72. Student's English teacher at Ashcreek, Ms. Staheli, established that Student has received educational benefit during the time he has attended. He has advanced from a rudimentary to a proficient writer, capable of reading texts, gathering information, and writing an organized, detailed, and persuasive position paper. Student also passed his math midterm examination. Ms. Staheli described Student as engaged in class as demonstrated by his work completion and follow-through in turning in assignments without reminders. At first, Student did not interact with teachers or students at Ashcreek. At the time of hearing, he had developed camaraderie with his peers and was respectful to his teachers.

73. Ashcreek runs a formal therapeutic program as well as a working horse ranch. Mr. Snyder described the interplay of the horse ranch as a place where he teaches students to teach horses and in return analogies are drawn and life lessons are learned. Licensed therapists work at the ranch with the students who are much more likely to open up and form a trust relationship as they work with large animals in this experiential setting. Student participates in weekly individual and family therapy sessions with Mr. Snyder, and has made progress in addressing his mental health and substance abuse issues. Student also agreed to take medication to combat his depressive symptoms.

74. Ashcreek has a four level system with Students earning higher levels with greater privileges as they complete more work and internalize the program. Student previously gained level two, but was on level one at the time of hearing. Students can receive day passes on level two and overnight passes on level three, but home passes

are reserved for level four. Parents visited Student at Ashcreek the weekend of August 28-29, 2014.²² During their visit, Student acted comfortably and engaged freely with them, and shared about his program. Parent was amazed at how he had changed, and described Student as a different person. Student made progress in his academics, social and behavioral adjustment, as well as in addressing his mental health needs.

75. Parents paid an enrollment fee of \$1,950, June 2014 tuition of \$7,649.91, and monthly tuition of \$8,500 for July through September 2014, with the same amount anticipated for each succeeding month. This amounts to a daily rate of approximately \$283.33. As outlined below, tuition reimbursement is appropriate and will be awarded for Student's placement at Ashcreek through November 3, 2014, the date of this Decision.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)²⁴ et seq.; Ed. Code, § 56000 et seq.; Cal.

²² They incurred approximately \$700 in travel expenses for that weekend and anticipate visiting once a month. Parent did not provide written proof of travel expenditures.

²³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

²⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) 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 if an

individual child was provided a FAPE. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951, fn. 10.) However, an educational agency may not discharge its duty under the IDEA by providing a program that “produces some minimal academic advancement no matter how trivial [citation].” (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Therefore, Student bore the burden of proving his claims by a preponderance of the evidence.

UNIQUE NEEDS

5. A student’s unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, educational needs include functional performance. (Ed. Code § 56345, subd. (a)(1).) Psychological, behavioral, and emotional goals are properly addressed through an IEP when they “affect academic progress, school behavior and socialization.” (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

ISSUE 1: MENTAL HEALTH NEEDS

6. Student contends that from July 2012, Oakland was on notice of his mental health needs and their negative impact on his ability to access his educational program. Student argues that Oakland was required to assess him in the area of mental health functioning and to offer appropriate therapeutic services, and its failure to do so denied him a FAPE. Oakland argues that Student had a substance abuse problem which negatively impacted his attendance, academics, and participation and that this is a medical issue that it was not required to treat. Oakland alleges that Student's medical diagnoses did not adversely impact his education, although it nevertheless offered an educationally related mental health services assessment once it learned of Student's psychiatric hospitalization. Oakland claims that Parents' failure to make Student reasonably available for assessment excused its duty to assess and offer therapeutic interventions.

Reevaluations

7. A reevaluation shall be conducted if the district determines that the educational or related services needs of the student warrant a reassessment or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).) In California, the term "assessment" has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5). A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability is a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031-1033 (*Park*).)

Procedural Violations

8. There are two parts to the legal analysis of whether a school district offered a student a FAPE, whether the educational agency has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, 458, U.S. 206-207.) A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the student'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); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

Related Services

9. Related services include psychological services, recreation, including therapeutic recreation, social work services, counseling, including rehabilitation counseling, and medical services for diagnostic and evaluation purposes only, as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a) [related services also include parent counseling and training].) State law adopts this definition of related services. (Ed. Code, § 56363, subd. (a) & (b).)

10. The responsible educational agency, including Oakland in the instant case, is charged with assessing a student with special needs who is suspected of needing related services, such as mental health services, to benefit from his education. (Gov. Code § 7572, subd. (a).) Further, the local agency is statutorily required to provide related services that a student needs in order to receive a FAPE. (Gov. Code, § 7573.) A related service shall be added to a student's IEP only upon recommendation of a qualified assessor. (Gov. Code, § 7572, subd. (c).)

11. An educational agency satisfies the FAPE standard by providing adequate related services such that the student can take advantage of educational opportunities and achieve the goals of his IEP. (*Park, supra*, 464 F.3d 1025, 1033.) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

EXCLUSION OF SUBSTANCE ABUSE TREATMENT

12. A district is not required to address a student's medical needs. (*Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 645 [psychiatric hospitalization to treat mental illness is an excluded medical service].) Substance abuse treatment is not a related service under state or federal law because it is a medical service. (*P.K. v. Bedford Cent. School Dist.* (S.D.N.Y. 2008) 569 F. Supp. 2d 371, 386 [Congress did not intend for school districts to pay for or provide substance abuse treatment for special education students]; *Blickle v. St. Charles Community Unit Sch. Dist. No. 303* (N.D.Ill. July 29, 1993, No. 93 C 549) 1993 WL 286485, p. 9, fn. 10 [a district is not required to treat the medical problem of substance abuse "particularly when these problems manifest outside the school day and do not directly bear on a child's instructional needs."]; *Field v. Haddonfield Bd. of Educ.* (D.N.J. 1991) 769 F.Supp. 1313, 1325-1327 [substance abuse treatment program constituted an excluded medical service based upon its medical model]; *Letter to Scariano* 213 IDELR 133 (OSEP 1988) [addiction is not a handicapping condition and if a service is required to solely treat addiction and is not required to provide a FAPE, then it is not the responsibility of the public agency].)

13. Student did not establish that he had any needs in the area of mental health or social-emotional functioning such that Oakland was required to conduct a mental health assessment or provide mental health services from July 2012 through the 2012-2013 school year. Although the October 2012 IEP team identified some emerging

behavioral issues, Student's attendance, academics, and effort improved by February 2013.

14. However, by the time of the October 29, 2013 IEP team meeting, due to Student's change in presentation and orientation towards schooling, as well as his academic struggles, Oakland was on notice that Student likely had needs in the area of mental health, given the context of his diagnosis of depression and reactive attachment disorder. Student was exhibiting increased social, emotional, and mental health symptoms, and his educational progress suffered as a consequence. That Student was using marijuana did not relieve Oakland of its duty to conduct an assessment of Student's mental health functioning, and Oakland assumed the risk of attributing his emotional difficulties to drug use, without corroborative assessment data. Student was depressed, withdrawn, unable to focus or apply himself, increasingly tardy or absent from school, and failing his classes. Teachers considered his emotional distance and non-responsiveness abnormal. He presented in class as disengaged from the learning process and those around him, peers and adults alike.

15. By October 29, 2013, Oakland had reason to suspect that Student may have needs in the area of mental health and was required to assess this area of need. Oakland's failure to timely assess Student did not result in substantive harm given its prior agreement to fund an independent neuropsychological assessment of Student's social and emotional functioning. Given its own staff reports and Dr. Peterson's independent evaluation, had Oakland timely assessed Student, it would have determined a need for educationally related mental health services by the third week of January 2014. Oakland's failure to directly assess Student's mental health needs, or rely upon the findings of the independent assessment it funded, led to the development of an amendment IEP that failed to include mental health services which Student required to receive educational benefit.

16. The requirement that related services, such as mental health, may not be added to an IEP without an assessment and recommendation is for Student's protection and to ensure that services are tailored to meet his individual needs, not to protect Oakland from its duty to offer required services or reward its refusal to timely assess once it was on notice of an area of suspected need. Further, as agreed to by Oakland and at its expense, Dr. Peterson did assess Student, including his mental health needs, and determined he required counseling to receive educational benefit. Dr. Peterson, as a licensed neuropsychologist is a qualified assessor, competent to recommend the provision of mental health services and his assessment and testimony were entitled to great weight. As of January 21, 2014, when Dr. Peterson reported his conclusions and recommendations to the IEP team, Oakland was on notice that Student's mental health needs adversely affected his education. Its failure to offer mental health services in the January 2014 amendment IEP denied Student educational benefit and resulted in a substantive denial of FAPE.

17. At the April 22, 2014 IEP team meeting, Oakland determined that Student's primary qualifying condition was that of emotional disturbance. In re-designating Student's eligibility category, Oakland acknowledged that Student's qualifying emotional challenges, rather than non-qualifying social maladjustment, had been impacting his education for a long period of time and to a marked degree.²⁵ Oakland's offer at the April 2014 IEP meeting to further assess Student's educationally related mental health needs did not relieve it of its obligation to offer and provide appropriate interventions as of January 21, 2014.

²⁵ See California Code of Regulations, title 5, § 3030(b)(4) (definition of emotional disturbance).

The April 2014 Assessment Plan and Oakland's Right to Assess

18. A district must deliver an assessment plan to a parent within 15 days of a referral for assessment, not counting days between the regular school sessions. (Ed. Code, § 56321, subd. (a).) A school district assessment must be completed and an IEP team meeting held within 60 days of receiving consent, excluding specified holidays. (Ed. Code, §§ 56302.1, subd. (a), 56344, subd. (a).) This 60-day time period does not apply if the parent repeatedly fails or refuses to produce the student for the assessment. (Ed. Code. § 56302.1, subd. (b)(2).)

19. Taking into account legal timelines and days of summer vacation, Oakland was required to complete its educationally related mental health assessment pursuant to the signed assessment plan dated April 22, 2014, and discuss the findings at an IEP team meeting by September 2, 2014.

20. The IDEA assumes parents, as well as school districts, will cooperate in the IEP development process. (*Schaffer v. Weast, supra*, 546 U.S. 49, 53 [noting that “[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools.”]; see also, *Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469 (*Patricia P.*) [reimbursement denied where parent thwarted assessment process].) The Ninth Circuit has held, “if the parents want [their child] to receive special education services under the [IDEA], they are obliged to permit [re-assessment] testing.” (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315.) There is no exception to a district’s right to re-assess a student itself, for IDEA eligibility, using its own personnel. (*Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 179 [no exception to the district’s right to reevaluate a student based upon medical or psychological harm to the student]; *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160; *Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48 (*Dubois*).) Unless a parent

waives claims under the IDEA, she must comply with the reasonable and necessary assessment requests of the district. (*Dubois, supra*, 727 F.2d 44, 49.)

21. Oakland contended that Parent's refusal to make Student available for assessment excused it from timely conducting its offered mental health assessment. Oakland did not carry its burden of proving this affirmative defense. There was no evidence that Parent refused to allow an assessment, and Oakland did not establish that Parent was legally required to return Student to Oakland for assessment. At the time it offered to assess Student, Oakland knew he was at an out-of-state therapy program and that he would not be discharged before May 20, 2014, likely to a residential program. Dr. Lopes waited until June 12, 2014, to first contact Parent and asked about Student's availability "in a week or so" knowing that June 20, 2014, was the last day of work for the school psychologists. While Oakland construed Parent's June 18, 2014 email response, inviting it to assess Student in Utah, as a refusal to have Student return for assessment, it never explained to Parent its position that she was required to bring Student to Oakland, and did not take any steps to determine if it would be safe for Student to return for an assessment. Student did not establish that it would be unsafe for him to travel home for assessment. However, Oakland failed to prove that Parent refused to make Student available locally. Parent did not refuse to produce Student; rather Oakland never scheduled a date, time, and location for the assessment.

22. Although Parent must cooperate in making Student available, there is no legal requirement that Student must be brought to Oakland for assessment. Oakland's contention that its duty to assess was conditioned upon Student being available locally was not supported by the facts or law. Oakland could have completed the assessment by traveling to Student's residential treatment facility in Utah and it did not do so.

23. Oakland's failure to timely assess pursuant to a signed assessment plan constitutes a further procedural violation which denied Student a FAPE as it deprived

him of educational benefit and substantially impeded Parents' participatory rights by depriving them of assessment data. Student's remedy for Oakland's denial of a FAPE for failing to timely assess his mental health needs and offer mental health services is addressed below.

ISSUE 2: INDEPENDENT TRANSITION PLAN AND GOALS

24. Student alleges Oakland failed to conduct required transition assessments and that the resulting individual transition plan in ninth grade did not include transition services and was neither individualized nor implemented. Oakland argues it developed an appropriate transition plan based upon an age-appropriate assessment. Oakland further claims it was not required to provide Student with any transition services prior to April 13, 2014, when he turned 16. Oakland contends that Student's premature exit from the district thwarted its ability to implement the annual plan.

Transition Assessment and Services

25. Beginning, not later, than the first IEP to be in effect when a student with a disability turns 16, and updated annually thereafter, the IEP must include appropriate, measurable, post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8).) Every such IEP must also include transition services to assist the student in reaching those post-secondary goals. (*Ibid.*) If determined appropriate by the IEP team, transition services may begin earlier than the IEP in effect at age 16. (34 C.F.R. § 300.32(b); Ed. Code § 56345, subd. (a)(8); 71 Fed. Reg. 46667 (August 14, 2006).)

26. Transition services are defined as a coordinated set of activities for a special needs student that: (A) is designed within a results-oriented process focused on improving the student's academic and functional achievement to facilitate movement

from school to post-school activities, including post-secondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation; (B) is based upon the individual needs of the student, taking into account his strengths, preferences, and interests; and (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. (20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a); Ed. Code, § 56345.1, subd. (a).)

27. The law requires that post-secondary goals be based upon “age appropriate” transition assessments; it does not prescribe that a formal transition assessment must be performed, or that standardized measures be used. Relevant information may be obtained from a variety of sources, including record review, interviews, assessment materials, as well as testing instruments, each of which may individually constitute an assessment. Ms. Rocke developed Student’s transition plan based upon her knowledge of Student, her experience as a resource teacher, and interviews and conversations with him. Ms. Rocke’s efforts to obtain information constitute an appropriate assessment in this case.

Inadequate Transition Plan Constitutes Procedural Violation

28. The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [notation in IEP that the required transition plan would be “deferred” was procedural violation where student was not in a position to benefit from it]; *A.S. v. Madison Metro School Dist.* (W.D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as procedural violation]; *Virginia S., et al. v. Dept. of*

Ed., State of Hawaii (D. Hawaii, January 8, 2007, Civ. No. 06-00128 JMS/LEK) 2007 WL 80814, p. 10 [transition plan violated procedural requirements of IDEA when it was not based on an interview with the student or parents, did not reference student's interests, and generically described postsecondary goals as graduation from high school and employment, but was ultimately found to be harmless error; transition plan assumes greater importance as student approaches graduation]; *C.B. v. Garden Grove Unified School District* (9th Cir. May 28, 2014, No. 12-56911) 575 Fed. Appx. 796 [inadequate transition service did not result in a FAPE denial as student had several years to receive services and work on transition goals].)

29. The local educational agency responsible for the student's education retains ultimate responsibility for ensuring that transition services are provided. (*Letter to Bereuter* 20 IDELR 536 (OSERS 1993); see 34 C.F.R. § 300.324(c) [if a participating agency fails to provide transition services identified in the IEP, the public agency must reconvene a team meeting to identify alternative strategies and services to assist the student in meeting the transition goals.]) "In considering the adequacy of a myriad of transition services, an inquiring court must view those services in the aggregate and in light of the child's overall needs. The test is whether the IEP, taken in its entirety, is reasonably calculated to enable the particular child to garner educational benefits." (*Lessard v. Wilton-Lyndeborough Coop. School Dist.*, (1st Cir. 2008) 518 F.3d. 18, 30.)

Clear Written Offer

30. One of the procedural prerequisites is that an offer of a FAPE to a student must be formal, specific and written. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, *cert. denied*, 513 U.S. 965, 115 S.Ct. 428, 130 L.Ed.2d 341 (1994) (*Union*).) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it; this includes the placement offer as well as specifics regarding what additional assistance will be provided. (*Ibid.*)

Implementation

31. There is no statutory requirement that a district must perfectly adhere to an IEP and minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 821). Only a *material* failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569 p. 7.)

32. Although Oakland did not list Student's individual transition needs in the transition plan, the October 2013 IEP, considered as whole, does identify these areas of need. However, Oakland failed to identify any transition services that it would be responsible for providing to support Student's independent living goals. The law requires that transition services begin no later than the first IEP to be in place when the child turns 16. (71 Fed. Reg. 46667 (Aug.14, 2006).) Oakland offers no legal authority in support of its claim that it was not required to provide transition services because Student was only 15 years old until the time he left Oakland Tech. Parents consented to the October 2013 IEP which included Student's transition plan. As part of the IEP, Oakland was responsible to implement this plan and provide transition services. Further, Oakland failed to provide a clear offer when it did not identify the individual responsible for implementing and overseeing Student's transition plan. Parent was never informed that Oakland expected her to provide services to support Student's independent living goals. Oakland impermissibly delegated its transition responsibilities by expecting Parent to implement his independent living goals. This failure to offer transition services and identify district personnel responsible for assisting Student in working towards his transition goals constitutes a procedural violation.

33. School districts are not required to ensure that students are successful in achieving all of their transition goals. The IDEA was meant to create opportunities for

disabled children, and not to guarantee a specific result. (*High v. Exeter Township Sch. Dist.* (E.D. Pa. February 1, 2010, No. 09-22020) 2010 WL 363832, p. 6, (*Exeter*) citing *Rowley, supra*, 458 U.S. at 192.)) The court in *Exeter* also discussed how a transition plan compares with an IEP, and noted that the statutory requirements for transition plans contain no progress monitoring requirement. An IEP must include a method to measure progress; however, a transition plan must only be updated annually and include measurable post-secondary goals and corresponding services. (*Exeter, supra*, 2010 WL 363832 p.6, fn. 15.)

34. In analyzing the impact of the deficiency noted above, Student did not establish that any violation resulted in substantive harm. There is no reporting requirement on the progress made during the year on annual transition goals, nor any requirement that transition services must be delivered at a particular time, frequency or duration. Student's post-secondary goals were linked to his annual IEP goals in the areas of self-help, study skills and academics and Oakland was implementing these. Oakland's failure to offer or provide transition services to support Student's independent living goal and identify the district staff responsible for such services is concerning. Even so, this violation did not constitute a material failure to implement the October 2013 IEP. Oakland minimally offer transition services in the areas of postsecondary employment and education. Student was not in a position to receive and participate in transition activities. He was struggling with learning challenges, mental health issues, and substance abuse. Further, Student stopped attending Oakland Tech as of March 4, 2014, and had not returned through the time of hearing. Student did not prove that Oakland denied him a FAPE by failing to offer and provide a legally compliant transition plan.

ISSUE 3: PLACEMENT NEEDS FOR THE 2014-2015 SCHOOL YEAR

35. Student contends that Oakland's continuing offer of placement at Oakland Tech with increased resource support and a behavior plan was inadequate to meet his

academic and mental health needs for the 2014-2015 school year. Student claims he required a residential treatment center or at least a nonpublic school placement to meet his specialized educational needs. Oakland contends that it had not made an offer of placement for the 2014-2015 school year at the time of hearing because Parent prevented it from conducting its assessment. Oakland argues it had the right to assess Student in order to determine his need for a therapeutic placement or services and, based upon its knowledge of Student's needs, he was able to receive benefit from its offered placement and did not require a more restrictive placement.

Requirement That IEP Team Meet At Least Annually

36. A district must have an IEP in effect for each student with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (c).) A school district must conduct an IEP team meeting for a special education student at least annually to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56380, subd. (a)(1) & 56343, subd. (d); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56.)

37. At the time of hearing, Student's operative IEP was dated October 29, 2013, and had not yet expired. Although Oakland offered two amendment IEP's in January and April 2014, it had not made an annual offer of placement for the 2014-2015 school year, and was not required to do so until on or about October 29, 2014. As determined herein, Oakland's continuing offer of placement at Oakland Tech in general education with resource support and a behavior plan denied Student a FAPE from January 21, 2014. This denial continued through the time of hearing. However, Student's claim that Oakland denied him a FAPE by failing to make an appropriate placement

offer for the 2014-2015 school year was not ripe for adjudication. Further, there is no need to determine whether Student required residential placement or a nonpublic school at the time of hearing, as Parent will be awarded reimbursement for his placement at Ashcreek through the date of this Decision.

REMEDIES

1. Student prevailed on Issue 1. As a remedy, he requests that Oakland reimburse Parents' private mental health services and tuition and travel costs for Open Sky and Ashcreek, and that it provide compensatory education and an appropriate placement. Oakland contends that it should not be required to reimburse Parents as it offered Student a FAPE. Oakland argues that Parents are not entitled to reimbursement for Open Sky as they did not provide advance notice of placement. Further, Oakland claims that Parents are not entitled to reimbursement for Open Sky or Ashcreek because their reasons for placement were not educationally related but rather to treat Student's substance abuse and behavior issues, and they failed to make Student available for assessment.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. 359, 374 [the purpose of the IDEA is to provide students with a disability "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].)

3. A parent may be entitled to reimbursement for unilaterally placing a student in a private placement if the parent proves at hearing that the district had not

made a FAPE available in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Burlington*, *supra*, 471 U.S. at 369-371.) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 (*Carter*).) To be entitled to tuition reimbursement, the private placement must meet certain basic requirements of the IDEA, such as the requirement that the placement address the student's needs and provide him educational benefit. (*Carter*, *supra*, 510 U.S. 7, 12-13 [reimbursement appropriate where the private school did not meet the FAPE standard but did provide an education otherwise proper under the IDEA].) The appropriateness of the private placement is governed by equitable considerations. (*Carter*, *supra*, 510 U.S. 7, 15-16.)

4. In *C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155 (*C.B.*), the Ninth Circuit found there was no abuse of discretion in awarding reimbursement for a private placement at a reading center which solely provided language based services and instruction, where the student received educational benefit even though all his needs were not met. The Ninth Circuit adopted the standard articulated by the Second Circuit regarding reimbursement under the IDEA, that to qualify for reimbursement, parents need not show that a private placement furnishes every special education service necessary to maximize their child's potential. (*C.B.*, *supra* 635 F.3d 1155, 1159 [citing *Frank G. v. Board of Education* (2nd Cir. 2006) 459 F.3d 356, 365 (*Frank G.*). Rather, "[parents] need only demonstrate that the placement provides 'educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.'" (*Frank G.*, *supra*, 459 F.3d 365 [citing *Rowley*, *supra*, 458 U.S. 188-189];

Union, supra, 15 F.3d 1519, 1526, [school district must reimburse parents for unilateral placement if school is an “appropriate alternative educational program.”].)

5. The reimbursement cases cited above emphasize the importance of the private placement providing instructional services tailored to meet the student’s needs. To be considered appropriate, a private placement must meet at least some of the student’s needs, and provide educational benefit by way of an instructional program. In *C.B.*, the Ninth Circuit distinguished the case of *Gagliardo v. Arlington Central School Dist.* (2nd Cir. 2007) 489 F.3d 105 (*Gagliardo*), where the Second Circuit denied reimbursement even where the student demonstrated success, finding that the private placement did not offer any special education services applicable to the student. (*C.B.*, *supra* 635 F.3d 1155, 1160 fn. 2.) The totality of the circumstances must be considered to determine if a private placement reasonably serves a student’s individual needs. (*Frank G.*, *supra*, 459 F.3d 364.) In *Gagliardo*, because the private placement did not provide a therapeutic setting with staff trained to handle the student’s anxiety disorder as recommended by private evaluators, the Second Circuit reversed the district court’s reimbursement award.

6. Student’s placement at Open Sky presents a factually similar, though reverse situation as the *Gagliardo* case. Open Sky was able to meet Student’s mental health needs but provided no educational component. Student’s own expert agreed that he has a specific learning disability such that the basic task of reading is a slow and laborious process for him, and he requires daily academic support in the form of individualized resource support in order to benefit from his curriculum.

7. The district’s responsibility under the IDEA is to remedy the learning related symptoms of a disability, not to treat other, non-learning related symptoms. (*Forest Grove School District v. T.A.* (D. Ore. 2009) 675 F.Supp.2d 1063, 1068, *affd.* (9th Cir. 2011) 638 F.3d 1234, 1238-39 [no abuse of discretion in denying parent

reimbursement where district court found parent sought residential placement solely for student's drug abuse and behavior problems unrelated to school difficulties].) While it is true that Student had mental health needs, the evidence established that the sole purpose of Open Sky was to provide Student with immediate crisis prevention rather than to address his educational needs.

Equitable Considerations in Denying or Reducing Award

8. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted unreasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) A parent's failure to provide the district with advance notice of intent to enroll the student in a private school at public expense, or failure to make the student available for a previously noticed assessment may adversely impact a reimbursement request. (*Ibid.*)

9. Parents who do not allow a school district a reasonable opportunity to evaluate their special needs child may forfeit their claim for reimbursement for a private placement. (*Patricia P., supra*, 203 F.3d 462, 469 [during summer, parent enrolled student in the district and then privately placed her out-of-state before the start of the school year, thereby preventing the district from conducting assessments and making an offer of placement]; *Schoenfeld v. Parkway School Dist.* (8th Cir. 1998), 138 F.3d 379, 381-382 [in removing student from district after one day of school and placing him out-of-state, parent denied the district the opportunity to develop a plan, so there was no evidence district's plan was inappropriate]; *Tucker v. Calloway County Bd. of Educ.* (6th Cir.1998) 136 F.3d 495, 503-505 [parents asked the district to delay its offer of placement for the following school year and then privately placed the student without allowing the district a chance to develop an offer].)

10. All of the above cases focused on the parents' failure to work cooperatively with the district in developing an appropriate IEP, and thus are factually

distinguishable from the case at hand. Here, Oakland had reason to suspect that Student had mental health needs four months prior to his first out-of-state placement. Because of Parent's persistence, Oakland agreed to fund an independent assessment and convened an IEP team meeting in January 2014, to consider the results. Parent participated in this amendment IEP team meeting and tried to convince Oakland to incorporate Dr. Peterson's recommendations into Student's IEP. Parent informed Oakland that she was not satisfied with the amendment offer during the IEP team meeting and in a subsequent meeting with Ms. Rocke. Oakland was on notice that Student required mental health services by January 21, 2014, at the latest. Oakland continued to be aware of Student's struggles through March 3, 2014, and was informed of Student's act of self-harm and psychiatric hospitalization at the beginning of April 2014. Its own expert anticipated Student's decline. Oakland had adequate notice, knowledge, and opportunity to develop an appropriate plan for Student.

11. The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Puyallup, supra*, 31 F.3d 1489, 1496 [citing *Target Range, supra*, 960 F.2d 1479, 1486].) The Seventh Circuit reminded districts, "This is not to say that a school district is not also bound by the IDEA's preference for a cooperative placement process: this Court will look harshly upon any party's failure to reasonably cooperate with another's diligent execution of their rights and obligations under the IDEA." (*Patricia P., supra*, 203 F.3d 462, 469.)

12. Having established that Oakland failed to offer Student a FAPE from January 21, 2014, through the time of hearing, the next inquiry is whether the private placements were appropriate, and if so, whether Parents' actions were reasonable in effectuating the unilateral placements or if there are any equitable factors that require reduction or denial of reimbursement.

13. Oakland contends that just as in the *Forest Grove* case, Parents must be denied reimbursement as they placed Student privately solely because of his drug and behavior issues. Despite similarities, Student's situation differs from that present in *Forest Grove*. Here, Oakland was responsible for meeting all of Student's educationally related needs which include mental health. Oakland failed to offer mental health services. Parents tried to work with Oakland to incorporate Dr. Peterson's recommendations into Student's IEP, but Oakland declined. When Student suffered a mental health crisis six weeks later, Parents secured placement at Open Sky to stabilize him, and then transferred him to Ashcreek which could address both his academic and educationally related mental health needs.

Appropriateness of Open Sky

14. Open Sky provided therapy services to address Student's mental health needs, and Student benefited from these services. Oakland ignored the warnings that Student had mental health needs prior to Dr. Peterson's assessment and failed to offer any mental health services after considering his results and even after learning of Student's psychiatric hospitalization and acknowledging his emotional disturbance. Despite all this, in considering the totality of the circumstances, Open Sky does not constitute an appropriate placement as it lacked any instructional or academic component. Student has a specific learning disability and required academic supports and specialized instruction. Student's academic struggles fueled his low self-esteem which further impacted his mental health functioning. Therefore, to receive educational benefit from related mental health services, he needed to receive academic supports. Had Open Sky provided Student some instructional, academic component, it would meet the Ninth Circuit's criteria in C.B. of an appropriate placement.

15. Even if it were found to meet the Ninth Circuit criteria, equitable considerations weight against reimbursement. Parents failed to timely notify Oakland of

their intent to place, and waited until after Student had already been there for more than three weeks. Had Parents timely apprised Oakland of Student's circumstance, it is likely, based upon its actions on April 22, 2014, that Oakland would have acknowledged Student's emotional disturbance sooner and offered an assessment, perhaps even while he was hospitalized. Further, Parents reasons for directly transferring Student from the hospital to Open Sky were to keep him from following through on another suicide attempt, and provide crisis intervention to predominantly address his behavioral issues, while they identified a more suitable placement. Parents are not entitled to reimbursement for Open Sky.

Appropriateness of Ashcreek

16. Ashcreek meets the criteria required by the Ninth Circuit for purposes of a reimbursement remedy even though it is not certified by the State of California. Student received educational benefit, both academic and social-emotional. That Student did not consistently progress on his levels at Ashcreek does not establish that he was not benefitting or the program was otherwise inappropriate, but rather evidences the severity of his continuing needs. On May 14, 2014, Parents timely notify Oakland of their intent to place Student at Ashcreek for educational purposes, at public expense. Parents are entitled to full reimbursement of tuition through the date of this Decision. This includes the \$1,950 enrollment fee, tuition of \$7,649.91 for the month of June 2014, monthly tuition of \$8,500 for July through October 2014, a period of four months (\$34,000), and three days in November at a pro-rated amount of \$283.33 per day (\$850) for a total of \$44,449.91. Student did not introduce sufficient evidence of Parent travel expenses and no award will be made in that regard.

ORDER

1. Within 45 days of the date of this Decision, Parents shall provide Oakland invoices and standard proofs of payment for Student's tuition at Ashcreek for the months of October and November 2014.
2. Within 45 days of receipt of the October and November 2014 tuition payment documents, Oakland shall reimburse Parents the amount of \$44,449.91 for the enrollment fee and full tuition at Ashcreek from June 2014 through the date of this Decision.
3. All of Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed as to Issue 1. Oakland prevailed as to Issues 2 and 3.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: November 3, 2014

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings