

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

THE CHARTER SCHOOL OF SAN DIEGO.

OAH Case No. 2014030133

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 4, 2014, naming The Charter School of San Diego.

Administrative Law Judge Rebecca Freie heard this matter in San Diego, California on August 5 through 6, and August 11-14, 2014.

Student was represented by Matthew H. Storey and Seth A. Schwartz, Attorneys at Law. On various days they were assisted by paralegals Jimmie Harris, and Christina Hebert. Mother attended all of the hearing, with the exception of the time Student was testifying. Student attended the hearing only when he was testifying.

Lisa Corr, Attorney at Law, represented Charter School. She was assisted by Barbara Hagberg, Attorney at Law. Stephanie Starr, Special Education Instructional Coordinator, attended the entire hearing as Charter School's representative, as did Lynne Alipio, Chief Business Officer of Charter School. Tim Tuter, Director of Innovation and Instruction for Charter School attended part of the hearing.

A continuance was granted to allow the parties to file written closing arguments and the record remained open until September 8, 2014. Charter School and Student

filed written closing arguments on that date and the record was closed on September 8, 2014, and the matter was submitted for decision.

## ISSUE <sup>1</sup>

Did Charter School fail to offer Student an individualized education program that would meet his unique needs and provide him with meaningful educational benefit from May 15, 2012 to July 1, 2013?

## SUMMARY OF DECISION

This Decision finds that Charter School failed to offer Student an IEP that would meet his unique needs and provide him with meaningful educational benefit from May 15, 2012 to July 1, 2013. In deciding that Charter School did not offer Student an IEP that would meet his needs during this period, the ALJ determines that Charter School did not procedurally comply with the laws governing the IEP process. It predetermined the offer it made at the IEP team meeting on May 15, 2012, which required Student to return from residential placement to attend Charter School. This predetermination denied Mother meaningful participation in the IEP process. Charter School committed a further procedural violation when it failed to offer Student a transition plan to facilitate his return from the non-public school, thus violating Education Code section 56345, subdivision (b)(4), and denying Student educational benefit.

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<sup>1</sup> The issue, as set forth in the Order Following Prehearing Conference, has been reworded 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.)

The ALJ also finds that the substantive offer of services and placement in a program at Charter School was not an offer of a free appropriate public education. First, Student established that he was not ready to return to Charter School from his residential placement at Summit Preparatory School in Montana on May 15, 2012. Further, Charter School did not offer a plan for transitioning Student back from Summit. Finally, all of the related services Student was to receive pursuant to the IEP, including individual and family therapy, were to occur at Charter School. Since the evidence established that Student had serious attendance issues when he was enrolled at Charter School, often unable to leave his home to go there, locating all of the related services at Charter School was a substantive denial of a FAPE. Therefore, Mother is entitled to reimbursement for tuition and other costs of placement, including transportation of Student and herself to and from the residential placement for the period at issue.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is now 20 years old.<sup>2</sup> He was initially made eligible for special education in November 2008 under the category of other health impairment due to chronic depression, and a specific learning disability.
2. Student began attending Charter School in mid-August 2010. Charter School is an independent study high school. Students attending Charter School are required to attend two-hour sessions of class twice a week by appointment. There is an expectation that each week students will complete 30 hours of independent coursework,

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<sup>2</sup> Student assigned his educational rights to Mother right after he reached age 18 in 2012, and she has held those rights since that time.

which includes the four hours of class attendance. Pupils take one course at a time, and are expected to complete a semester's worth of coursework in three to four weeks.

3. While enrolled at Charter School from August 2010 to September 2011, Student had serious attendance issues, and problems with work completion. After 12 months, he had completed only one course: geometry. Student's attendance and work-completion issues were due to his diagnosed depression.

4. Mother dis-enrolled Student from Charter School in September 2011, and re-enrolled him in November 2011. In early December 2011, she unilaterally enrolled him at Summit. At that time, Summit was certified by the California Department of Education as a residential treatment center with an on-grounds certified nonpublic school.

5. On May 14, 2012, Charter School and Mother entered into a settlement agreement that required Charter School to reimburse Mother for all expenses she incurred concerning Student's enrollment at Summit to that date, including travel expenses, as well as the fees of Allan Roth, a consultant Mother had retained in November 2011.<sup>3</sup> Mother waived all of Student's claims up to May 14, 2012.<sup>4</sup> An IEP

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<sup>3</sup> Mr. Roth has a masters of education/administration degree, and multiple California teaching credentials in the fields of special education and administration. He was employed by many school districts in many capacities, including director of special education, from 1974 to 2001. In 2001 he retired from the field of public education and became a consultant for parents of children with special needs, as well as a consultant for public school districts to provide training to ensure compliance with the Individuals with Disabilities Education Act.

<sup>4</sup> The settlement agreement was not fully executed until the end of May 2012, but this does not affect this Decision.

team meeting was then held on May 15, 2012. This meeting was part of a series of IEP team meetings that began on December 1, 2011, and continued on February 7, 2012, and March 21, 2012.

6. At the May 2012 IEP team meeting, Charter School made the offer of placement and services that are at issue in this case. Mother rejected the offer of placement, which, among other things, called for Student to return from Summit and resume attendance at Charter School immediately. The IEP also made various types of therapy services available to Student, all to occur at Charter School. Mother told the IEP team that Student would continue his unilateral placement at Summit, and she would be seeking reimbursement for continued placement, and she subsequently filed the complaint that is at issue.

#### IEP TEAM MEETINGS DECEMBER 2011 THROUGH MARCH 21, 2012<sup>5</sup>

December 1, 2011

7. In August 2011, Mother signed consent for District to assess Student because his triennial IEP team meeting was to occur in November 2011. The IEP team meeting occurred December 1, 2011. The purpose of this IEP meeting was to review Student's triennial assessments. However, due to Student's dis-enrollment in September, Charter School was unable to complete the psychoeducational assessment. Carrie Stora, Student's special education teacher at Charter School, had completed an academic assessment, and a health assessment had been completed by the Charter School nurse as of the date of this IEP team meeting. The meeting was adjourned so that the

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<sup>5</sup> Although these IEP team meetings preceded the settlement agreement of May 14, 2012, in which Mother waived all prior claims, they are discussed because the IEP offer of May 15, 2012, was the culmination of all these prior meetings.

psychoeducational assessment could be completed. An assistive technology assessment would also be completed.

February 7, 2012

8. At this IEP team meeting, a psychoeducational assessment by Steven Fisher, Psy.D., and Jennifer Chappell-Marsh, an intern, was discussed. <sup>6</sup> The IEP team agreed that Student met the eligibility criteria of emotionally disturbed for special education due to depression, which was confirmed by Dr. Fisher's report. In fact, the evidence established that Student had been diagnosed with depression as early as 2005. Before going to Summit, Student expressed a sense of hopelessness, and felt there was no reason to attend school and complete assignments, and this was reported by Ms. Chappell-Marsh and Dr. Fisher. Dr. Fisher and Ms. Chappell-Marsh had no contact with Student following the completion of the psychoeducational assessment.

9. The IEP team discussed the assistive technology report by Steven Oas, a licensed speech and language pathologist. It was agreed by the IEP team that Student

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<sup>6</sup> Dr. Fisher has a master's degree in counseling, a second master's degree in counseling, and a doctoral degree in psychology. He became a licensed educational psychologist in 1999 and a licensed clinical psychologist in 2000. He was credentialed as a school psychologist in 1982, and received an administrative credential in 1984. He was a public school psychologist from 1993 to 2013, and since 2000 has had a private practice that provides services, including assessments, to families of children with special needs.

Ms. Chappell-Marsh has been a licensed marriage and family therapist since 2013. At the time she assessed Student she was marriage and family therapist intern. She has a master's degree in counseling psychology.

could benefit from computer-generated software to assist him in organizing written assignments, as well as word prediction software. Although Dr. Fisher's assessment had found Student to be cognitively in the average to high average range, Student was writing at the level of a ninth-grader, and was now in grade 11, which is why the writing software was necessary.

March 21, 2012

10. Since the previous IEP team meeting in February, Charter School had contracted with Jean Cook, Psy.D., to conduct another psychological assessment of Student with a focus on placement.<sup>7</sup> In conducting her assessment she did a thorough records review and interviewed Mother, Student via video conference, and consulted with Ms. Stora, Ms. Chappell-Marsh, and Jason Calder, Student's therapist at Summit.<sup>8</sup> Dr. Cook completed two assessment tools, the Child and Adolescent Needs and

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<sup>7</sup> Dr. Cook is a licensed marriage, family and child counselor. She received her doctoral degree in clinical psychology in 2008, and has a master's degree in individual and family counseling. She is the proprietor of a nonpublic agency, Contract Behavioral Health Services, and has provided mental health services to children and families as an employee of public and nonpublic agencies since 1980. From 1992-1995, and 2012 to present, she has provided mental health assessments to determine mental health services for children with special needs.

<sup>8</sup> Mr. Calder is a licensed marriage and family therapist in Montana. He received his master's degree in marriage and family therapy in 2003, and has provided therapy services to families and children since that time in Montana and Utah. He was employed by Summit from 2006-2014 and in 2014 became the clinical director for Outback Therapeutic Expeditions.

Strengths Assessment Instrument, and the Child and Adolescent Level of Care Utilization System.<sup>9</sup> Dr. Cook described both of these tools as “guidelines” and explained they are used for reasons not related to education to determine the level of care needed by a child or adolescent; they are not norm-based assessments. Based on all the information she received, Dr. Cook determined that Student could return to Charter School with intensive therapeutic services. Her agency would provide most of these therapeutic services.

11. At this March meeting the IEP team discussed whether Student required continued residential placement at Summit, or could return home to attend Charter School and receive intensive outpatient therapeutic services. The Summit program was discussed at length. Both Student (who was present for part of the meeting), and Mr. Calder strongly expressed that if he returned to San Diego, even with intensive services, he would slide back into old habits, meaning school avoidance and failure to complete assigned work. Mr. Roth expressed disagreement with Dr. Cook’s report and asked for an independent educational evaluation. Dr. Cook had no further contact with Student or Mother following the IEP team meeting in March 2012, other than participating in the IEP team meeting in May 2012 with Mother.

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<sup>9</sup> During the due process hearing these instruments were referred to as the CANS and CALOCUS.

## MAY 15, 2012 IEP'S PROCEDURAL AND SUBSTANTIVE APPROPRIATENESS

### Independent Educational Evaluation

12. On April 21, 2012, Student returned from Summit briefly so that he could participate in an independent assessment by Glenn Bortnick, Psy.D.<sup>10</sup> Unlike Dr. Fisher's assessment, which was educationally focused, Dr. Bortnick's assessment was more clinical in assessing Student's mental health. Dr. Bortnick diagnosed Student with depression, and distinguished that diagnosis from social maladjustment, since a diagnosis of the latter does not qualify one for special education eligibility under the criteria for emotional disturbance. Dr. Bortnick recommended that Student continue in residential placement. Dr. Bortnick attributed Student's lack of school attendance and work-completion when he attended Charter School to his severe depression at the time. He also confirmed Mr. Calder's opinion that Student had great difficulty establishing rapport with a therapist, and that for therapy to be successful, Student and his therapist would need to connect and establish strong rapport.

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<sup>10</sup> Dr. Bortnick has been a licensed clinical psychologist in California since 1985. He received his school psychologist credential in California in 1983, and the same credential in Pennsylvania in 1977. He was a director of special education for middle schools in the Vista Unified School District from 1999 to 2008. He has been employed as a school psychologist with that school district since 1999, and has several additional years of experience as a school psychologist in other school districts. From 1989 to 1997, he was a senior clinical psychologist for the San Diego County Mental Health, and in that capacity conducted hundreds of mental health evaluations to determine the mental health needs of students in San Diego County. Although he does not have a private clinical practice, from time to time he conducts independent educational assessments pursuant to the IDEA. He has attended hundreds of IEP team meetings.

13. At hearing, Charter School tried to counter this evidence by having an expert witness, Kenneth Wesson, Ph.D., attack the methodology and conclusions in Dr. Bortnick's assessment, and support the conclusions in Dr. Fisher's and Dr. Cook's assessments and testimony.<sup>11</sup> Student also attacked the assessments of Dr. Fisher and Dr. Cook via Dr. Bortnick's testimony. Each assessment is found to have strengths and weaknesses, but this Decision is not based on the findings in any single assessment. Rather it is based on the facts of the case in its entirety.

#### Conduct of the May 15, 2012 IEP Team Meeting

14. Attending the IEP team meeting on May 15, 2012, in person and on behalf of Student were Mother, Mr. Roth, and Dr. Bortnick. Ginese Quann, of Charter School attended as an administrator; Ms. Stora, Amy Hagen (Student's general education teacher at Charter School), and Dr. Cook were also in attendance on behalf of Charter School. Attending telephonically were Mr. Calder, Tom Kallay, and Steve Gessler from Summit.<sup>12</sup> At least one person from each of these three contingents had attended each

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<sup>11</sup> Dr. Wesson has a master's in counseling and earned his doctorate in school psychology in 1984. He is credentialed as a school psychologist and administrator. He has been employed by the Riverside County Office of Education as a special education and alternative education administrator since 2007. From 1984 to 2007, he was employed by public school districts as a school psychologist and/or administrator. He has acted as an independent educational evaluator for school districts and families since 1999, and has conducted many trainings for school psychologists on the identification of emotionally disturbed children.

<sup>12</sup> The IEP team meeting lasted over four-and-one-half hours. Three hours into the meeting phone service with Summit was lost, and never regained. However, the

of the three previous meetings, with the exception of Summit personnel who had not attended the December 2011 IEP team meeting.

15. Dr. Bortnick presented his report to the IEP team. Dr. Cook questioned why Dr. Bortnick was diagnosing Student with depression, since she believed he was no longer showing signs of it at Summit. Dr. Bortnick was also questioned by Charter School team members as to why he continued to recommend residential placement. There was also some discussion as to how Student could transfer back to Charter School when he was ready. Mr. Calder informed the team that Summit's transition planning process included visits home with decreasing amounts of structure and supervision to assess whether a student had progressed sufficiently to return home. However, this discussion occurred long before the time in the meeting when accommodations, modifications and support services were discussed, and placement was then offered by Charter School. As discussed below, this issue was not raised again during the placement discussion.

#### ELIGIBILITY AND NEEDS

16. Following Dr. Bortnick's report, the team began a discussion concerning eligibility, and information and reports from previous meetings were referenced and accessible to the team. The IEP team began looking at eligibility at the February 7, 2012 IEP team meeting. Dr. Bortnick's more recent assessment from late April 2012 confirmed the diagnosis of depression made by Dr. Fisher in his February 2012 psychoeducational assessment, as did the Intake Assessment from Summit from December 2011, and more recent progress reports from Summit.

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Summit team members were active participants in the IEP meeting until that time, and the team was able to continue working without their presence.

17. Student's primary eligibility as emotionally disturbed was confirmed by his history of being diagnosed with depression as early as fifth grade, and his gradual loss of interest during high school in activities he had previously enjoyed, such as skateboarding and soccer. During his tenure at Charter School, Student demonstrated withdrawal in that he rarely left his home, and sometimes barricaded himself in his room to avoid contact with Mother. He had rare contact with friends. Student's appetite was affected, and he also suffered from severe sleep disturbance, having difficulty developing a regular schedule of sleeping at night, and being awake and active during the day. Although Student was in outpatient therapy until January 2011, and taking medication for depression until the spring of 2011, these interventions did not alleviate his depression.

18. Charter School operates 7:00 a.m. to 7:00 p.m., year-round, Monday through Friday, and also for a few hours on Saturday. Student was to attend class for two hours, twice each week, beginning at 4:00 p.m. on specified days. He was also required to complete 30 hours of work each week, which was combined with class attendance. When Student was first enrolled at Charter School, he steadily attended and completed work from August 25 through September 16, 2010, for a total of 96 hours at the rate of 6 hours for each day of completed work. He then did not return to school or turn in work until December 6, when he accumulated another 36 hours. After that Student was absent until February 28, 2011. He acquired another 18 hours of work from that date through March 2, 2011, and then did not return to school until April 25, 2011. At that time, he resumed regular attendance, acquiring six hours each day, Monday through Friday until May 31, 2011, with the exception of the week of May 16, 2011. After May 31, he did not attend Charter School or complete work until June 20, when he had three consecutive days with six hours of credit, and then again stopped. His last

attendance until disenrollment was steady attendance five days per week, six hours per day from July 18, 2011, through August 18, 2011.

19. When Student did attend Charter School, he did well, completed assignments, and was liked by his teachers, Ms. Stora and Ms. Hagen. However, as just described, the consistency of his attendance and work completion was dismal. On two or three occasions staff from Charter School came to his home to stage what were referred to as "interventions." At these times Student was told that if he continued his truancy he would be referred to a juvenile court school. While some of these interventions did result in Student returning to school and turning in work, not all of them did. No other methods were tried by Charter School to encourage attendance and work completion.

20. Mother's attempts to get Student to attend school and complete work were ineffective. Because he was an adolescent, and fully grown, she was physically unable to wake Student or force him into the car to take him to school if he did not want to go. And he had extreme passive resistance to her other attempts to enforce school attendance and work completion.

21. Student began using marijuana at age 14, and in June 2011 began using it daily until he was placed at Summit on December 5, 2011, where he tested positive for the substance. Although some Charter School witnesses seemed to blame Student's poor attendance and work completion on this daily use, the evidence did not establish this, as demonstrated by his steady attendance for several weeks at a time in May through August 2011, when he was smoking marijuana daily. Student was sometimes under the influence of marijuana when he attended Charter School. Student was engaged in a substance abuse program at Summit, and other than one incident of alcohol use when he was home on leave in November or December 2012, he remained clean and sober through graduation in May 2013.

22. There was no discussion at any of the IEP team meetings referenced in this Decision that suggested that Student had been placed at Summit for drug treatment. In fact, his use of marijuana was not a focus in any of the assessments, including those of Dr. Fisher and Dr. Cook. Although the intake report at Summit did refer to marijuana use, the focus of the report was on Student's severe depression at the time of admission. Further, Mr. Calder's therapy sessions with Student were centered on depression and related family issues, and several witnesses credibly reported that drug use was not uncommon among people with mental health issues in an effort to medicate themselves and alleviate the symptoms. Finally, the evidence established that Summit is not a drug treatment program. Although some students enter the program with a history of substance use or abuse, this is less than 50 percent of the population. A 12-step program is offered, as is another type of drug treatment program, but mental health issues are the focus of Summit when students are placed there.

23. Although Student did appear to become less depressed after he began attending Summit, and did not have problems with either class attendance or work completion there, the evidence established that the structure and strict schedule and routine at Summit simply did not permit him to cut class or not complete assignments. If he did so, or if his grades fell below 70 percent, he would lose privileges such as movie time, and would be assigned extra chores such as pulling weeds or organizing a storage room. Student performed well academically at Summit, earning A's and B's, and acquiring enough credits to obtain his high school diploma from Summit on May 17, 2013.

24. Dr. Bortnick was very persuasive in his testimony and assessment, as well as his comments at the May 15, 2012 IEP team meeting, that Student's depression was deep-seated, and would not be responsive to a "quick fix." The effectiveness of Summit's program was based on its entire program, which is described below. Summit's focus was

on giving students tools and strategies necessary to achieve happiness, independence, and success as adults, and to aid the students in internalizing these tools and strategies for permanent success.

25. The evidence established a strong likelihood that Student's depression was the result of several factors. First, both Dr. Fisher and Dr. Bortnick theorized that the depression might have a genetic basis, possibly from his biological father. Second, Dr. Fisher, Dr. Bortnick, and Mr. Calder all seemed to think that Student had abandonment issues concerning his father; Mother is a single parent, and the biological father has had no contact with him at all. Finally, several witnesses, including Mother and Dr. Bortnick, believed that undiagnosed learning disabilities in his early school years led to Student feeling like a failure, and therefore made him angry and resistant to attending school.

26. The May 2012 IEP team agreed that Student qualified for special education under the category of emotional disturbance due to his history of chronic depression. Everyone on the IEP team was aware of Student's history of poor attendance and work completion while at Charter School, and no one questioned the opinion of Dr. Bortnick that this was due to depression. Specific learning disability was added as a secondary disability on the IEP.

#### PRESENT LEVELS OF ACADEMIC AND FUNCTIONAL PERFORMANCE, AND TRANSITION PLANNING

27. The Charter School IEP team members discussed Student's levels of present performance when he attended that program, and made sure those levels were accurately recorded on the draft IEP. Summit participants discussed Student's current levels of performance there, and those were also recorded in the IEP. There was no dispute among team members that Student was making academic progress at Summit, his outward manifestations of his depression were decreasing, and that he was

maintaining a regular schedule at Summit with no sleep irregularities. He was establishing social relationships at Summit, and benefitting from the presence of positive male role models. The parties did not dispute the accuracy of the present levels of performance at hearing, and the levels that are reflected in the IEP document of May 15, 2012, are accurate as of that date.

28. The IEP team discussed post-secondary transition planning at the May 15, 2012 IEP team meeting, including how that occurred at Charter School, and how that occurred at Summit. This is not a disputed issue, nor was it at the May 2012 IEP team meeting. The only dispute is whether he was ready to leave Summit at that time and return to Charter School.

29. The IEP stated that Student's school avoidance and lack of work completion impeded his learning. A behavior goal was added to the IEP to address this, and the team agreed with this goal. There was no discussion of a behavior plan at the IEP team meeting, and no evidence presented at hearing as to what a behavior plan would look like to address this issue.

#### GOALS

30. Following the discussion of present levels of academic and functional performance, the IEP team moved to a discussion of goals for the IEP. Dr. Cook had great difficulty understanding that before services and placement could be discussed, goals needed to be developed. She talked about tailoring the goals so they could be implemented at Charter School, giving the impression that Student would be returning to Charter School from Summit in the near future. However, part of the IEP process, before moving on to needed supports and placement, is to develop baselines for the student's current functioning, and then to develop meaningful goals that a student can make meaningful progress on during the upcoming year. The goals and supports

developed then assist the IEP team in determining the level of placement required by the student who is subject to that IEP, and what that placement will be.

31. Mr. Roth guided the IEP team in developing six goals, all of which could be worked on at either Summit, or Charter School. Summit personnel were very active participants in this process until phone service was cut off three hours into the meeting.<sup>13</sup> However, when Summit participants “left” the meeting, only a post-secondary transition planning goal remained to be developed, and there had been sufficient discussion of what each school had to offer in this regard at a previous IEP team meeting, as well as earlier in this meeting, for the team to develop this goal.

32. During the goal development portion of the IEP team meeting in May 2012, the Summit participants provided the other members of the team with examples of areas where Student could benefit from goals, such as procrastination, and gave specific examples of behaviors and actions of Student at Summit that enabled the team to create meaningful, measurable goals. This was true even though the IEP team needed additional information concerning some baselines, but the team agreed that these could be obtained in a short period once Summit gathered specific data. The goals, as written, meet all legal requirements, subject to further information from Summit, and there was no dispute at hearing concerning these goals. The question was where they needed to be implemented, Charter School or Summit, for Student to receive a FAPE.

#### SUPPLEMENTARY AIDS, SERVICES AND OTHER SUPPORTS

33. The team then moved to the IEP draft page which showed recommended accommodations, modifications, and other support services, including a social skills group. This page showed the location of these supports as “general education

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<sup>13</sup> Dr. Cook also left the IEP team meeting while the team was working on goals.

classroom.”<sup>14</sup> All could be provided at either Summit or Charter School. There was no disagreement with this portion of the IEP.

#### PLACEMENT

34. The team then discussed the next page of the draft IEP entitled “Special Education and Related Services.” Included on this page was an offer of specialized academic instruction, 60 minutes for two sessions each week; college awareness and career awareness, 180 minutes each year; individual counseling twice a week for 60 minutes each session; assistive technology services, 240 minutes yearly; health and nursing, 120 minutes yearly; parent counseling, 60 minutes twice monthly; and group counseling weekly for 60 minutes. As the team was moving through these items, Dr. Bortnick asked why all of the services were noted as being located at “Charter school (operated as a LEA[local education agency]/district).” Ms. Quann responded that this was Charter School’s offer.

35. Prior to Ms. Quann announcing Charter School’s offer, there was no discussion as to the continuum of placements available to Student, such as continued placement at Summit, return to a special day class for emotionally disturbed students, or return to Charter school. The evidence established that Charter School personnel had no intention of discussing a continuum of placements, the pros and cons of placement at both Summit and Charter School, and a plan for transitioning Student back from the more restrictive residential placement to the general education classroom at Charter School.

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<sup>14</sup> Although some students at Summit had IEP’s, not all of them did, and the curriculums used in classes at Summit were similar to or the same as curriculums used in regular public high school general education classes.

36. Ms. Quann's announcement, combined with Dr. Cook's comment that goals should be tailored to a return to Charter School, establish a determination by Charter School personnel, before the IEP team meeting of May 15, 2012, even began, that Student be returned to Charter School immediately. Also, conduct of Charter School team members at the meeting following Ms. Quann's announcement establishes that Charter School's offer was not to be disputed, but was "take it or leave it."

#### SUMMIT PLACEMENT

37. Summit is a private school that provides a therapeutic environment for its residential students. At the time Student attended Summit, it was certified as a residential placement by the California Department of Education, and it operated a certified nonpublic, nonsectarian school on campus.

38. The Summit campus is comprised of several hundred acres and located more than seven miles away from the nearest town. Varied and numerous outdoor physical recreation activities are available and built into the structure of the school. Summit is described by staff as a therapeutic boarding school with approximately 70 high school students present at any given time. Students live in two dormitories (one male and one female) with residence parents in the dorm at all times Students are present. At least one therapist is also on campus or on call at all times.

39. Students attend classes that are taught by credentialed teachers, with no more than 10 students in a class, five days per week. There is also a credentialed special education teacher on staff for students who need that service. The high school is accredited, and Summit is able to issue a Montana high school diploma.

40. Each day at Summit is highly structured and scheduled with a balance of academic, therapeutic, and physical activities built into that structure. At Summit, Student was a member of a team of seven to 10 males who participated in group therapy at least twice a week, which included social skills training. Student also had 75

minutes of individual therapy each week with Mr. Calder, and approximately 25 minutes of that therapy time involved family therapy with Mother via video conference. Three times per year, there would be a multi-day recreational event that might involve wilderness hiking and camping, skiing, or other activities.

41. Students at Summit progress through four stages, each lasting an average of three to four months, sometimes more, and each providing students with increased opportunities to be unsupervised. The expectation is that students will develop, through the structure and embedded therapy, the ability to return to their home schools with the tools to progress and become successful contributing members of society. The usual length of stay for students is 13 to 15 months, and most students return to their home high school to obtain additional credits and graduate with a diploma from that high school.

42. Student was very successful at Summit. At Summit he “had no choice” but to attend classes. He made good progress in therapy, developing tools and strategies such as regular physical activity, to deal with his depression and the negative behaviors and attitudes he had developed through the years. He also participated in drug treatment to address his marijuana abuse. However the primary reason for his attendance at Summit was for educationally related reasons related to his depression, i.e., his inability to maintain consistent school attendance and work completion.

#### CHARTER SCHOOL’S OFFER OF PLACEMENT

43. Charter School’s offer of placement was that Student be required to attend classes at Charter School five days a week (although the duration of attendance each day was not detailed), that he receive 480 minutes monthly of specialized academic instruction in the general education class (60 minutes each, two days per week), 60 minutes twice weekly for individual counseling, 240 minutes annually for assistive technology consultative services, 120 minutes annual nursing services, and 60 minutes

twice monthly for parent counseling. This offer of services and placement by Charter School was intended to “replicate” the program at Summit.

44. There was a section of the IEP called “Individual Transition Plan,” but this detailed services to assist Student in transitioning from Charter School to either a job or postsecondary education following high school, and was not designed to assist him in transitioning from Summit to Charter School. The IEP did not contain anything that could be construed as a plan to gradually transition Student from Summit back to placement at Charter School. Rather, the evidence established an expectation by Charter School personnel that, if Mother had consented to the IEP, Student would have immediately flown back to San Diego, resumed residence with Mother, begun attending Charter School five days each week, receiving services at Charter School such as group and individual counseling. This “plan” ignored credible information presented to the IEP team by Dr. Bortnick and Mr. Calder that Student had difficulty establishing therapeutic relationships.

45. All of the services and offer of a FAPE placement listed on the IEP were to occur at Charter School. Ms. Quann explained at hearing that this was because the software program used for developing IEP documents at Charter School only provided for one location for services on the drop-down menu in that portion of the IEP. Although there was testimony from several witnesses that most services could also be offered in the home setting if Student was refusing to attend school, the IEP itself only stated “Charter School” as the location for services. This “plan” completely ignored credible statements at either this IEP team meeting, or one of the earlier IEP team meetings, by Dr. Bortnick, Mr. Calder, and Student, that if Student returned prematurely from Summit to Charter School, he would relapse and fall back into previous behaviors of truancy and work avoidance.

46. As previously discussed there was no placement discussion following the review of services and accommodations before Ms. Quann informed the team that Charter School's offer was that Student return to Charter School. Multiple witnesses, including Dr. Cook and Dr. Fisher testified that a student transferring back to a charter school or other public school following residential placement should be given a transition plan for that return. They did not reference statutory requirements as a basis for that opinion, but rather their professional judgment. No such transition plan was discussed at the IEP team meeting, nor offered by Charter School when it made the placement offer at the May 15, 2012 IEP team meeting. Nor did Ms. Quann open up such a discussion.

47. The evidence at hearing established that Student was not ready to return to Charter School, with or without a transition plan, following the IEP team meeting of May 15, 2012. Rather, based on longstanding past behavior, had Student returned to San Diego prematurely, especially without a transition plan from residential placement, he would have resumed old habits of not attending appointments at Charter School, and not completing sufficient work to progress academically. Further, Ms. Cook and Charter School assumed that it would not be difficult to reengage Student in therapy with a new therapist once he returned to San Diego. There was strong evidence at hearing from Student, Mr. Calder, and Mother that developing a therapeutic relationship was extremely difficult for Student. Only Mr. Calder, and one other outpatient therapist in the past, had "clicked" with Student so that he was able to make therapeutic progress. Charter School's offer was not an offer of a FAPE.

48. The next IEP team meeting where members created a new IEP offer was not held until May 13, 2013, four days before Student's high school graduation from

Summit.<sup>15</sup> The evidence established that Student was well on the way to completing the program at Summit in February 2013, and only stayed at Summit to accumulate credits to get his high school diploma, something he would have been able to do had he returned to Charter School at that time. However, there was no current IEP offer on the table at or near that time.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>16</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, 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) et seq.;<sup>17</sup> Ed. Code, § 56000 et seq.; Cal. 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 FAPE 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

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<sup>15</sup> Two other IEP team meetings were noticed, one for August 2012, and the other for November 2012 (as Student's annual IEP), but no IEP offer resulted from either meeting, since only Student was noticed for the August meeting, and did not appear, and the November meeting was simply to fulfill what Charter School believed was an obligation to hold an annual meeting.

<sup>16</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>17</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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, such as speech and language therapy, mental health services, and occupational therapy, which 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 general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures, with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to

typically developing peers. (*Id.* at p. 200.) Instead, *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.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950.) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided or offered a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords local educational agencies and parents 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); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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. 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].) In this Decision, Student has the burden of persuasion since he filed the case.

## ISSUE: WAS CHARTER SCHOOL'S OFFER OF MAY 15, 2012, AN OFFER OF A FAPE?

### Offer of a FAPE

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit. (*Ibid.*)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is "a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrman*).)

### Procedural Violations

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

## Meaningful Participation

8. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304.) “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.) Violations that impede parental participatory rights “undermine the very essence of the IDEA.” (*Id.* at p. 892.)

9. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrman, supra*, 993 F.2d at p. 1036.) The standard for “meaningful participation” is an adequate opportunity to participate in the development of the child’s IEP. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133.)

10. A parent has meaningfully participated in the development of an IEP when he or she is informed of his or her child’s problems, attends the IEP team meeting, expresses his or her disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrman, supra*, 993 F.2d at p. 1036.)

## Predetermination

11. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.*, (6th Cir. 2004) 392 F.3d 840, 858.) A

district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

#### Evaluation of an IEP

12. For a school district’s IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student’s unique needs, must be reasonably calculated to provide the student with educational benefit, and must comport with the student’s IEP. (20 U.S.C. § 1401(9).) Educational benefit is not limited to academic needs, but includes social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

13. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(1).) An IEP must contain a statement of the child’s present levels of academic achievement and functional performance as well as a statement of measurable annual goals designed to meet the child’s needs that result from his disability, to enable him to participate and progress in the general education curriculum, and which meet each of the child’s other educational needs resulting from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(I) & (II); 34 C.F.R. § 300.320(a)(1) &(2); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

## Provision of Mental Health Services and Residential Placement

14. Since January 1, 2012, the obligation to assess and provide related mental health services to special education students was transferred to local education agencies, which includes charter schools. (Gov. Code, § 7573.) Therefore, if a student requires mental health services to benefit from education, it is the responsibility of the local educational agency for the student's education.

15. Under the IDEA, a child's unique educational needs include the child's academic, social, health, emotional, communicative, physical, and vocational needs, but do not include medical needs and drug treatment. In *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635 (*Clovis*), the parties agreed that the student needed a residential placement, but disputed whether the hospital constituted "related services" or a "residential placement" that was educationally necessary. The Ninth Circuit held that Clovis was not responsible for the costs of the hospitalization. The court identified three possible tests for determining when a school district is responsible for the cost of a residential placement: (1) when the placement is "supportive" of the child's education; (2) when medical, social, or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement primarily aids the student to benefit from special education. The Ninth Circuit determined that the student's psychiatric hospitalization was for medical, rather than for educational, reasons and therefore did not satisfy any of the three enumerated standards.

16. The Ninth Circuit decided two cases in 2009 addressing residential placements. The student in the first case, *Ashland School Dist. v. Parents of Student E. H.* (9th Cir. 2009) 587 F. 3d 1175 (*Ashland v. E.H.*), had suffered from emotional problems and migraine headaches that led to suicide attempts and hospitalizations. The parents privately placed Student at a residential treatment facility without giving appropriate

notice to the school district. The hearing officer found that the district had not offered the student a FAPE and ordered that the parents' private placement be reimbursed partially, discounting the amount due to the parents' failure to notify the district of the placement. The District Court reversed on several grounds, including that the student's educational and medical issues were not intertwined and that the parents had placed the student at the residential placement primarily for medical reasons. The Ninth Circuit affirmed, finding that the evidence supported the District Court's findings that the parents had placed the student at the residential placement based on problems at home rather than at school.

17. The student in *Ashland School Dist. v. Parents of Student R.J.* (9th Cir. 2009) 588 F.3d 1004 (*Ashland v. Student R.J.*), had different issues. Although she had Attention Deficit Hyperactivity Disorder, which caused her to have difficulty completing homework, her primary problems occurred outside of home or school. The IEP noted that the student was performing well at school. The District Court denied reimbursement for a unilateral residential placement as the student's problems occurred outside of the school setting and were independent of the educational process. Citing to *Clovis*, the Ninth Circuit upheld the District Court's ruling as a residential placement was not necessary to meet the student's educational needs; her risky behaviors occurred outside of the school setting.

#### Least Restrictive Environment

18. Students must have a continuum of placements available beginning with the least restrictive, a general education classroom, to the most restrictive, home-hospital services. (Ed. Code, § 56361.) On the continuum, a residential placement is the second most restrictive placement.

19. A local education agency must ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not

disabled.” (20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This “least restrictive environment” provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*) A local education agency must have a continuum of alternative placements available that proceed from “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” (34 C.F.R. § 300.115(b); see also Ed. Code, § 56342, subd. (b).) However, not every child can benefit in a general education program, and a more restrictive environment may be necessary for a child to receive educational benefit. (*Rowley* fn. 4 at p. 181.)

#### Transition Planning when Moving a Student from a More Restrictive Environment to a General Education Environment

20. If a child is being moved from a nonpublic school to a general education classroom in a public school, there must be a plan to transition the student from the more restrictive placement to the less restrictive placement in a general education classroom. (Educ. Code, § 56345, subd. (b)(4).)

#### Analysis

21. Student argues that continued placement at Summit was necessary and beneficial to Student, and that the evidence supports a finding that on May 15, 2012, Student was not ready to return to Charter School. Further, Student argues that Charter School was obligated to develop a plan to transition his return to Charter School from Summit, and did not do so. Student also argues that he required a behavior plan in the IEP to address previous issues of non-attendance and lack of work completion.

22. Charter School argues that Student's problems, including failure to attend school were the result of daily marijuana use, and that Student did not establish why he needed to remain in residential placement at the May 15, 2012 IEP team meeting. It argues that the real reason Student was placed at Summit was to deal with substance abuse issues, and that his poor school attendance and other issues were due to that substance abuse, and Mother's inability to impose consequences on Student exacerbated his attendance issues. Charter School contends that it was able to replicate Summit's services of individual, group and family counseling in San Diego, and by requiring daily attendance at Charter School, and that Charter School was the least restrictive environment for Student to receive an education.

23. Student has a history since at least fifth grade of longstanding, chronic depression, which has been corroborated by several mental health assessments throughout the years, including assessments on behalf of Charter School by Dr. Fisher and Dr. Cook, and the independent assessment by Dr. Bortnick. The intake assessment and progress reports from Summit also confirm this diagnosis. Since at least the fall of 2010, one of the manifestations of Student's depression was an inability to attend school and complete classwork on a consistent basis. Interventions performed by Charter School staff members included coming to his home and attempting to convince him to come to school and complete work, and threatening him with school at juvenile hall. These interventions would sometimes, but not always, result in a flurry of Student coming to school and completing assignments, but this would only last for a few days, or at most, a few weeks. Mother's attempts to get Student to attend school and complete work were also futile.

24. Outpatient counseling services for Student were unsuccessful in modifying his lack of attendance and work completion prior to January 2011 when those services ceased. By August 2011 Student was making virtually no academic progress at Charter

School, having completed only one two-semester class after 12 months at Charter School, when the expectation was that he would have completed five or six, assuming a rate of four weeks to complete one semester of a course, with approximately a week in between each six week period. Although Charter School attempted to prove that lack of attendance and work completion was due to Student's use of marijuana, this was not supported by the evidence, since the most sustained period of attendance and work completion occurred during the summer of 2011, when Student was smoking marijuana daily.

25. The evidence established that causes of Student's depression were likely genetic, from his father; and/or undiagnosed learning disabilities in early school years that led to hopelessness and frustration, with resulting anger; and school/work avoidance as a maladaptive coping mechanism. After years of struggle, trying to make Student attend school consistently and complete school work, Mother determined that, as a last resort, she needed to place him residentially and chose Summit. Due to its relatively isolated location, and highly structured program, as well as the intensive therapeutic components of its program, Summit was a good fit for Student. He not only attended school consistently and completed work, but he received excellent grades and made significant academic progress. He learned coping strategies to deal with his depression, such as the benefit of regular physical activity. Both Student and Mother benefited from family therapy.<sup>18</sup> Although Mother admitted that it was physically

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<sup>18</sup> Charter School argued that because Student was unemployed at the time of the due process hearing, and admitted to occasionally using marijuana, this established that Summit did not provide him with educational benefit. However, Student's current circumstances are irrelevant in determining that Charter School's offer at the May 15, 2012 IEP team meeting was not an offer of a FAPE.

impossible for her to compel Student's attendance at Charter School, and she was unsuccessful at implementing behavioral strategies to encourage attendance and work completion, the primary reason for Student's lack of attendance and work completion was his deep depression, not problems at home, or substance abuse.

26. The IEP team meeting of May 15, 2012 was procedurally flawed. Dr. Cook's comments when the team first approached goal development indicates predetermination. Then, following the interactive development of goals, and the discussion of aids and supports, Charter School made the stark announcement that the placement it was offering was Charter School. No discussion about placement occurred prior to that announcement, other than at the beginning of the meeting when Dr. Bortnick presented his report. At this point in the IEP team meeting, some three hours and 37 minutes into the meeting, it was clear that Charter School had no intention of discussing a continuum of placements, and had predetermined its placement offer and was unwilling to budge.<sup>19</sup> This established predetermination by Charter School. This predetermination denied Mother meaningful participation in the IEP process. Further, there was another procedural violation in that there was no discussion, let alone development, of a plan to transition Student out of residential placement at Summit and back to Charter School, in violation of Education Code section 56345, subdivision (b)(4).

27. Student also established that the offer made at the IEP team meeting on May 15, 2012, was substantively flawed since the offer was a placement that would not meet his unique needs and provide him with meaningful educational benefit. The

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<sup>19</sup> Student audio recorded all IEP team meetings, and this recording was admitted into evidence, with the agreement of the parties that the ALJ would consider only the recordings of the IEP team meetings of February 7, 2012, March 21, 2012, and May 15, 2012. The ALJ listened to the recording of each of these meetings.

parties relied heavily on their experts' assessments in the presentation of their respective cases. The ALJ carefully considered the assessments and testimony of Drs. Fisher, Cook, and Bortnick. However, in determining whether Student was ready to be returned to Charter School in May 2012, one must look at the entire picture, not just the expert opinions.

28. The evidence established that before going to Summit Student's depression prevented him from attending school and completing work. His depression was deep-seated, and while appropriate intense outpatient therapy in 2010 and 2011 might have effectively dealt with Student's nonattendance and lack of work completion, thereby preventing subsequent placement at Summit, that did not occur. Student's failure to attend school and complete work had become entrenched by the time he went to Summit. The testimony of Dr. Bortnick and Mr. Calder were very persuasive in establishing that while Student's external manifestations of depression had diminished while at Summit, he was still very depressed at the time of the May 15, 2012 IEP team meeting. Student was attending class and completing classwork there, but he had not yet internalized strategies to cope with that depression, or engaged in sufficient therapy and experienced sufficient success in many areas to actually be able to deal with the underlying causes of that depression.

29. The evidence also established that the unilateral placement of Student at Summit in December 2011, and his continued placement at Summit following the May 15, 2012 IEP team meeting was not for drug treatment or due to family problems. At the IEP team meeting on May 15, 2012, and the preceding IEP team meetings, no one suggested that this was the case, although the team, including Charter School members, had documentation that Student had a history of marijuana use, and had tested positive for marijuana when he entered Summit on December 5, 2011. Further, although the team was aware of the fact that Student was engaged in a drug program at Summit, this

was incidental, and not the primary reason for placement. Instead the team focused on Student's depression in finding him eligible for special education due to emotional disturbance. Further, the evidence established clearly that Student's depression was the cause of him not attending school and completing schoolwork. Other than evidence that Student isolated himself from Mother when at home, there was nothing to suggest that he was violent or destructive in that setting, or that the primary reason for placement at Summit was for anything other than depression which was interfering with him being able to access education.

30. The evidence established that Student was not ready to return to Charter School in May 2012, and that Summit was the least restrictive environment for him to obtain an education at that time. And even if he was ready, failure of the IEP team to create a plan for that transition from Summit to placement at Charter School denied Student a FAPE, and made it likely that the return would not be successful, notwithstanding the array of supports and services offered in the IEP.

31. In regards to Student's contention that the IEP of May 15, 2012, was substantively flawed due to the failure of the IEP team to create a behavior plan to address school avoidance and lack of work completion when Student returned to Charter School, there was no evidence as to what such a behavior plan would look like. While several of Student's witnesses testified that such a behavior plan should have been placed in the IEP, they did not provide any examples of an adequate behavior plan to address this issue, so there was insufficient information and evidence to reach a legal conclusion that the IEP was flawed because the IEP did not contain such a plan.

## REMEDIES

### Reimbursement

32. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student 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); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).)

33. Student established that the offer in the IEP of May 15, 2012, was not an offer of a FAPE, both procedurally and substantively. This was the only offer made by Charter School until May 13, 2013, and the substance of that offer is not an issue in this case. Further, the evidence established that Summit was an appropriate placement for Student and he made academic progress there, graduating with a high school diploma in May 2013. Therefore, Mother is entitled to be reimbursed, according to proof. The evidence of the costs of placement proffered at the hearing, including transportation of Mother and Student to and from Summit was undisputed by Charter School. The transportation was necessary for Student's transportation to and from Summit during the period at issue, and visits Mother made to Summit for therapeutic purposes. Mother paid \$42,000 for tuition and other costs of placement at Summit. She also paid for travel costs for herself and Student in the amount of \$5,190.88. Therefore, Charter School shall reimburse Mother the total amount of \$47,190.88.

34. Charter School points out that there was evidence Student could have successfully returned from Summit in February 2013, and only stayed on because he would be able to graduate in May 2013. The evidence did establish that had Student

returned to Charter School in February 2013, he could have acquired the necessary credits for graduation from high school there. However, the only IEP offer Charter School made was in May 15, 2012, and that offer was not necessarily appropriate in February 2013. If Charter School believed that Student was continuing at Summit after February 2013 only to acquire academic credits for graduation, not because he still needed the therapeutic environment, it could have called another IEP team meeting and made a new offer. Therefore, the reimbursement ordered is for expenses through Student's graduation and return from Summit in May 2013.

## ORDER

Student's request for reimbursement of tuition and other costs of placement at Summit, including transportation of Student and Mother to and from Summit is granted. Charter School shall reimburse Mother \$ 47,190.88 for these expenses.

## PREVAILING PARTY

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

## 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: October 17, 2014

\_\_\_\_\_/s/\_\_\_\_\_  
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REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings