BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. WILLIAM S. HART UNION HIGH SCHOOL DISTRICT.	OAH Case No. 2016030220

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 26, 2016**,** naming William S. Hart Union High School District. The matter was continued for good cause on April 20, 2016.

Administrative Law Judge Chris Butchko heard this matter in Santa Clarita, California, on April 28 and 29, and May 3, 4, 10 and 11, 2016.

Brian Wynn, Attorney at Law, and Alexis Casillas, Attorney at Law, of Newman Aaronson Vanaman represented Student. Student's Parent attended all days of hearing.

Ian Wade, Attorney at Law, of Littler Mendelson represented District. Sharon Amrhein, Director of Special Education, attended all days of hearing on behalf of District.

On May 11, 2016, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments on May 25, 2016, the record was closed and the matter was submitted for decision.

ISSUES

1. Whether District denied Student a free appropriate public education in the

2014-2015 and 2015-2016 school years by:

a) failing to find Student eligible for special education and related services at the October 27, 2014 Individualized Education Program team meeting;

b) failing to consider the continuum of placement options at the December 9, 2014 IEP team meeting; or

c) failing to offer Student appropriate placement at the December 9, 2014 IEP team meeting, specifically a residential treatment center.

SUMMARY OF DECISION

District established that the IEP team did not fail to carry out its obligations based upon the information available to it at the time it made its eligibility decision. Student established that she was denied a FAPE from December 9, 2014, by District's failure to consider a continuum of options for her placement after District found her eligible for special education and related services. Parent is entitled to reimbursement for tuition paid for Student's residential program.

FACTUAL FINDINGS

BACKGROUND

1. Student is a 16-year-old female who resided in District until her placements at residential treatment centers beginning in April of 2015. Student is currently classified as in the 10th grade. Although initially found ineligible for special education services at an IEP team meeting held on October 27, 2014, she was later found eligible under the category of emotional disturbance at an IEP team meeting held on December 9, 2014.

2. Student has a history of atypical behaviors. In second grade, Student's teacher reported that Student appeared to be engaging in sexual self-stimulation. Student was evaluated and authorities determined that she had not been molested. She

was taken to therapy for school anxiety. In fourth grade, Student was observed pulling out her hair and eyelashes. She was successfully redirected from that behavior.

3. In seventh grade, Student's relationship with her elementary school friends ruptured. At some point Student returned to pulling out her hair. Parent arranged for Student to get counselling.

4. On August 20, 2013, just after Student began eighth grade, Student was observed drinking from a bottle of vodka that was being passed around on campus. Student was suspended for the remainder of that day and the following day. A few months later, a classmate informed the school that Student had been cutting herself on her arms. The school informed Parent on November 12, 2013. Parent was not aware that Student was currently cutting herself, although she told the school that she was aware of old cuts on Student's legs. Parent arranged tor Student to get counseling, and the cutting did not recur. Jackie Cooke, the school psychologist at Student's middle school, began monitoring her.

5. During this time, Parent had been working with Student's middle school counselor, Didi Kelly, who was aware of Student's history and recommended Parent call an IEP team meeting. Parent believed that Student was suffering from depression and anxiety, which were interfering with Student's ability to work and attend school. At the end of eighth grade, Student was found to be using drugs. On June 6, 2014, Parent notified District that she had placed Student at the Action Ranch, an inpatient facility, for drug abuse treatment.

6. Action Academy and Action Ranch are the outpatient and inpatient drug treatment programs, respectively, run by the Action Family Foundation. The programs are a "free public sober school" for students within the Hart Union High School District who are seeking assistance in staying sober. Although the school is not run by District, District supplies instructors to work with the largely self-directed course work of the

students. District cannot place students at either program, as the programs make their own decisions whether or not to admit students.

7. Student ran away from the Action Ranch after approximately two weeks. Parent then placed her in a residential treatment facility in Provo, Utah. Student was to be kept there for long-term treatment, but was taken out after three weeks because Parent's insurance would not cover it. Student was put on mood stabilizing drugs, but had a reaction which required hospitalization at Loma Linda, which is not within District, and the stabilizing drugs were discontinued.

8. Parent contacted District that summer about holding an IEP team meeting, but was told that one could not be held as Student was not currently a resident in the district. Following Student's release from the hospital, Parent placed her in the intensive outpatient program at Action Academy on August 13, 2014.

9. Student began attending Saugus, District's regular high school, in late August. Parent again contacted District about an IEP team meeting. Because a 504 plan[1] could be put in place quickly, Parent and District agreed following a meeting on September 1, 2014, to implement a 504 plan of academic accommodations.

10. Student's 504 plan consisted of three accommodations. She was given additional time to complete assignments and tests, allowed to use a "stress pass" to leave class to see staff if she felt overly stressed, and given preferential seating away from distractions. The 504 plan was an accommodation to Student's recovery from her

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[1] A Section 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity, such as learning.

drug reaction and the fact that she had to be off her anti-anxiety drugs during her recovery.

11. Following her release from the hospital, Student had been placed on steroids to treat her reaction to the mood stabilizers and became self-conscious about a resulting 35-pound weight gain. Parent found that Student's anxiety and depression worsened. Student was now seeing Christy Aijian, a licensed marriage and family therapist, twice weekly.

DISTRICT ASSESSMENT

12. Following Parent's renewed request for an IEP team meeting on August 26, 2014, District generated an assessment plan to evaluate Student's social and emotional development, which Parent signed on August 29, 2014. School psychologist Tiffany Harris was assigned to conduct the assessment, which would be presented at an IEP team meeting on October 27, 2014.

13. No Parent interview is reported in the assessment. Although Ms. Harris testified that she had "a few" telephone conversations with Parent, nothing from any conversation was referenced in her report. Parent completed a health and development questionnaire, which was used by Ms. Harris, along with Student's self-reporting, a one-page treatment summary by Ms. Aijian, and District's educational records, to describe Student's background. Student's algebra teacher returned the Behavior Assessment System for Children teacher report rating scale. In addition, Ms. Harris's report included brief reports from Student's art and biology teachers, which she had received by e-mail on the day of the IEP team meeting. Ms. Harris also used information from high school teachers which she had obtained prior to the September 1, 2014 504 plan meeting.

14. Ms. Harris testified that she conferred with Ms. Cooke at Student's middle school, but that Ms. Cooke did not have a lot to say, other than that there had been some drug issues. Ms. Harris testified that Ms. Cooke did not report on Student's cutting

behavior. Although cutting was mentioned in Student's behavior report in middle school, Ms. Harris did not ask Ms. Cooke about it. Ms. Harris did not contact Ms. Kelly or any of Student's middle school teachers to obtain information about Student. Ms. Harris did not follow up on the issue of Student's cutting, and erroneously believed it had taken place at the end of eighth grade.

15. Ms. Harris noted that Student has a family history of depression, learning disability, and drug use. Student's other parent had been out of her life for the last three years due to ongoing drug use. Parent reported that Student has "high levels of anxiety (hair pulling, cutting), depression, and drug use."

16. Because Student was not reported as disruptive during classes, Ms. Harris did not conduct any classroom observations. Parent had told her that Student was so stressed or anxious about her biology class that Student would hide in the bathroom during class, but Ms. Harris chose not to observe her in that or any other class. Ms. Harris' observation of Student was during unstructured time, where she appeared to relate normally with friends during the school's passing period.

17. Ms. Harris administered a battery of standardized tests. Although her report states that the Burks Behavior Rating Scale, Second Edition, was used, it was not administered. She did employ the Wechsler Intelligence Scale for Children, Fourth Edition; the Woodcock Johnson Tests of Cognitive Abilities, Third Edition; the Test of Nonverbal Intelligence, Fourth Edition; the Beery-Buktenica Developmental Test of Visual Motor Integration, Sixth Edition; the Motor-Free Visual Perception Test, Third Edition; the Test of Auditory Processing Skills, Third Edition; the Woodcock Johnson Test of Achievement, Third Edition; the Behavior Assessment System for Children, Second Edition; the Reynolds Adolescent Depression Scale, Second Edition; and the Piers-Harris Children's Self-Concept Scale, Second Edition.

18. Ms. Harris reported Student's academic performance as unremarkable,

noting that she scored at the proficient level in spring 2013 standardized testing in both English and mathematics, and that her grades at that point in the term ranged from C- in Spanish to A+ in ceramics, making an unweighted GPA of 2.83. Two teachers reported issues with attendance and tardies, but it had not reached a level at which the school took action. District's tracking of pupil attendance and tardies was not fully reliable.

19. Although Ms. Harris found that Student had presented with inappropriate types of behavior or feelings, as well as depressive symptomology, she concluded that Student did not meet the criteria for emotional disturbance at the time of her report, as she believed Student's symptoms were neither sufficiently severe nor long-standing. Student's self-reported scores for emotional problems put her in the clinically significant range for a number of behavior and self-perception categories, but Ms. Harris found them outweighed by teacher reports, her observation of Student, and Student's academic performance to date.

20. Although there were indications that Student had a significant discrepancy between her verbal and nonverbal reasoning abilities, Ms. Harris did not find that she had a learning disability or processing disorder because her verbal abilities were at the superior level and nonverbal abilities at the average level. Ms. Harris concluded that Student did not meet the eligibility criteria as a student with a specific learning disability.

THE OCTOBER 27, 2014 IEP TEAM MEETING

21. Ms. Harris's report was the centerpiece of the October 27, 2014 IEP team meeting. Ms. Harris cut and pasted her report's summary of Student's functioning into the IEP team report. The sixth paragraph of her report's Summary appears verbatim in the Meeting Notes page, followed immediately by the seventh paragraph from the following page of her report and the first narrative paragraph from the next page. The seventh paragraph also appears again and without change as the "Social Emotional/Behavioral" section at page four of the IEP team report.

22. With only two exceptions, all of the text in the three pages of Student's Present Levels of Academic Achievement and Functional Performance is taken wholly from Ms. Harris' report. The paragraph reporting the administration of the Beery-Buktenica Developmental Test appears twice. The only two statements not present in Ms. Harris' report are "[Student] is a bright student who seems to get along with others," and the entry under Communication Development reading "Not a concern at this time."

23. Although five District representatives and Student's private therapist were at the IEP team meeting, the only narratives regarding Student not drawn from Ms. Harris' report are a two sentence summary of the presentation by Student's private therapist and a statement from Student's Spanish teacher, reporting that although Student did not participate willingly in class, she was "doing okay."

24. The IEP team found that Student did not qualify for special education under either emotional disturbance or specific learning disability. The IEP team report stated that the team agreed that, should Student's "educational performance decline and she demonstrate an inability to access her education," Ms. Harris's assessment could "be used for up to one year to reconsider eligibility for special education."

25. Parent did not agree with the IEP team's decision, and submitted a statement to the IEP team meeting report arguing that Student should have been found eligible for special education due to both her emotional and academic issues. Parent conceded at hearing that Student did not qualify due to specific learning disability, but Parent does believe Student has Attention Deficit Hyperactivity Disorder.

26. Following the IEP team meeting, Ms. Harris sent Parent information on the Action Academy Program. The attached brochure stated that prospective students must reside within the boundaries of the District, and directed interested parties to contact the District's director of student services for further information.

BEHAVIOR LEADING TO SUSPENSION

27. Parent believed that Student was still cutting herself around the time of the October 27, 2014 IEP team meeting, and that she had stopped doing her homework and was ditching classes. In addition, Parent had been testing the water in Student's toilet and determined that Student was again using drugs. Student was hanging out with transients and gang members, and began using methamphetamine.

28. On the morning of November 25, 2014, Parent observed Student put a knife in her backpack. Parent went to Student's school later that morning and told them about the knife, hoping that it would make an impression on her. Parent did not know that having a knife on campus was an offense for which Student would be arrested.

29. Student was arrested and taken to the Sheriff's station. Student was suspended from District's high school for five days on November 26, 2014. Before Student's suspension was completed, District sent out an invitation on December 2, 2014, to an IEP team meeting on December 9, 2014.

30. Parent again enrolled Student at Action Academy. Although Student was receiving therapy and counselling, Parent felt the program was inadequate because Student was not prevented from meeting with the people who provided her with drugs.

THE DECEMBER 9, 2014 IEP TEAM MEETING

31. An IEP team meeting was held on December 9, 2014. Student was not present at this meeting, nor was Ms. Aijian, Student's private therapist. Parent was again present, as was Ms. Harris, Student's school counselor, and the same special education teacher. In addition, an assistant principal, a program specialist, an additional special education teacher, and a representative of the school-based counselling attended. No general education teacher was present, but an excusal was signed by Parent. Parent and the IEP team did not confer with a general education teacher prior to the meeting, and

no written input to the IEP team was provided by a teacher.

32. There is no Present Levels of Academic Achievement and Functional Performance section in the IEP team meeting report.

33. The Notes to the meeting stated that the purpose of the meeting was to "revisit [Student's] initial assessment and IEP." The report stated that Ms. Aijian, a marriage and family therapist, diagnosed Student with "Major Depressive Disorder, Recurrent, Moderate; Generalized Anxiety Disorder; Trichotillomania; Cannabis Abuse; Amphetamine Abuse; Rule Out Bipolar Disorder." In addition, the report stated that Student's "grades recently declined, prior to being arrested for bringing a knife to school." On that basis, the team concluded that Student qualified for special education due to emotional disturbance.

34. District's offer of FAPE is set out in the notes as follows: "The District's offer of a free and appropriate public education is the SC3 program with [Designated Instructional Services] counseling, 30 minutes 1X weekly." No other statement of those services as an offer of FAPE is present anywhere else in the meeting report.

35. Parent chose to keep Student at Action Academy. Parent requested that Student get Designated Instructional Services counseling while at Action Academy. District agreed to do so, but required Parent to transport Student.

36. Parent disagreed with the offered placement. The IEP notes report in two places that Parent believed that a residential placement was necessary. In the meeting notes, the placement discussion is reported as follows: "Different options were discussed: RSP or SC3." RSP refers to the resource specialist program, which provides additional academic support to special education students. SC3 is a classroom run by District for students with emotional disturbances. Neither is a residential program. There was no discussion of a residential treatment center as a placement option.

37. There are no goals in the IEP team meeting report. In the notes section, it

is stated that if Parent took Student to Designated Instructional Services counseling, a counseling goal would be added after a few sessions.

38. One page in the IEP team meeting report is headed "Offer of FAPE-SERVICES." It states that the service options considered were "SC3, RSP, DIS counseling." Two boxes are present under the heading "SPECIAL EDUCATION and RELATED SERVICES."

ACTION ACADEMY AND ACTION RANCH

39. Student attended Action Academy from December 8, 2014, to December 18, 2014. During the winter break Student had a relapse into drug use, and was put into the residential program at Action Ranch. She returned to Action Academy on January 14, 2015, and stayed there until another relapse and return to Action Ranch on February 6, 2015. She returned from Action Ranch on February 23, 2015, and stayed there until she was withdrawn from the program on April 20, 2015. Don Marziani, Student's teacher at Action Ranch, recorded Student's attendance for District on a form headed "Saugus High School HH," and testified at hearing that Action Academy is considered by District to be Home/Hospital Instruction.

40. Parent continued to believe a residential program was necessary. Although the Action programs provided Student with both drug and emotional counseling services and offered acceptable academic services, Parent felt that Student could not make real progress until she was removed from contact with the people around her who enabled her to self-medicate her anxiety and depression with street drugs.

FEBRUARY 11, 2015 IEP TEAM MEETING

41. District convened another IEP team meeting on February 11, 2015. The purpose of the meeting was described as "to review services and placement." Again present at the meeting were Parent, Ms. Harris, Student's counselor, and a District

program specialist. The sole new attendee was Ms. Amrhein, District's director of special education. No general education or special education teacher attended, although one party, possibly the program specialist, did sign as special education specialist. Neither Mr. Marziani nor any other person connected with Action Academy attended. No excusal of a teacher appears in the record.

42. At hearing, Ms. Amrhein stated that she called the IEP team meeting because she heard from Parent that Parent wanted Student in a residential treatment center placement.

43. The report of this meeting is contained on an IEP Amendment(s)/Addendum Page, and there are attached pages headed Offer of FAPE- EDUCATIONAL SETTING and Offer of FAPE- SERVICES.

44. There is no Present Levels of Academic Achievement and Functional Performance section in the IEP team meeting report.

45. Mr. Marziani had not been contacted by District staff for reports on Student's progress, but was asked to "send a blurb" to be used at the February 11, 2015 IEP team meeting. His report informed the team that Student's attitude was positive, that she was doing well and passing her classes, and that all of her drug tests had been negative.

46. Mr. Marziani's report was dated February 2, 2015. The meeting report stated that Student tested positive for methamphetamine on February 5, 2015, and was returned to the residential program at Action Ranch. Student left an evening meeting at the Ranch two or three days later and went missing for at least one day. She was recovered by Sheriff's Deputies, observed to be "high," and taken back to the Ranch.

47. The meeting report stated that "IEP team discussed that substance abuse is driving the need for support," and states that "Parent feels that the drug abuse is the primary concern." At hearing, Parent disputed the statement. The report stated that

Parent renewed her request for a residential placement. In response, the report states that the team agreed that an updated review of Student's social and emotional issues was necessary, and Ms. Harris was to generate a new assessment plan, complete a review, and report back to the team. The team then reviewed programs available within the District.

48. The IEP team reviewed available District programs and recommended placement in the District's SC6 program, another classroom for emotionally disturbed students. The report summarized the offer of FAPE as "the SC6 program with ERICS[2] and parent counseling." The difference between the SC3 and SC6 programs was presented at hearing as mainly being that the SC6 offered a-g courses for college preparation while the SC3 did not. Both contained unspecified embedded services, which were not described within the IEP team meeting reports.

49. On the "Offer of FAPE- SERVICES" page, the report states "Student options considered: general education, SC3, SC6, ERICS, RSP, DIS counseling."

50. Parent again declined to remove Student from her current placement. The suggested SC6 placement was unacceptable to Parent because it would put Student with the influences Parent believed she needed to escape. Parent also declined to have Ms. Harris conduct another assessment of Student, and requested an independent evaluation. District agreed to provide one, and it was conducted by Dr. Timothy Gunn, a licensed psychologist.[3]

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[2] 'ERICS' is educationally related intensive counseling services.

[3] Some dispute was raised at hearing over whether or not District had refused to pay Dr. Gunn for the assessment. As that matter was not raised as an issue for hearing, is not part of this action and it is not discussed here.

THE INDEPENDENT ASSESSMENT

51. Student returned to Action Academy from Action Ranch on February 23, 2015, and stayed there until she was withdrawn from the program by Parent on April 20, 2015. Parent decided that Student, having again relapsed into methamphetamine use while at Action Academy, required a residential program away from the pressures and influences affecting her at home. Parent worked with staff at Action Academy to find an appropriate placement, and decided to place Student in a 45-day mental health and drug treatment program at Sovereign Health in San Diego, a residential treatment program with surveillance. Parent's insurance covered the cost of Student's placement at Sovereign Health.

52. Dr. Gunn assessed Student while she was at Sovereign Health. Dr. Gunn has a master's degree and doctorate in psychology, both from Azusa Pacific University. He is a licensed psychologist in the state of California and has been an adjunct professor of psychology at Azusa Pacific and Alliant University. He has one published paper and has contributed to papers presented at, among other places, the annual meetings of the American Psychological Association. He did post-doctoral work in pediatric psychology and has worked the last five years almost exclusively in doing psychological assessments of children and young adults.

53. Dr. Gunn extensively reviewed Student's background, and had access to materials not available to Ms. Harris, such as treatment summaries by her private therapists and an assessment done at the request of her deputy public defender. In addition, Dr. Gunn was aware of Student's subsequent history of relapses and elopements from home and the Action Ranch. Dr. Gunn also performed personal interviews of people involved with Student, including Parent and Student's counselor at Sovereign Health.

54. As part of his assessment, Dr. Gunn gave Student a number of

standardized tests over two days. He administered the Structured Clinical Interview; the Beery-Buktenica Developmental Test of Visual Motor Integration; the Behavior Assessment System for Children, Second Edition; the California Verbal Learning Test-Children's Edition; the Campbell Skill and Interest Inventory; subtests of the Delis-Kaplan Executive Function System; the grooved pegboard test; the Integrated Visual and Auditory+Plus Continuance Performance Test; the Millon Adolescent Clinical Inventory; the Minnesota Multiphasic Personality Inventory, Adolescent Version; the NEPSY Neuropsychological Test Battery, Second Edition; the Wechsler Intelligence Scale for Children, Fifth Edition; subtests of the Woodcock Johnson test of Achievement, Third Edition; and the Wisconsin Card Sorting Test.

55. Dr. Gunn found that Student was plagued by feelings of self-disillusion and resentment of others, and prone to act impulsively, erratically, and self-destructively. She self-medicated with street drugs as an indulgence and as a passive-aggressive act against her family and herself. She suffered from depression and anxiety. Dr. Gunn noted that Student's levels of academic achievement were declining and her prospects for future education, independent living and vocational functioning were becoming a concern.

56. Despite her clear interest in leaving her residential treatment facility and returning home, Dr. Gunn found that Student was unable to mask her significant emotional symptoms and high risk of substance abuse. He concluded that she needed to be treated at a "lockdown type facility" because she had a worsening history of escaping from treatment centers to return to risky situations conducive to drug use. Without treatment in a highly restrictive setting, Dr. Gunn believed that Student's emotional, social, and drug abuse problems could not be prevented from adversely affecting her education and life prospects. Student's counselor told Dr. Gunn that her treatment team at Sovereign Health recommended that she be moved to a more

restrictive facility.

PLACEMENT AT FALCON RIDGE

57. Student escaped from Sovereign Health the day before Dr. Gunn met with her counselor, her second elopement from the facility. She was unaccounted for from June 2, 2015, until she was arrested outside a police station on June 5, 2016, with a boy who was attempting to "tag" the station. She gave a false name when arrested and was put in juvenile hall in San Diego.

58. Student was held in San Diego from June 5 until July 21, 2015, when she was released to Parent on the condition that she agree to be immediately transported to a residential treatment center placement at Falcon Ridge in Virgin, Utah. Parent sent an email to her attorney on August 12, 2015, stating that "[t]he judge ordered [Student] to go to Falcon Ridge for 12-24 months," and attached a copy of the order setting the conditions of probation. Parent's attorney forwarded the email to District's attorney on August 17, 2015.

59. Falcon Ridge is an educational and therapeutic facility for women between the ages of 12 and 18 who have dual diagnoses of mental health issues and addiction. The facility has a prescribing psychiatrist on staff, along with therapists and counselors. Falcon Ridge is academically accredited in the state of Utah and has certified teachers and a principal. Although the students are not locked into their residences, the school is in a remote, rural location from which students would not be able to run. There is no set duration of treatment at Falcon Ridge; stays can be as short as six months but generally last about a year.

60. Falcon Ridge costs $5,000 per month, plus enrollment costs. Parent was charged $3,333 for the partial month of July 2015, which presumably included the charges to process Student into the facility. Thereafter, Parent was charged $5,000 per

month, except for the month of February 2016, when she was charged $4,677.[4] According to Student's therapist at Falcon Ridge, if Student maintains her current rate of progress she would be discharged sometime between July and September of 2016.

PARENT'S RESIDENCE

61. The costs of Student's attendance at Falcon Ridge were not paid by Parent's insurance. To pay Student's tuition, Parent sold her house in September, 2015. Parent moved her possessions into her mother's house in Corona around that time. Thereafter, Parent would commute from her mother's house to her job in Granada Hills, although sometimes she would stay in a hotel or at a friend's house in the area so as to avoid the lengthy commute. Parent sold her house in order to be able to pay for Student's education and treatment, and was not motivated by any desire to leave the area in which she had lived and continued to work.

62. The due process hearing request in this matter was filed on February 26, 2016. Parent's address is listed as her former home within District.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[5]

1. This hearing was held under the Individuals with Disabilities Education Act,

[4] The implication is that students are charged $5,000 per month based upon a standardized 30-day month, or $166.67 per day, but that fee is reduced for February, which has typically only 28 days. That would indicate that Parent was charged $1,666 to enroll and $1,666 for ten days' stay in July 2016.

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

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)[6] et seq.; 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 free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for 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 individualized education program. (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].) 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

[6] All subsequent references to the Code of Federal Regulations are to the 2006 version.

curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

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.) 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. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUE 1A): FAILURE TO FIND STUDENT ELIGIBLE AT THE OCTOBER 27, 2014 IEP TEAM MEETING

5. Parent contends that District denied Student FAPE by failing to find her eligible for special education at the October 27, 2014, IEP team meeting. Parent contends that District failed to take into account Student's potential when assessing her current academic performance and did not consider the impacts of Student's tardies and absences from class on her education. District counters that the team weighed these factors but did not find them compelling.

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

7. California Code of Regulation, title 5, section 3001, subdivision (b)(4), defines emotional disturbance special education eligibility as:

> Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's

educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(F) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under subdivision (b)(4) of this section.

8. Parent asserts that the decision not to find Student eligible for special education was unreasonable because her grades, attendance, and behavior were adversely affected by her emotional disturbance.[7]

9. In Parent's view, Student's grades did not match her superior potential. However, Student's grades at that point represented two months of the school year, and were highly variable given the low number of grade opportunities she had to that date. In addition, Parent did not provide evidence of how Student's potential had been realized in her prior academic performance. Student's potential is not a relevant factor,

[7] As noted above, Parent conceded at hearing that Student was not eligible under specific learning disability in October 2014. Parent's contention in briefing that Student should have been found eligible under other health impairment was not raised in her Due Process Hearing Request, which in Paragraph 12 listed her proposed eligibilities as emotional disturbance and specific learning disability.

as the emotional disturbance must impede Student's ability to make meaningful educational progress and is not measured against potential. Further, Student was transitioning from middle school to high school, and District personnel testified that it was not uncommon for students' grade to dip during an adjustment period. Student's academic performance to that point in her high school career did not demonstrate academic impact from emotional disturbance.

10. Parent established at hearing that District's records of student absences and tardies were incomplete. She argues that Student had many more tardies and uses of her stress pass than recorded in District's records, and that these absences negatively impacted Student's education. However, the IEP team did consider teacher reports of Student's attendance, and neither teacher reporting attendance issues indicated that it was a major concern. The record does not establish that Student's class attendance was affected significantly enough to affect her educational performance.

11. Student's behaviors were also not clear evidence of a disability. Parent argues that Student lacked appropriate judgment and underperformed her ability. These behaviors are not indicative of emotional disturbance. Although not cited by Parent, the incident where Student hid in a bathroom because of stress may have been a one-time event, and is reconcilable with Student's 504 plan and her stress pass.

12. Parent has not carried her burden to show that the IEP Team failed a duty to find Student eligible at the October 27, 2014 IEP Team meeting under emotional disturbance by failing to establish that she met the criteria set forth in California Code of Regulation, title 5, section 3001, subdivision (b)(4). Parent has presented evidence concerning Student's grades, attendance, and behavior which does not meet the criteria. The information before the IEP team does not indicate that their decision was unreasonable.

ISSUE 1B): FAILURE TO CONSIDER A CONTINUUM OF PLACEMENT OPTIONS

13. Parent contends that Student was denied FAPE because the District-employed members of the IEP teams[8] refused to consider placing Student at a residential treatment center.

Denial of FAPE

14. The legal analysis of whether a school district offered a pupil a FAPE consists of two parts. First, whether the local educational agency complied with the procedures set forth in the IDEA, and, second, whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, *supra*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

Placement Options

15. School districts, as part of a special education local plan area, must have available a continuum of program options to meet an eligible student's needs for special education and related services. (34 C.F.R. § 300.115; Ed. Code, § 56360.) This

[8] Although Parent did not specifically list the February 11, 2016 IEP team meeting as part of her complaint, she contended that District failed to offer FAPE at all relevant IEP team meetings for the 2014-2015 and 2015-2016 school years, which covers the October 27, 2014, December 9, 2015, and February 11, 2015 IEP team meetings.

continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006); see also Ed. Code, §§ 56360, 56361.)

16. A district must make a continuum of placement options available, but do not need to discuss every possible placement at every IEP team meeting. (See *L.S. v. Newark Unified Sch. Dist*. (N.D.Cal., May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, pp. 5-6 [nonpub. opn]; *Katherine G. v. Kentfield Sch. Dist.* (N.D.Cal. 2003) 261 F.Supp.2d 1159, 1189-1190.) Only placement options that are likely to be relevant to a student's needs must be discussed.

17. Predetermination of a student's placement is a procedural violation that deprives the student of a FAPE. (*Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs when an educational agency has decided on its offer prior to the IEP 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 meeting with a "take it or leave it" offer. (*Target Range, supra*, 960 F.2d at p 1084*; J.G. v. Douglas County School Dist*. (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.) A school district is required to consider those placements in the continuum that may be appropriate for a particular child, and failure to do so is a procedural violation.

18. No placement was offered at the October 27, 2014 IEP team meeting, as student was not found eligible for special education.

19. Although aware at the December 9, 2014 IEP team meeting that Parent had been seeking a residential treatment center placement for Student, the IEP team would not discuss that option as a placement for Student. After a discussion of placing student with resource support or in the SC3 classroom, Parent was told she had to "take or leave" the SC3 placement offered by District. Although District did not enter the

meeting with a single offer in mind, it was unwilling to consider other possibly appropriate placements for Student at the December 9, 2014 IEP team meeting.

20. The February 11, 2015 IEP team meeting was called to review Student's placement and services. The meeting was held without a general education teacher or Student's current teacher in attendance. The meeting report contains little information of any discussion of Student's appropriate placement. Instead, the report notes focus on Student's activities since the last IEP team meeting and setting out the conclusion that substance abuse is Student's primary issue. When Parent raised the issue of a residential treatment center placement, the team rebuffed the suggestion by stating that a new assessment would have to be conducted by Ms. Harris before it could be discussed. Instead, the IEP team proceeded to discuss only programs available within the District. The IEP team was unwilling to consider a residential treatment center placement for Student.

21. District also did not consider or discuss a home/hospital instruction placement at the December or February IEP team meetings, even though Student was attending programs at Action Academy and Action Ranch that the district considered to be home/hospital instruction. District could not place Student at either Action program, but it is highly suggestive of predetermination that the IEP team never considered a home/hospital instruction program wholly operated by or contracted to by District.

22. District asserts that there was no basis to suggest that residential treatment center placement would be necessary for Student, and thus no reason to consider that option in the continuum of placements. In reaching that decision, the IEP team had to rely upon the assessment report by Ms. Harris and the input of IEP team members.

Assessment

23. For purposes of evaluating a child for special education eligibility, a District

must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what testing is required is made based on information known at the time. *(See Vasheresse v. Laguna Salada Union 20 School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

24. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

25. School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7) (2006).)

26. In preparation for the October 27, 2014 IEP team meeting, Ms. Harris conducted a psychoeducational assessment of Student. The assessment was conducted without input from Parent, other than from a Health and Development questionnaire.

Although Ms. Harris testified that she talked with Parent a number of times on the telephone, she did not directly state that she interviewed Parent over the telephone for use in her assessment report. Given that Parent testified that she was never interviewed and the fact that Ms. Harris carefully parsed her answers[9] to questions posed of her, Parent established that the assessment was conducted without the use of parental input to gather relevant functional, developmental, and academic information.

27. Ms. Harris had to deal with a low rate of response from Student's high school teachers. Only one teacher filled out the Behavior Assessment System for Children, and the only two teachers who otherwise responded to her requests for information sent e-mails on the day of the IEP team meeting. The background material available to Ms. Harris from high school staff was scant. This defect was compounded by the fact that Student was new to the high school, having just arrived at the time of the completion of assessment plan and had spent only approximately two months there by the date of the October 27, 2014 IEP team meeting.

28. Despite this lack of information on Student's background, Ms. Harris made no special effort to obtain additional knowledge of Student. An in-depth interview of Parent would have been helpful, but none was conducted. Although Ms. Harris contacted Ms. Cooke, the middle school psychologist, she testified that Ms. Cooke did not have much information, other than there had been some drug issues with Student. Parent's statement that Ms. Cooke had been monitoring Student is more credible, given Student's issues. Further, Ms. Harris incorrectly reported that Student's eighth grade

[9] Ms. Harris' caution in answering questions was understandable, given that her assessment is a central issue in this case for her employer. However, her repeated reticence to directly answer questions posed and its impact upon her demeanor rendered her less credible as a witness.

cutting incident was reported to her by Ms. Cooke as having taken place at the end of the school year, which was contradicted by District's records.

29. Ms. Harris represented that Student's previous school year did not merit further inquiry, given Ms. Cooke's report. This neglects the fact that over that time Student displayed self-harming behavior, drank alcohol on school campus, and embarked on drug use to such a degree that Parent placed her in a locked residential facility. Ms. Harris neglected to follow up with Ms. Aijian, Student's therapist, following receipt of a treatment summary which reported issues with depression.

30. Had Ms. Harris conducted a thorough interview of Parent, it is likely that she would have learned of Ms. Kelly, who worked closely with Student during eighth grade. Almost certainly she would have learned more about Student had she contacted any of Student's teachers, her counselor, or anyone else from the middle school in addition to Ms. Cooke. Given the dearth of information she had obtained from high school teachers who had only brief experience with Student, District did not have adequate information available to make a placement decision from Ms. Harris' assessment.

31. Both Dr. Gunn and Dr. Nicholas Betty, District's psychological expert and its director of counselling, remarked that Ms. Harris' background information was notable for its lack of depth. Dr. Betty was struck by the fact that there were only three sentences devoted to Student's family, health, and development. Dr. Gunn criticized Ms. Harris' decision not to conduct an in-class observation of Student, given that there was a report that she had left class to hide in a bathroom because she felt stressed in the class. Dr. Gunn considered Ms. Harris' administration of standardized testing instruments to be somewhat confused, and Ms. Harris admitted in testimony that her report of the testing was not completely accurate.

32. Even so, Ms. Harris' report was the backbone of the October 27, 2014 IEP

team meeting report, and the team was said to have agreed that her assessment could be used for up to another year to determine Student's eligibility for special education services. This report was the only assessment of Student and was used to make decisions about appropriate placements for Student at the December and February IEP team meetings. Contrary to the recommendations in Ms. Harris' report, District decided at the December 9, 2014 IEP team meeting that Student was eligible due to emotional disturbance. However, District continued to rely on Ms. Harris' problematic assessment report to make decisions about her placement and services. This reliance caused District not to have accurate information as to Student's unique needs. District may not rely on the "snapshot" rule to defend the IEP team's decision not to consider a continuum of placement options when the report it relies on does not contain adequate information as to Student, and District failed to adequately consider newer information about Student's unique needs after the October 2014 IEP team meeting.

33. Parent requested an independent psychological assessment and District agreed to provide one. This does not, however, indicate that District conceded that Ms. Harris' assessment was inadequate. Nevertheless, given the flaws of the report, particularly the lack of adequate background information about Student, its use in Student's individual educational program development, especially determining Student's educational placement, led to District not considering the appropriate continuum of placements.

Teacher participation

34. The December 9, 2014, and February 11, 2015 IEP team meetings were held without the attendance of general education teachers.

35. The IDEA requires a district to ensure that an IEP team for a child with a disability includes not less than one general education teacher of the child (if the child is or may be participating in the general education environment) and not less than one

special education teacher of the child. (34 CFR § 300.321 (a).) Student had been in general education at Saugus High School prior to her suspension, and was continuing to take a-g classes at Action Academy and Action Ranch.[10]

36. The IEP team meeting held on December 9, 2014, did not have a general education teacher. The IEP team meeting report notes that parent signed an excusal form for the teacher, and that form is included in the IEP team meeting report. As Student was in general education, the meeting would concern the general education teacher's area of curriculum or service. There is no evidence in the record that Parent or District staff conferred with the general education teacher prior executing the excusal or that the teacher submitted written input for the use of the IEP team prior to meeting.

37. The IEP team meeting held on February 11, 2015, had neither a general education teacher nor a teacher from Action Academy in attendance. No excusal for either party appears in the record or is mentioned in the meeting report. Despite the fact that no general education or present teacher of Student attended the meeting, Parent was offered a new placement for Student at this meeting, with District's summary offer of FAPE changing from an SC3 to SC6 classroom. Despite the fact that the team was willing to change its placement offer without teacher input, it refused to consider the possibility of a residential treatment center placement.

Present Levels of Academic Achievement and Functional Performance

38. An IEP team must consider a student's ability and achievement in determining whether a placement in the continuum might be appropriate.

[10] Student failed to allege that District committed a procedural violation by failing to have a general education attend Student's IEP team meetings, and no such finding will be made in this decision. This discussion goes to the available information District had to determine the continuum of placement options.

39. An IEP is a written document describing a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) A student's individualized education program must contain a statement of her present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects her involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals.

40. The December 9, 2014 and February 11, 2015 IEP team meeting reports contain no Present Levels of Academic Achievement and Functional Performance section at all. The December meeting noted that Student's grades had recently declined, and the report of the February meeting noted that Student's grades had been good and that all of her drug tests had been negative until she resumed using methamphetamine. Such cursory notations support Student's contention that District did not consider all relevant continuum options because District did not have adequate present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects her involvement and progress in the regular education curriculum. District has depicted the December and February IEP's as continuations of the October 27, 2014 IEP team meetings. This is not supported by the record, and the levels described in that report are not reliable. The IEP team made the decision not to consider a residential treatment center placement without required information about Student's abilities needed to make decisions regarding her educational programming.

41. District did not consider the full continuum of appropriate placement

options. The IEP team was not justified in refusing to consider a residential treatment center placement because they relied on an assessment that was not sound or reliable and which did not provide all relevant available information to the team. Further, the decision not to consider an appropriate continuum of options was made without appropriate teacher input and reliable information about Student's present levels of academic achievement and functional performance. This failure to consider appropriate placements means that the District's offer of placement was predetermined.

42. District's failure to consider a continuum of placement options is a procedural violation which deprived Student of her right to a FAPE. First, this significantly prevented Parent from being able to participate in Student's educational decision making process as District would not discuss residential or home/hospital placements, even though there were relevant options based on the information District should have had. Also, District denied Student an educational benefit by failing to consider the residential continuum options to meet Student's unique needs. Student has been denied her right to a free and appropriate public education since December 9, 2014.

ISSUE 1B: FAILURE TO OFFER APPROPRIATE PLACEMENT.

43. Having found a procedural violation resulting in the denial of Student's right to a FAPE, the necessary inquiry ends. "[W]here the procedural inadequacies of an IEP may have resulted in the loss of an educational opportunity, or deprived a child's parents of the opportunity to participate meaningfully in forming an IEP, [a] court should not proceed to step two of the *Rowley* analysis, i.e., whether the IEP was reasonably calculated to enable the child to receive educational benefits." (*Target Range*, 960 F.2d at 1485.)

REMEDY

1. Parent seeks reimbursement for the costs for Student to attend Falcon Ridge and for other ancillary costs incurred during her stay and for services provided at Parent's expense prior to Student's residential placement.

2. Private school tuition reimbursement is available as a remedy under the IDEA where a court or hearing officer finds that the public agency did not make FAPE available to the student in a timely manner prior to the private enrollment and the private placement is appropriate. (34 CFR 300.148 (c), See also *Letter to Chamberlain*, 60 IDELR 77 (OSEP 2012.) The determination of whether to award reimbursement and how much to award is a matter within the discretion of the court. (*School Committee of Burlington v. Department of Ed*. (1985) 471 U.S. 359, 369.)

3. In *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, the court articulated "three possible tests for determining when to impose responsibility for residential placements on the special education system: (1) where the placement is 'supportive' of the pupil's education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education." (*Id*. at p. 1468.)

4. Parents have no obligation to allow a school district to exhaust all possibilities before they make a unilateral placement. As the Ninth Circuit observed in *Seattle School District v. B.S.*, (9th Cir. 1996) 82 F.3d 1493, 1501: "The IDEA does not require [the student] to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option short of residential placement." In *Forest Grove Sch. Dist. v. T.A*. (9th Cir. 2008) 523 F.3d 1078, 1087, affd. (2009) 557 U.S. 230, the Ninth Circuit held that parents need not seek special education services from a school district at all before they seek

reimbursement for a private placement. A contrary rule, the court stated, "would lead to the absurd result that the parents of a child with a disability must wait (an indefinite, perhaps lengthy period) until the child has received special education in public school before sending the child to an appropriate private school . . . no matter how inappropriate the special education." (Id., 523 F.3d at p. 1087.)

5. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or (4) the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

6. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*Target Range*, 960 F.2d at 1487; *Almasi*, 122 F.Supp.2d at 1109.)

7. Parent did not act precipitously in placing Student at Falcon Ridge. When the combination of Student's emotional disturbance and self-medicating resulted in her suspension from high school, Parent initially placed Student at Action Academy, a program where she would be educated by District teachers and be able to continue on a path to graduate from high school within District.

8. District argued that this was a unilateral private school placement. However, Ms. Harris provided information about Action Academy to Parent. The materials bore the imprint of the District and directed Parent to contact a District employee for further information. Although District could not directly place students at Action Academy because it controlled its own admissions, it was a free, public school utilizing District teachers to provide instruction. Although Parent did inform District that she was rejecting District's proposed placement, there was no unilateral placement at this time.

9. Student passed between Action Academy and Action Ranch until Parent became convinced that it was necessary to move Student from District to get her away from the peer group that was enabling her destructive behaviors. Parent placed Student at Sovereign Health in San Diego, a residential facility with a degree of security. District was aware of that placement, which was covered by Parent's insurance. Student's second unauthorized departure from Sovereign Health resulted in her arrest.

10. At this point Parent waited no longer to put Student in a fully restricted residential program. She arranged for Student to attend Falcon Ridge, and got the juvenile justice system to agree to release Student to Parent's custody in District for transportation to Falcon Ridge.

11. District has argued that this was a court-ordered placement of a court ward, and that District is therefore not liable for its costs. Welfare and Institutions Code section 727 prohibits a court from ordering the placement of a minor who is a ward in a

private residential facility or program that provides 24-hour supervision, outside of the state, unless the court finds, in its order of placement, that all in-state facilities or programs have been determined to be unavailable or inadequate to meet the needs of the minor and that the State Department of Social Services or its designee has performed initial and continuing inspection of the out-of- state residential facility or program and has either certified that the facility or program meets all licensure standards required of group homes operated in California or that the department has granted a waiver to a specific licensing standard upon certain findings.

12. District has not produced an order of placement by the court. Further, District has represented at hearing that Falcon Ridge is not a state-certified facility, which means that the juvenile court could not place Student at Falcon Ridge. In addition, the probation order present in the record does state that Student was released to Parent's custody, with the condition that Student attend the placement at Falcon Ridge. The fact that Student was released to Parent's custody undercuts District's other argument that the County of San Diego, as Student's last district of residence, is responsible for the cost of Falcon Ridge. If a student is released from juvenile hall back to her parent, the district of residence resumes responsibility for providing services. The transfer between the county office of education and the district of residence is accomplished pursuant to provisions of law relating to transition. (5 C.C.R. § 3042(b); Ed. Code, § 56325.) District remains the responsible party.

13. Parent's placement of Student is appropriate and reimbursable. Student is receiving an appropriate education and advancing to graduation. She is receiving treatment for her emotional and addictive problems which interfere with her ability to attend school and benefit from special education services. Student's placement supports her education by supplying and imposing structure, discipline, and consistency, her emotional, social, and medical problems requiring residential placement are inseparably

intertwined with her educational problems; and the placement is primarily occasioned by the need to aid her so that she may benefit from special education. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643.)

14. District argues that Parent's recovery of tuition and the cost of related services should be reduced for three reasons.[11]

15. First, District notes that as of September 2015 Parent no longer lived within the District, having sold her house and moved to her mother's house in Corona. Although she has the ability to shelter with family, Parent is effectively homeless,[12] having lost her residence due to the economic hardship of having to pay to place her daughter at Falcon Ridge and being forced to sell her home. The loss of a home due to the cost of treating a child's mental illness is a striking example of the plague of homelessness. As Parent's last permanent residence was within District, District remains the agency charged with responsibility for Student's education. (Ed. Code, § 48852.7 (a).)

16. District argues that it did not receive written notice of Parent's placement of Student at Falcon Ridge 10 business days before placing her at Falcon Ridge. The

[11] District also asserts that recovery should be barred because Parent refused to make Student available to District for assessment because she insisted on an independent psychoeducational assessment in February of 2015. The argument is not persuasive, especially as District did not make a hearing request to compel the assessment.

[12] The McKinney-Vento Homeless Education Assistance Improvements Act of 2001 defines homeless children and youths as those sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason. (42 U.S.C. § 11434a (2)(B)(i).) Parent is homeless under the application of that definition.

required notice must include a statement rejecting District's proposed placement, stating Parent's concerns, and expressing their intent to seek reimbursement. If such notice is not given, reimbursement may be reduced or denied according to the hearing officer's discretion. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) District was aware from December 2014 that parent had rejected District's placement and had heard her concerns on that issue at least three times at IEP team meetings. District was notified through counsel of the placement at Falcon Ridge on August 17, 2017, approximately 19 business days after Student's release from juvenile hall. District has not explained how this delay caused it prejudice.

17. District makes an equitable argument that Parent concealed the fact that she moved out of District in September 2015. It notes that Parent filed this action in February 2016, but still listed her address as the home she sold in September 2015. Parent did not respond to this assertion, raised at the hearing, and was less than fully forthcoming in her testimony on this matter. Parent also inaccurately testified about the date on which she moved out of her house. It is not possible to believe that Parent lacks memory of such significant events. It is, also, troubling that Parent was represented by counsel when this error was made and that it was neither caught nor corrected. The matter is not minor. If Parent were not found to be homeless as of the date of her departure from the district, her recovery would be limited to less than three months' tuition.

18. Accordingly, balancing the conduct of both parties, Parent's recovery will be limited to reimbursement of the tuition and fees incurred for Student's placement at Falcon Ridge. Any further recovery would require trust in the accounting made by Parent of the amount, purpose, and appropriateness of incurred charges. Given the lack of candor about her departure from the district, that trust cannot be given. Therefore, Student established entitlement for reimbursement for tuition expenses through the

date of this order. An ALJ may not make a prospective placement of a student at a nonpublic, nonsectarian school if the school has not been certified by the state of California for such placements. (Ed. Code § 56505.2(a)) Falcon Ridge is not so certified. Accordingly, Student cannot be ordered placed at Falcon Ridge. Parent will be granted reimbursement for additional tuition expenses at Falcon Ridge only until a new IEP team meeting is held and an offer of FAPE provided to Student.

ORDER

Within 45 days of the date of this Order, District shall reimburse Parent $58,010 for tuition and fees at Falcon Ridge, representing payment through June 2016 for ten months at $5,000 per month, $4,677 for the month of February 2016, and $3,333 for fees and tuition for the month of July 2015. Prospective placement at Falcon Ridge cannot be ordered because the facility is not certified for placement by the state of California. District shall reimburse Parent for all additional monthly tuition expenses incurred within 30 days of payment by Parent until appropriate assessments, including a psychoeducational assessment, have been conducted by assessors chosen by District, an IEP team meeting has taken place to review the results of those assessments and the assessment conducted by Dr. Gunn, and an offer of FAPE has been made by District; or until Student has been discharged by Falcon Ridge and District has made an IEP placement; or until Student has received a high school diploma or its equivalent.

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. District prevailed on Issue 1(a), Student prevailed on Issue 1(b), and no finding was made as to Issue 1(c).

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: June 13, 2016

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings