

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2017041138

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

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DECISION

Parents on behalf of Student filed a request for Due Process Hearing with the Office of Administrative Hearings, on April 24, 2017, naming Los Angeles Unified School District. District served Student with a response to his complaint on May 3, 2017. On June 6, 2017, OAH granted the parties' joint request for a continuance.

Administrative Law Judge Darrell Lepkowsky heard this matter in Van Nuys, California, on September 5, 6, 7, 12, and 13, 2017.

Attorneys Henry Tovmassian and George Crook appeared on behalf of Student. Mother and Father attended the entire hearing. Student did not attend.

Attorney Karl Widell appeared on behalf of District. District Due Process Specialist Anait Sinanian or Due Process Specialist Juan Tajoya attended the hearing on behalf of District on different days.

At the parties' request, OAH continued the hearing to October 16, 2017, for written closing arguments. Closing arguments were timely filed, the record was closed, and the matter was submitted for decision on October 16, 2017.

## ISSUES<sup>1</sup>

1. Whether District denied Student a free appropriate public education by:
  - (a) Failing to meet its child find obligation to him from April 25, 2015,<sup>2</sup> through the end of the 2016-2017 school year; and
  - (b) Failing to conduct timely assessments in all areas related to Student's suspected disability, including (i) intellectual functioning, including areas of attention; concentration; executive functioning; information processing; visual/perceptual skills; and memory functioning, including verbal and non-verbal memory; (ii) language processing, including development and use; (iii) academic functioning; (iv) gross and fine motor functioning and sensory integration; (v) social-emotional functioning; and (vi) behavior from April 25, 2015 through the 2016 – 2017 school year?
  - (c) Failing to conduct appropriate assessments in all areas related to Student's suspected disability, including (i) intellectual functioning, including areas of attention; concentration; executive functioning; information processing; visual/perceptual skills; and memory functioning, including verbal and non-

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<sup>1</sup> The issues were clarified by Student and agreed to by District on the first day of hearing, and finalized in an Amended Order Following Prehearing Conference dated September 8, 2017. The ALJ has further reorganized the issues for clarity. The issues as outlined in this Decision are the only issues heard and decided. The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

<sup>2</sup> Student does not raise any claims outside of the applicable two-year statute of limitations.

verbal memory; (ii) language processing, including development and use; (iii) academic functioning; (iv) gross and fine motor functioning and sensory integration; (v) social-emotional functioning; and (vi) behavior from April 25, 2015 through the 2016 – 2017 school year?

2. Whether District committed procedural violations, which denied Student a FAPE by:

- (a) Failing to timely review and consider third party assessments;
- (b) Failing to hold timely individual education program team meetings to determine Student's eligibility for special education;
- (c) Failing to meet its child find obligations to Student from April 25, 2015, through the end of the 2016-2017 school year; and
- (d) Failing to make a formal, specific, written offer of FAPE in the IEPs of (i) September 15, 2016 and (ii) October 17, 2016?

3. Whether District denied Student a FAPE from April 25, 2015, though the end of the 2016-2017 school year, by failing to find him eligible for special education and related services, and develop an appropriate IEP for him to address all of his unique needs?

## SUMMARY OF DECISION

Student convincingly demonstrated that District should have assessed him for special education eligibility after Parents asked District to convene a Section 504<sup>3</sup> team meeting on March 9, 2016, in response to his increased inability to focus and attend in class, increased poor behavior in class, and increased absences due to anxiety about attending school. Student also met his burden of persuasion that he should have been

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<sup>3</sup> Section 504 refers to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.)

found eligible for special education at that time as a child with other health impairment and emotional disturbance. At the time of the Section 504 meeting, Student had limited strength, vitality or alertness, due to his chronic attention deficit hyperactivity disorder and accompanying anxiety. His behaviors in class were disruptive and he was off-task 50 percent of the time. Student's anxiety manifested itself primarily as a resistance to attending school. Student developed physical gastrointestinal health issues that had no medical basis but were instead caused by his anxiety concerning school. Although Student continued to make good grades academically, his focus and attention at school was impaired, as was his behavior in class. His anxiety and resulting physical symptoms caused him to miss a significant amount of school days. Student's 504 plan failed to address these issues. Student required special education interventions that could only be provided through an individualized education program.

Student also proved for the same reasons that District should have found him eligible for special education and developed an IEP for him at the October 17, 2016 IEP team meeting District convened after it assessed him for special education eligibility in the spring and fall of 2016. Although Student's academic grades did not suffer, Student's anxiety the previous school year caused him to miss substantial amounts of school days, and his behavior, attention, and lack of focus in school continued through the end of the 2015-2016 school year, in spite of changes District made to his section 504 plan. District's reliance on the fact that Student was able to maintain his grades was misplaced. Lack of academic achievement is not the only factor to consider in determining whether a child qualifies for special education.

Student failed to meet his burden of persuasion that District had an obligation to assess him and/or find him eligible for special education prior to March 9, 2016, or that District denied him a FAPE in any manner other than those discussed above.

## FACTUAL FINDINGS

1. Student was an 11-year-old sixth grader at the time of the hearing who attended Bridges Academy, a private school. Parents unilaterally placed Student at Bridges at the beginning of the 2016-2017 school year. Student resided with Parents within District boundaries. At the time of hearing, Student was not eligible for special education services.

### EDUCATIONAL BACKGROUND: KINDERGARTEN THROUGH SECOND GRADE

2. Parents chose to enroll Student in a private school of their choice for kindergarten through second grade. Even at a young age, Student presented with difficulties at home and in school. He had many irrational fears and anxiety. He was impulsive, had an inability to concentrate long enough to complete homework assignments, and could not eat a meal without being constantly in motion. He had difficulty concentrating, particularly on tasks that were not of interest to him. When Student was six years old, his physician diagnosed him with attention deficit hyperactivity disorder and prescribed several medications to address Student's symptoms.

3. Although Student was successful academically at his private school, Parents were concerned that the small size of the school would not provide him with enough social opportunities. They began to consider transferring Student to public school. Parents had another, older child, who had already been found eligible for special education. They were familiar with the IEP process but were not certain if Student's issues would qualify him for special education.

4. On June 7, 2013, Mother wrote to Deborah Plat, who was the Principal of Wilbur Charter School for Enriched Academics, asking that District assess Student for an IEP. Wilbur Charter was a District charter school in the neighborhood where Student

lived. At hearing, Ms. Plat could not recall receiving Mother's June 7, 2013 request that District assess Student. Neither Ms. Plat nor any other District staff person responded to the request or contacted Parents about it. Parents did not pursue the issue of assessment. Rather, they had Student assessed by Dr. Sandra Kaler, a psychologist who had provided services to Student's older sibling.

#### Dr. Kaler's Psycho-Educational Evaluation<sup>4</sup>

5. Parents contacted Dr. Kaler in early June 2013 to assess Student due to their concerns about his impulsivity, inability to control his activity levels so that he could complete homework, inability to eat a meal without being in constant motion, and inability to focus on tasks in which Student was not interested. Dr. Kaler conducted her assessment over four days in June, July, and August 2013. Student was approximately seven-and-a-half years old when she started her assessment, and was just finishing first grade.

6. Dr. Kaler received a masters' of science degree in nursing in 1976, and was certified as a family nurse practitioner in 1978. After working in the nursing field as a practitioner and instructor for over 15 years, she returned to school and obtained a doctorate degree in psychology from the University of California, Los Angeles in 1990. She thereafter worked as a staff psychologist and assistant research psychologist at UCLA, working predominantly with children with cognitive, social and environmental delays. She had maintained a private psychology practice since 1992, and had been an assistant clinical professor at UCLA since 1996. She was well-qualified to assess Student.

7. Dr. Kaler used a variety of standardized testing instruments to assess

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<sup>4</sup> The terms "assessment" and "evaluation" are synonyms and were used interchangeably by the parties and witnesses at hearing. They are used interchangeably in this Decision as well.

Student in the areas of cognition, academics, behavior, and social and emotional development. The tests included rating scales that Mother completed. Dr. Kaler also observed Student during the assessment process. She did not have Student's teachers complete the rating scales. She did not observe Student at school or interview his teachers.

8. During the assessment process, Student was articulate, but attempted to talk off-topic frequently. He demonstrated a marked motor restlessness. He had trouble keeping his hands still and kept bending pages in Dr. Kaler's workbook, even after she tried to re-direct him. He had difficulty attending to tasks in which he was not interested. When asked to do tasks of low interest, Student complained about his head hurting. Dr. Kaler surmised that Student was somaticizing as Student's stress and dislike of the tasks manifested as the physical symptom of a headache. On language tasks, Student missed information due to his lack of attention. He would sometimes hit his head with his hand to stay focused. Student also had difficulty doing tasks or answering questions that required him to be introspective. He also had negative attention-seeking and provocative behaviors. For example, when asked to do something, he would respond "You can't make me."

9. Student's overall intelligence quotient was 123, in the superior range. He also scored above grade level in all but one of the areas tested. His academic achievement scores were also very high. Student's scores were primarily in the above-average to superior range. The only exceptions were average scores in sentence composition and in oral expression.

10. Dr. Kaler administered several testing instruments to Student to review his social/emotional and adaptive levels. Student scored in the clinical range for thought problems, attention, and aggression. His scores were in the clinical range for attention deficit/hyperactivity problems and oppositional-defiant problems, as well as for

externalizing problems. Student's scores on these testing measures indicated he had sleep issues, was dependent, nervous, fearful, and worried a lot. Student's scores also demonstrated he had a deficiency in social awareness. He had difficulty understanding emotional states past a superficial level. Student's scores on adaptive tests were all in the average range. Dr. Kaler did not find that Student had any fine or gross motor deficits, or any sensory-motor integration issues that needed to be addressed.

11. Dr. Kaler agreed with Student's physician that Student had attention deficit hyperactivity disorder. Student was impulsive, constantly distracted, and had a high degree of motor restlessness in spite of the medications he took. She also confirmed that Student had a lack of basic social foundational understanding although he was not on the autism spectrum. She recommended that Student receive social skills support as well as in-home behavioral support due to how both Student's and his older sibling's behavior was impacting the family at home.

12. Dr. Kaler determined that Student required a section 504 plan at school to provide him with accommodations and behavioral support. She also felt that, given Student's high degree of impulsivity and provocative behavior, he might appear to be a person with emotional difficulties if he attended a mainstream classroom. Dr. Kaler therefore recommended that Parents retain Student in his private school placement until a medication regimen was found that would address Student's behavioral issues. Once Student's behaviors were medically controlled, Dr. Kaler believed Student would then be ready to transition to a larger school setting with section 504 accommodations.

13. Dr. Kaler did not believe that Student qualified for special education at the time she assessed him in June through August 2013. She did not recommend that Parents request a special education assessment from his school district. Rather, she believed that section 504 accommodations were sufficient to address Student's issues and that he should remain in his private placement until his medications were stabilized.



She recommended that Parents have Student reassessed the following year.

14. Mother took a copy of Dr. Kaler's assessment report to Wilbur Charter and gave it to Ms. Plat. Neither Ms. Plat nor any other District staff member contacted Parents to discuss the report.

#### 2013-2014 School Year and Section 504 Eligibility

15. Parents followed Dr. Kaler's recommendation and retained Student in his private school placement for second grade, and also enrolled Student in a social skills program. The social skills group was run by Dr. Jeffrey Jessum, a doctor of psychology who had been in private practice since 1994. Dr. Jessum focused on teaching the children in the group how to see things from another person's perspective, how to read social and cultural context, how to act with sportsmanship behavior, and how to give feedback. Student remained in the group for approximately two years.

16. Student successfully completed second grade at his private school. At the end of the 2013-2014 school year, Parents had Dr. Kaler re-assess him. Dr. Kaler did a brief psychoeducational evaluation that was not as in-depth as the full evaluation she did the year before. Although Student still demonstrated a high degree of distractibility, Dr. Kaler advised Parents that Student should be able to transition to public school as long as he had accommodations under a section 504 plan. She did not believe that Student qualified for special education in June 2014, when Student was completing second grade. Dr. Kaler believed that a section 504 accommodations plan would address sufficiently Student's distractibility, motor restlessness, and impulsivity. She did not suggest that Parents ask District to assess Student as she did not believe an assessment was necessary.

17. Mother contacted Wilbur Charter in June 2014, and met with assistant principal David Price on June 9, 2014. Although Dr. Kaler had said that a section 504 plan would meet Student's needs, at the meeting Mother verbally asked Mr. Price to

have District assess Student for special education eligibility. Mr. Price felt that a section 504 accommodation plan would be sufficient to meet Student's needs and that it was not necessary for Student to have an IEP. Parents acceded to Mr. Price's recommendation and did not renew their request for a special education assessment at that time.

18. Mother signed a request for a section 504 evaluation on June 9, 2014, the day she met with Mr. Price. The request for evaluation stated that learning, concentrating, working, and thinking were life activities substantially limited by Student's attention disability. Mr. Price accepted Mother's input and Student's medical diagnosis of attention disorder and developed a section 504 plan based on that information. Mr. Price developed the plan the same day he met with Mother.

19. Under the section 504 plan, Student would receive accommodations during testing. He would also receive the following accommodations in his general education classroom, which his teacher would implement: preferential seating; extended time on assignments and tests (one and a half times the normally allotted period); time for Student to review his answers if he handed in a test or assignment too quickly; homework to be limited to one hour a day, with no deduction for unfinished work; ability to stand rather than sit in class as necessary; and two-to-three minute breaks as necessary. Student's teacher would be in charge of teaching him how to take the breaks. Mother consented to the section 504 plan.

### THIRD GRADE: 2014-2015 SCHOOL YEAR

20. Student attended Jennifer Stern's general education classroom for third grade. Ms. Stern implemented the section 504 plan. Student had some behavior challenges during the school year. He was impulsive and sometimes engaged in inappropriate behavior, such as drawing inappropriate pictures or calling a classroom aide "a loser." Some of the behaviors were the result of changes in his medications that

resulted in Student not being able to sleep. Ms. Stern worked on his behavior at school and asked Parents to reinforce the same at home. She also used reinforcers, such as having Student earn tickets for good behavior and losing them for not following class rules, such as being late to line up.

21. Although Student contends that his lack of focus and attention and behavior in class should have alerted District that he might have a disability and therefore should be assessed, Student's lack of focus and inappropriate behaviors did not significantly interfere with his ability to access his education during third grade. While Ms. Stern noted on Student's report cards that he had difficulty settling down to the quiet routines in class, there is no persuasive evidence that Ms. Stern was unable to successfully redirect Student and keep him on task so that he could complete his schoolwork.

22. Student's academic grades for the first two trimesters of third grade were all in the proficient or advanced levels. His only low scores for work and study habits and learning and social skills were in the areas of organizing materials, following directions, exercising self-control, and demonstrating appropriate social interaction with peers. Student received scores of "2" in those four areas, indicating that he was making partially proficient progress. However, there is no persuasive evidence that his behaviors interfered with his ability to access his education or that it interfered with his classmates' ability to learn. Nor is there any evidence that Student's very few absences in third grade were the result of his anxiety, physical symptoms caused by anxiety, or a refusal to go to school. Rather, most of the absences were due to Student's reactions to new medications.

23. At some point during the Student's second or third grade year, Parents began taking him to see a counselor for individual counseling. By the end of third grade, they stopped having Student participate in Dr. Jessum's social skills group in favor of the

one-on-one counseling. The counseling was primarily in response to difficulties Student had at home.

24. Dr. Kaler continued to have contact with Mother while Student was in third grade, primarily because of issues with Student's sibling. Mother informed her of Student's challenges at school. However, Dr. Kaler did not believe that any of those challenges were significant enough to recommend changes to Student's section 504 plan, or to recommend that Parents request District to assess Student for special education eligibility. At hearing, Dr. Kaler stated that she did not believe Student was eligible for special education while he was in third grade. She stated that there was no reason for her to recommend an assessment for special education at that time.

#### FOURTH GRADE: 2015-2016 SCHOOL YEAR

##### Fall 2015

25. Student attended fourth grade in Victoria Greene's general education class. Ms. Greene had a multiple subject teaching credential and been a general education teacher since 2004. She began working at Wilbur Charter in 2005, and was still there at the time of the hearing. Ms. Greene had no special education certifications or training. There were 36 to 37 pupils in Ms. Greene's class during the 2015-2016 school year.

26. Although Student contends that he demonstrated significantly disruptive behaviors during the first trimester at school, which ran from August 18, 2015, to November 6, 2015, that should have alerted District that he might be a child with a disability, there is little persuasive evidence to support that contention. Student was off-task in class, said inappropriate things, talked too loudly and too much, and tended to engage in behavior to attract attention, but Ms. Greene was able to redirect him. Student's academic grades remained at the proficient to advanced levels. He was only

absent one day and only tardy three times during this first trimester. Father informed District at a March 9, 2016 section 504 team meeting, discussed below, that Student had loved to go to school and had a wonderful first trimester in Ms. Greene's class.

27. Student's behaviors and difficulties with school began to increase toward the end of the first trimester. He began to experience extreme anxiety about going to school and began expressing to Parents that he did not want to go. However, Parents did not have any significant difficulty convincing Student to go to school before District's winter break, which began on December 21, 2015.

28. Student was selected to participate in Wilbur Charter's gifted and talented education program, known as GATE, on October 15, 2015. It is an enrichment program for high academic achievers. Pupils participated in the GATE program an hour a week during school time and were given different projects on which to work. Because of his anxiety about school, Student was unable to complete a single project in the GATE program during the 2015-2016 school year. As discussed below, his anxiety increased substantially after returning from winter break in January 2016. The burden of having to complete the extra assignments and his embarrassment about his inability to do the GATE projects added to Student's anxiety. Parents eventually withdrew Student from the GATE program because he was too anxious to do any of the work and being pulled from class to participate increased his anxiety.

29. District contends that Ms. Greene continued to be able to address Student's issues in class during the entire 2015-2016 school year and that none of Student's issues affected him academically. District overlooks what was happening with Student beginning in January 2016.

#### Winter 2016

30. Student began having even more difficulty organizing his tasks and activities after he returned to class in January 2016 following District's winter break. He

avoided tasks that involved sustained mental effort. He was talking more in school to his classmates, and talking more about inappropriate things to gain attention, even if the attention was negative. Ms. Greene tried moving Student's seat, but it did not stop the behaviors. Student often lost things that were necessary to do work. His work notebooks and folders were disorganized. He had difficulty doing his homework and turning in assignments. He blurted out answers in class no matter how many times he was asked to wait to be called on to answer. He interrupted others when they were talking. He had difficulty waiting his turn. He was forgetful. He would deliberately act silly to gain attention, or do things like try to trip his classmates in an effort to gain attention. He was constantly off-task.

31. Student's anxiety also increased substantially after returning from winter break in January 2016. Student was more and more resistant to going to school. He complained of headaches and stomach aches. He complained that he had difficulty going to the bathroom and would vomit in the morning before it was time to go to school. He would go into the bathroom at home in the morning and refuse to leave, complaining of various physical symptoms.

32. Student's anxiety caused him to freeze up and be unable to complete assignments. It became a cycle: Student could not do an assignment because he was overcome by anxiety, and then he did not want to go to school because he was humiliated that he had not done the assignment. Student was not keeping up with class assignments and often had to continue working on an assignment and project while the rest of his classmates had moved on to something else.

33. Parents made sincere efforts to get Student to school. They told Student he needed to take responsibility for his school obligations and that he needed to change his priorities with getting his work done. They told Student they were not happy with his lack of responsibility. Their encouragement and interventions were not

successful. Student continued to exhibit physical manifestations of his anxiety in the mornings and he continued to refuse to go to school. Parents often had to physically drag Student out of the house and place him in the car.

34. Wilbur Charter's second trimester went from November 9, 2015, to February 26, 2016, that consisted of 56 school days. Student was absent for 11 of those days, which amounted to almost 20 percent of class days during the trimester. He was tardy on four days. The majority of days tardy and days absent were due to Student's refusal to go to school. As of January 2016, Student was almost as big as Mother. She was no longer able to physically pick him up and place him in the car. Father often had to become involved in getting Student to school, even though it interfered with his ability to get to work.

35. Although school attendance is compulsory and truancy can be addressed through school attendance review board proceedings,<sup>5</sup> District never contacted Parents about Student's excessive absences, never addressed the issue, and took no action to procure Student's attendance in class.

36. Mother communicated her concerns to Ms. Greene through emails. She expressed to Ms. Greene that what she was seeing in Student was more than just disorganization and forgetting to bring his homework assignments from school. After winter break, Mother started seeing much more anxiety and worry in Student than she previously saw. Parents tried giving Student more structure at home and limited his access to things like video games and other electronic diversions, but it did not help. Mother noted that Student was having a more difficult time controlling his impulses and was more hyperactive. In a January 27, 2016 email to Ms. Greene, Mother expressed her fear that, although Student had loved school to that point and had been doing well, that

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<sup>5</sup> See, generally, Education Code section 48200, et seq.

had changed and she was concerned about how this was affecting him at school.

37. Ms. Greene did not refer Student for an assessment and did not contact any of Wilbur Charter's administrators about Mother's concerns. Neither Ms. Greene nor any Wilbur Charter administrator took any action based upon Student's excessive absences the second trimester of school.

#### March 9, 2016 Section 504 Team Meeting

38. Between the end of January 2016 and the beginning of March 2016, Student's anxiety issues and physical reactions to the anxiety continued unabated. Since District did not take any action in response to her concerns expressed to Ms. Greene, Mother asked District to convene a section 504 plan team meeting to discuss Student's needs. District convened the meeting on March 9, 2016. Present at the meeting were Parents, Ms. Greene, and Maeva Carter, who was a District assistant principal and elementary instructional specialist. Ms. Carter had a master's degree in educational administration. Before becoming an assistant principal, she was a special education teacher and program specialist for over 25 years. She was assigned to assist principals at several District schools meet special education compliance obligations.

39. During the section 504 meeting, the participants discussed Student's issues at school. Ms. Greene informed the team that Student's behavior in class at been "off the charts" since returning from winter break. He constantly talked to classmates. He was off-task at least 50 percent of the time. Student would talk about anything other than the assignment or project on which he was supposed to be working. He had not finished a class project that the pupils had about a month and a half to complete, even when Ms. Greene provided Student with extra time, and even though she redirected him and told him he would suffer consequences for not finishing the project. The class had started working on another project and finished it, and Student had not finished his. Ms. Greene had a plastic divider she would use to separate Student from his classmates so



he could focus on doing his work, but the divider did not decrease Student's behaviors.

40. Student could not remain in his seat, but rather was constantly walking or running around the classroom. At times he would engage in attention seeking behavior such as trying to trip classmates, even after Ms. Greene told him he could hurt someone that way. Student spent half his time being silly, disruptive, or off-task. Student attempted constantly to get attention, even if it was in a negative way.

41. Ms. Carter recognized that Student's behaviors were disruptive and interfered with his learning in class. She also recognized that his behaviors needed to be controlled before he went to middle school, because there would be less tolerance for them there. However, she did not refer Student for a special education assessment after the March 9, 2016 section 504 team meeting, because Student's academic grades were not affected by his behaviors. She opined at hearing that a pupil had to have an academic need to qualify for an IEP. She also stated that if the pupil had some social/emotional deficits but was not a danger to himself or to others, the pupil also would not qualify for an IEP. For these reasons, she felt that Student's issues could be addressed through changes to Student's section 504 plan, and by teaching Student how to control the things he was then unable to control. Ms. Carter's belief that a pupil with good grades was not eligible for an IEP, unless a danger to themselves or to others, was voiced by the majority of District staff who testified at hearing. Those witnesses included Ms. Plat and District school psychologist Ashley Laucis, as discussed below.

42. At the March 9, 2016 section 504 team meeting, District amended Student's section 504 plan by adding a specific accommodation to use a privacy divider during class work. District also added an accommodation for Student to write down his homework assignments every day and to take home his math, science, health, and writing folders every day as well. The plan also included an accommodation to use a token system in class as Parents did at home. However, Ms. Greene had already tried

unsuccessfully to use reward and consequence systems with Student, and had already tried unsuccessfully to use the dividers. Hence, adding their use to the section 504 plan failed to address Student's needs.

43. District retained several accommodations from Student's prior section 504 plan. The plan again provided the accommodations of giving him extended time to finish assignments and tests, allowing Student to stand at his desk to complete assignments, permitting Student to take two to three minute breaks, and having Student's teacher instruct him on how to take a break. These latter accommodations had been in place all through fourth grade, and Ms. Greene had implemented them. However, even with these accommodations, Student's behaviors had not decreased and his anxiety had substantially increased. Retaining unsuccessful accommodations failed to address Student's needs.

44. District did not explain at the section 504 team meeting or in the plan itself how Ms. Greene was supposed to teach Student to take breaks, or who was going to teach her how to address Student's behavior. Ms. Greene had no training in addressing the needs of a pupil with attention disorders and had not received training on how to teach pupils to take breaks.

45. Parents acknowledged, during the March 9, 2016 section 504 team meeting, that Student had done well in school before the winter break and had enjoyed going to school. However, they also voiced their concern with Student's increased anxiety about attending school, his resultant physical symptoms, and the extreme difficulty they had getting Student to attend school. District did not address these issues through the amended section 504 plan, did not offer Student any type of counseling, did not address Student's absences or anxiety, and did not offer to assess him for special education eligibility.

## DISTRICT'S INITIAL ASSESSMENT OF STUDENT

### Events Leading Up to Parent's Request for Assessment

46. Student continued experiencing high levels of anxiety about going to school after the March 9, 2016 section 504 team meeting, and after Ms. Greene implemented the new accommodations. Parents continued to have Student see a private therapist. On March 10, 2016, the day after the meeting, Mother sent an email to Ms. Greene giving her written permission to speak with Student's therapist, or to send her a form to give such permission. Ms. Greene did not contact the therapist or tell Parents they needed to fill out a release form. Ms. Greene did not forward the email to any school administrators.

47. Although Student expressed interest in the new token award system Ms. Greene implemented pursuant to the revised section 504 plan, the system was not successful. On April 27, 2016, Mother sent an email to Ms. Greene describing the challenges Parents experienced since the Student returned to school after winter break. Student's behavior had a pattern. He was fine during the school day, but suddenly, at bedtime or in the morning, he would complain of stomach pain and having an upset stomach. Student had diarrhea at times and sometimes vomited in the morning. He complained about being anxious. Student did not have a fever and Mother did not believe there was anything physically wrong with him. She believed the physical symptoms were the result of Student's anxiety.

48. Student was afraid and embarrassed to use the restroom at school and afraid he would have a bathroom accident because of this. He thought the bathrooms were too filthy. This was causing him additional anxiety.

49. Parents continued having considerable difficulty getting Student to school. On one occasion, Russell Wise, a Wilbur Charter special education teacher, had to go to Parents' car when the family arrived at school to coax Student to get out and go to class.

On another occasion, Mother and Father both had to physically put Student in the car in his pajamas. They had to put the child locks on in the car and both had to take Student to school because he was trying to climb into the front seat and exit the car while it was moving.

50. Student would sob on most days Parents took him to school, saying he did not want to go. Sometimes Parents were able to get him into the car, other days he would remain in the bathroom. Even when Parents were successful getting Student into the car, they were not always successful in convincing him to get out of the car and go to class.

51. Wilbur Charter's third trimester lasted from February 29, 2016, to June 10, 2016, 65 school days. Student was absent 17 days during the third trimester and was tardy seven days. Neither Ms. Greene nor any District administrator took any action to address Student's excessive absences. No one contacted Parents to determine why Student was absent and/or how District could address Student's school anxiety. Although Student was absent for over 25 percent of the third trimester, District did not look into the cause of the absences or refer Student to a school attendance board. District chose to ignore the issue because Student was able to maintain high grades.

52. Although Ms. Greene did attempt to implement Student's accommodations, they were not successful. Student continued to engage in off-task and disruptive behaviors. Ms. Greene's response often was to have Student remain in class during recess or what was called "Fun Fridays." She had Student complete eight-paragraph introspective essays on his behavior. Ms. Greene believed that Student was deliberately misbehaving and that he could control his behavior if he really wanted to. Ms. Greene's methods failed to address Student's needs because his attention deficit hyperactivity disorder meant he was unable to control his behavior. He therefore did not know why it occurred and could not state how he could stop it. He blamed himself and

thought it meant he was bad. This added to his anxiety. Additionally, given Student's hyperactivity and motor restlessness, prohibiting him from recess activity increased his disruptive behaviors rather than serving to inhibit them. Student felt that he was being punished for something he did not understand and could not control.

53. At some point before the end of the 2015-2016 school year, Mother took Student to see a gastroenterologist. She wanted to determine if there was a medical basis for Student's diarrhea, vomiting, headaches, and stomach aches. The doctor could not find any medical reason for Student's symptoms.

54. On April 27, 2016, Mother made a formal request for District to assess Student. District sent Parents an assessment plan on May 13, 2016. The plan proposed assessing Student in the areas of health and development; general ability; academic performance; language function; motor abilities; and social/emotional status, including the area of emotional disturbance. Mother signed consent to the assessment plan on May 16, 2017.

#### Dr. Kaler's May 9, 2016 Brief Psychological Evaluation

55. Dr. Kaler maintained contact with Parents due to her past relationship with them and ongoing concerns about Student and his sibling. Mother communicated with her over the course of the 2015-2016 school year, describing Student's increasing anxiety and school refusal, and the physical symptoms he was manifesting. Parents asked Dr. Kaler to re-assess Student soon after Mother requested District assess him.

56. Dr. Kaler re-evaluated Student using many of the testing instruments she used in 2013. She had Student complete some of the rating scales that previously only Mother completed. However, Dr. Kaler did not do any academic assessment of Student. She did not list or summarize any of Student's school records. Although she observed him during her assessment she did not observe him at school at Wilbur Charter. She did not think it necessary because she was familiar with both schools and had observed

some of the classrooms when assessing other children. Dr. Kaler did not contact Ms. Greene to get any input from her on Student's needs. Nor did Dr. Kaler contact Student's treating therapist or his treating physician. She did not observe Student at Bridges or speak with his teachers after he began attending school there.

57. During Dr. Kaler's assessments, Student demonstrated continual motor restlessness. He expressed concern that he missed school due to his stomach problems. Student felt like he was aching all the time. He felt that his teacher yelled at him and kept him from doing fun activities because of his behaviors. He felt that he was being punished for things that he could not control.

58. The rating scales Mother completed indicated Student was in the clinical range for being anxious and depressed; withdrawn; having somatic complaints; having attention problems; demonstrating aggressive behavior; internalizing problems; being hyperactive; being impulsive; having difficulties with executive functioning; and being defiant. Student also self-rated himself in the clinical range in several areas.

59. Student scored in the clinically significant range in the area of social awareness on a test that measured social responsiveness. The test result indicated that Student had deficiencies in reciprocal social behavior. This meant that his ability to interact appropriately with peers was negatively impacted.

60. Dr. Kaler re-assessed Student's cognitive levels. His full scale intelligence quotient dropped from the score of 123 on the 2013 assessment, to 111 on the new assessment. Dr. Kaler acknowledged during her testimony that it is fairly common for a child's full scale intelligence quotient to drop up to 15 points during the course of a child's education. However, in Student's case, she felt that his attentional and emotional difficulties suppressed some of his scores. She came to that conclusion because Student's sub-test scores were scattered, which had not been the case when she previously assessed him.

61. Dr. Kaler concluded that Student was experiencing increasing stress at school. Although Student denied that he was depressed or anxious, his somatic symptoms contradicted his self-assessment. Dr. Kaler was concerned that Student was becoming increasingly dysregulated, which impacted his moods. She concluded that Student's school anxiety, which resulted in his physical symptoms and corresponding refusal to go to school, clearly demonstrated that Student was not accessing his education.

62. Dr. Kaler ultimately concluded that Student required an IEP for social and emotional reasons. She believed that Student would not be able to be successful in school while placed in a general education classroom with a large number of pupils. She also believed that Student needed to continue with individual therapy. Dr. Kaler recommended that Parents initiate the IEP process with Student's school. She also recommended that Parents place Student in a private school. She recommended Bridges Academy. Although not certified by the State of California as a non-public school, Dr. Kaler made the recommendation because the focus at Bridges was addressing the educational needs of children who are twice exceptional, meaning they have high cognition but also have a disability. Student, with his above-average full scale intelligence quotient and diagnosis of attention deficit hyperactivity disorder, was the type of pupil Bridges served.

#### District's Assessment

63. District's initial assessment of Student took place in May, August, September, and October 2016. The results of the assessment were memorialized in a

report dated October 10, 2016,<sup>6</sup> and included reference to each of the assessments District administered. The only portions of the assessment completed before the end of the 2015-2016 school year were the school psychologist's review of Student's records, her observation of Student in Ms. Greene's classroom, and Ms. Greene's completion of the Attention Deficit Hyperactivity Disorder-Fourth Addition rating scales. All other assessments were completed after Student began the 2016-2017 school year at Bridges Academy.

64. School nurse Lindsay Quiazon completed the health assessment component. Her report was based on information from Mother and a review of Student's school records. The report noted that Student had a diagnosis of attention deficit hyperactivity disorder and was prescribed medication to treat the disorder. The report further noted that Student received private psychology therapy once a week, but did not have a history of serious or chronic illness. Although Student had been absent 11 days in the second school trimester of the 2015-2016 school year and 17 days over the course of his third trimester, the health report stated that Student's physical health was not an area of need, and did not impact Student's participation, performance, and access in his educational program. However, this was a conclusion and recommendation and did not invalidate the assessment.

65. Special education teacher Mr. Wise assessed Student's present academic levels using the Woodcock-Johnson IV Tests of Achievement. The test measured Student's academic abilities in various components of reading, mathematics, writing, and academic skills. Although Mr. Wise administered the test, he left Wilbur Charter

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<sup>6</sup> The original psycho-educational assessment report was dated September 14, 2016. It was revised after District assessors had an opportunity to observe Student in his classroom at Bridges and receive input from his teachers there.



before writing his assessment report. Wilbur Charter special education teacher Christine Kazandjian wrote the assessment report based on the scores Mr. Wise obtained.

66. Student's standard scores on the Woodcock-Johnson ranged from the average range to the superior range. They were similar to his scores on Dr. Kaler's 2013 assessment. His only low score was an 82 in spelling, which was in the below average range. The score was considerably lower than the score in spelling on Dr. Kaler's 2013 assessment, where Student had scored 117, which was above average.

67. District school psychologist Ashley Laucis administered the remaining portions of District's psycho-educational assessment. Ms. Laucis had a masters' degree in educational psychology, an education specialist degree, and a pupil personal specialist credential. At the time of the hearing, she had been a school psychologist for five years, all with District. Ms. Laucis had assessed many pupils during the course of her career. She received additional training from District in assessing pupils and in making determinations of eligibility for special education. Ms. Laucis was qualified to assess Student.

68. Ms. Laucis reviewed Student's school records; received written input from Ms. Greene and Mother; observed Student in Ms. Greene's classroom on June 8, 2016, and observed him in his classes at Bridges on September 29, 2016; and administered several testing instruments and rating tools to assess various aspects of Student's development. Ms. Laucis also reviewed Dr. Kaler's 2013 assessment and her recent May 2016 assessment.

69. During Ms. Laucis' observations of Student in Ms. Greene's classroom, he was on-task and demonstrated no disruptive behaviors. Student's classroom at Bridges the following school year had only nine pupils. Student's seat was a type of rocking chair. As he had during the observation in Ms. Greene's classroom, Student participated in the lessons, raised his hand appropriately to ask and answer questions, and was not

disruptive except for one time when he interrupted a classmate by blurting out an inappropriate comment. His teacher easily re-directed him.

70. Ms. Greene's evaluation of Student was that he was at or above grade level in all academic areas. She felt that although Student was often disruptive in class, made inappropriate comments, and needed re-direction to stay on task, he was academically successful as indicated by his high grades in all areas. Ms. Greene did not recount to Ms. Laucis the comments she made at the March 9, 2016 section 504 team meeting, where she informed Ms. Carter and Parents that Student's behavior was "off the charts." Nor did Ms. Greene discuss Student's anxiety and substantial absences. She was aware that Student had stopped attending the GATE program since he was no longer pulled out of class for it. However, she failed to inform Ms. Laucis that Student had withdrawn from the GATE program. Mother filled out an interview questionnaire as part of Ms. Laucis' assessment. She too neglected to tell Ms. Laucis that Student had to withdraw from GATE due to his anxiety.

71. Student's teachers at Bridges were more specific about Student's challenges in class. Although Student's classes only had about nine pupils, Student still needed prompting to refrain from disruptive behavior. Student continued to make off-topic comments and jokes in class; blurted out answers out-of-turn; talked while classmates were answering questions; had difficulty staying on task; and had poor self-control. As he had while attending Wilbur Charter, Student's academic achievement remained high at Bridges. However, although Student continued having challenges controlling his behavior in class, his anxiety levels had decreased. While he still voiced anxiety to Parents about going to school, Student had ceased refusing to go to school. He no longer had the gastrointestinal problems he had during the spring of 2016 while at Wilbur Charter. Student attributed this to the fact that he was eating better, but there is no evidence that corroborated Student's belief. Once Student began attending

Bridges, Parents no longer had to forcibly place him in the car and Student no longer locked himself in the bathroom, or experienced many of the physical symptoms he had the previous school year.

72. District did not use general standardized tests to determine a pupil's intelligence quotient. Rather, it used a variety of procedures, including review of records, observations, interviews, and other types of formal and informal testing instruments, to determine a pupil's general abilities and cognitive functioning.

73. Ms. Laucis administered the Cognitive Assessment System-Second Edition to evaluate Student's cognitive processing. This assessment is based on four areas: planning, attention, and successive and simultaneous processing. The planning processing scale measured Student's ability to strategize solutions to problems and work under time-restraints. Student's standard score in planning was 91, in the lower average range. Student's score on the attention processing scale reflected his ability to sustain focused attention and resist distractions. Student scored 109, which was near the top of the average range. In the area of simultaneous processing, which measures Student's ability to relate parts into a group or whole and to understand relationships among pictures and words, Student's standard score was 124, in the superior range. Because Student's subtest scores in these three areas were scattered, Ms. Laucis believed that his overall scores needed to be interpreted with caution. On the successive processing scale, which reflected Student's ability to work with information in a specific linear order, Student's standard score was 106, in the average range. Overall, however, Student's scores indicated his high level of cognition.

74. Ms. Laucis administered the Test of Auditory Perceptual Skills – Third Edition, which measured Student's ability to process and interpret what he heard orally. Student scored in the average range in all three auditory memory index subtests.

75. Ms. Laucis administered the Motor-Free Visual Perception Test-Third

Edition to assess Student's overall visual perceptual ability without motor involvement. Student's skills were in the average range on this test.

76. To test Student's ability to integrate visual perception and fine motor skills, Ms. Laucis administered the Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition. Student was required to copy shapes and symbols. His standard score on this test was 75, in the below average range. Ms. Laucis concluded that Student demonstrated a significant deficit in his overall visual and fine motor abilities, but attributed his low score to his impulsivity. She felt that Student had the potential to show higher visual and fine motor skills, but acknowledged that Student's low performance might be reflective of his lack of organizational skills, attention difficulties, and impulsivity. She based this conclusion as well on the fact that neither Dr. Kaler's 2013 assessment or Dr. Kaler's 2016 assessment of Student indicated that Student had any deficits in the areas of fine or gross motor skills, or in the area of sensory processing. Ms. Laucis did not recommend further testing in the area of sensory-motor integration. Student failed to provide any persuasive evidence at hearing that he had a deficit in that area, or that Ms. Laucis should have suggested additional testing for Student, especially in light of Dr. Kaler's prior findings.

77. Ms. Laucis found that Student functioned in the superior range in the area of conceptualization, which is the ability to learn new concepts. Student was also in the high average range in association, which is the ability to acquire and store information in your memory. Student had average processing abilities in visual processing, auditory processing, auditory comprehension, auditory reasoning, expression, attention, phonological processing receptive language, and expressive language.

78. Ms. Laucis used a variety of methods to assess Student's social/emotional status. She had Ms. Greene, Mother, three of Student's teachers at Bridges, and Student complete the Behavior Assessment Scale for Children-Second Edition. These were rating

scales covering numerous areas of emotional and social development. Scores in the clinically significant range suggested a high level of maladjustment. Scores in the at-risk range identified either a significant problem that might not be severe enough to require formal treatment or indicated a potential for developing a problem that should be monitored.

79. Although Ms. Greene had called Student's classroom behavior "off the charts" in March 2016, the only behavior she rated above the average range for Student was in the area of hyperactivity, which she rated as at-risk. Ms. Greene did not indicate any issues with Student's anxiety or somatization despite the fact she was aware that he had missed over 25 percent of class for the last trimester of the 2015-2016 school year due to anxiety about attending school. She was aware of Student's resulting physical manifestations because of her correspondence with Mother and the discussions at the March 9, 2016 section 504 team meeting. At hearing, Ms. Greene could not persuasively explain why her responses during the assessment process contradicted her communications with Mother and the information discussed at the section 504 team meeting.

80. One of Student's teachers at Bridges rated Student at-risk only in the area of hyperactivity; he rated Student as average in all other areas. Another teacher rated Student as average in all areas. The third teacher rated Student at risk only in the areas of study skills and leadership. He rated Student average in all other areas. None of the teachers testified at the hearing, so it is unknown if they believed that Student no longer had issues in those areas or if they believed that it was the small classroom environment that helped him control his maladaptive behaviors, lack of focus, and lack of attention.

81. Mother rated Student in the clinically significant range for hyperactivity, somatization, adaptability, and activities of daily living. She rated Student at-risk in the areas of aggression, conduct problems, anxiety, depression, attention problems, and

social skills. Student's responses were all in the average range, although he did voice his prior anxiety about attending school to Ms. Laucis. Student completed the Behavior Assessment Scales after he had started school at Bridges, which affected his self-rating in the average range. He was much happier attending school there than he had been at Wilbur Charter.

82. Ms. Laucis had Mother, Ms. Greene, and Student's three teachers at Bridges complete the Attention Deficit Hyperactivity Rating Scale-Fourth Edition. This testing tool is one of several used to determine if a child is demonstrating characteristics of inattention and/or hyperactivity and impulsivity. Mother scored Student in the clinically significant range in both areas. Ms. Greene and Student's teachers at Bridges scored Student in the average range in both areas, although Ms. Greene's scores were higher than were those of the teachers at Bridges.

83. Ms. Laucis and Ms. Greene completed the Childhood Autism Rating Scales-Second Edition. This test is designed to help determine if a child is on the autism spectrum. Scores on this test demonstrated that Student did not manifest any symptoms of autism.

84. To determine if Student was demonstrating symptoms of depression, Ms. Laucis had Student and Mother complete the Children's Depression Inventory-Second Edition, another test consisting of rating scales. Their responses demonstrated that Student's functional and emotional problems were in the average range, compared to other children his age.

85. The Multidimensional Anxiety Scale for Children-Second Edition is an assessment of anxiety dimensions in children. It is used to help diagnose anxiety disorders. Like many of the other assessments Ms. Laucis administered, this test consisted of rating scales. Mother and Student completed the scales. Student rated himself as average in all areas. Mother rated Student as having slightly elevated

separation anxiety and phobias. She rated Student as very elevated for having a general anxiety disorder.

86. Ms. Laucis noted in her assessment report that Dr. Kaler's most recent assessment had determined that Student was experiencing increasing stress at school and was becoming increasingly dysregulated. However, Ms. Laucis did not mention in her assessment report that Dr. Kaler had determined that Student qualified for special education based on his anxiety and attention deficit at the time she assessed him in May 2016, and required an IEP to address his school-related anxiety.

87. After summarizing Student's test results in her assessment report, Ms. Laucis reviewed several special education eligibility categories. In pertinent part, she determined that Student did not qualify for special education as other health impaired because she felt the test result indicated Student did not exhibit a heightened alertness to environmental stimuli that might have been due to his attention deficit. Although Student had attention deficit hyperactivity disorder, Ms. Laucis concluded that the disorder did not appear to be adversely impacting his academic performance. Therefore, Student did not meet the eligibility criteria for other health impairment. Ms. Laucis discounted Student's anxiety and barely mentioned his significant absences while he was in the general education classroom at Wilbur Charter. She did not find that his anxiety qualified him for other health impaired because she felt it was not affecting him academically.

88. Ms. Laucis' assessment report also reviewed the five criteria for determining if a child had an emotional disturbance for purposes of qualifying for special education. She found that Student did meet one of the five criteria because he had a tendency to develop physical symptoms or fears associated with personal or school problems. She noted that these symptoms had prevented Student from coming to school "at times." Ms. Laucis found that Student's symptoms had been observed for a

long period of time, and that they had been present to a marked degree, at least until Student started attending Bridges.

89. However, Ms. Laucis discounted the fact that Student had missed approximately 20 percent of school days during his second trimester at Wilbur Charter and over 25 percent of school days his third trimester. Her focus was rather that Student did not present with anxiety when he was at school. When he was there, even at Wilbur, Student participated in class and did not demonstrate any outward signs of anxiety. Although the criteria looks to whether a child's "educational performance" has been adversely affected, Ms. Laucis focused on the fact that Student's "academic performance" was above average. She concluded that Student's physical symptoms of school-related anxiety did not adversely affect his academic performance and did not require special education support because of Student's good grades and his participation in the GATE program.

90. Ms. Laucis was unaware at the time of her assessment that Student had not been able to complete a single project in the GATE program, and that he had dropped out of it due to his anxiety. During her testimony, she, as had Ms. Plat, acknowledged that had she known that information, it might have changed her opinion regarding Student's eligibility.

#### SEPTEMBER 15, 2016 AND OCTOBER 17, 2016 INITIAL IEP TEAM MEETINGS

91. Had District started the assessment process after the March 9, 2016 section 504 team meeting, it would have completed Student's initial assessment and convened an IEP team meeting prior to the end of the 2015-2016 school year on June 10, 2016. Since the process was not started until Mother requested the assessment on April 27, 2016, District did not complete its assessment of Student prior to the end of the 2015-2016 school year. Rather, Ms. Laucis continued the assessment process after District's summer break and after Student had started attending Bridges. The majority of



Ms. Laucis' assessment was done on August 29, 2016, or later.

92. Ms. Laucis completed her draft assessment report in September 2016. District convened an initial IEP team meeting for Student on September 15, 2016, a few weeks after he started the 2016-2017 school year at Bridges. District timely noticed Parents about the meeting on August 22, 2016. Mother and Father attended the meeting, as did Dr. Kaler. Present for District was assistant principal Crystal Shirley, who served as District's administrator; special education teacher Ms. Kazandjian; Ms. Greene; Ms. Laucis; district nurse Ms. Quiazon; and Jodie Mensik, a district specialist in the area of least restrictive environment placements. All required IEP members were present. No one from Bridges attended.

93. Ms. Quiazon reviewed her health assessment with the team. There were no questions or concerns about her assessment.

94. District then determined that it wanted to observe Student at his placement at Bridges and receive input from his present teachers there to have a clearer picture of his needs. Parents agreed with the District team members' recommendation to recess the IEP team meeting so that the information could be gathered. In the intervening month before the continued meeting, Ms. Laucis completed the assessment process by observing Student at Bridges, getting input from his teachers there, and revising her assessment report.

95. Student's IEP team reconvened on October 17, 2016. Mother attended the meeting, as did Dr. Kaler. District team members consisted of Ms. Shirley; Ms. Kazandjian; Ms. Laucis; and Ms. Mensik. Ms. Greene was not available for the meeting so District general education teacher Diane Schulte attended in her place. All required IEP team members were present.

96. The IEP team reviewed the results of District's psycho-educational assessment. The team reviewed the input from Ms. Greene and from Student's teachers

at Bridges. The team reviewed Student work samples, the results of Ms. Laucis' observations of Student at Wilbur Charter and at Bridges, and the results of all the assessments, including the rating scales completed by Mother, Student, and Student's teachers. The team discussed placement options including general education with no special education supports; general education with special education support services; and special day class placement.

97. The IEP team reviewed Dr. Kaler's report. She was present at the two IEP team meetings and presented her opinion that Student qualified for and required special education support to address his school anxiety and inability to regulate his behavior. However, the District team members determined that Student did not qualify for special education. The District team members arrived at this conclusion even though Ms. Laucis had determined that he met one of the criteria for having an emotional disturbance based upon his anxiety, which resulted in developing physical symptoms associated with his fear of going to school. District based its denial of eligibility on the fact that Student's grades and test scores demonstrated that he was at proficient levels or higher in all academic subjects. District staff also based their denial of eligibility on the fact that Student's teachers at Bridges had not indicated that he had any emotional problems at school or that his attention deficit was causing significant issues in class. District felt that Student's ability to maintain his high academic levels demonstrated that he was able to access his education without special education supports.

98. At hearing, Ms. Carter, Ms. Laucis, Ms. Plat, and Ms. Greene all took the position that a child cannot qualify for special education eligibility if his or her grades are not impacted by a disability. Although none of District's witnesses suggested that Student's excessive absences during his last two trimesters at Wilbur Charter were not validly based on his physical symptoms and/or anxiety, none of the witnesses believed that the absences affected Student's ability to access his education because his grades

and continued high academic achievement were not affected.

99. The October 17, 2016 IEP team clearly reviewed Student's present levels of performance. The IEP document clearly stated that District did not find Student eligible for special education and therefore was not offering him any special education placement or services. Parents did not agree with District's denial of eligibility and did not sign consent to the IEP.

#### Testimony of Student's Expert Dr. Kaler

100. Dr. Kaler opined that District inappropriately delayed assessing Student and inappropriately found Student ineligible for special education. She felt that District had failed to consider Student's school anxiety and the fact that the anxiety resulted in Student's loss of so many days at school. She pointed to the fact that Ms. Laucis had found Student met one of the criteria for emotional disturbance, but had then failed to acknowledge that Student missed so much school for the very reasons that he met the criteria. She believed that District should have assessed Student following the March 9, 2016 section 504 team meeting. Dr. Kaler believed that Student could not benefit educationally from placement in a large general education classroom. Student was not able to screen out stimuli. He knew what he was supposed to do, but just could not do it. Writing in detail was onerous for him as was attempting to keep track of things such as his homework assignments.

101. Dr. Kaler opined that Student required a small class with one-on-one instruction to address his anxiety and to prevent him from becoming bored in class. She opined that Student not only met the criteria for eligibility under emotional disturbance due to his physical symptoms resulting from his school anxiety, but he also met the criteria for eligibility under other health impairment. Student's anxiety resulted in his limited alertness to the demands of his classroom. Although she had originally believed that a section 504 plan could meet Student's needs, it was apparent to her after her May

2016 assessment, and after reviewing District's assessment, that the section 504 plan, even as modified, was not successful in addressing Student's needs. Student's anxiety affected his educational performance because Student did not regularly attend school, was not completing assignments, had to drop out of the GATE program, and not functioning at his cognitive or achievement levels.

102. Dr. Kaler's opinion that Student met the eligibility categories of other health impairment and emotional disturbance, was more persuasive than the opinion of District's witnesses that Student failed to meet eligibility criteria. District witnesses inappropriately failed to consider as significant that Student missed 28 days of school and was tardy on 11 days during his last two trimesters of fourth grade, primarily due to school anxiety. They failed to consider that Student had never completed a single project or assignment for the GATE program and stopped participating in it due to his anxiety over the work assigned in the program. Finally, District witnesses failed to consider the amount of assignments Student could not complete in Ms. Greene's class. Rather, they mistakenly focused solely on Student's ability to maintain his grades as the only criteria on which to base an eligibility determination.

103. Dr. Kaler believed that Student required a placement in a small, structured setting with few pupils in the class and opportunities for Student to receive one-on-one instruction. She was familiar with Student's classroom at Wilbur Charter, and did not believe that a general education classroom with up to 39 pupils (the maximum permitted in a fifth grade classroom) could meet Student's needs. Dr. Kaler believed that Student was getting an optimal education at Bridges because its instructional model addressed his disabilities as well as his high cognitive skills.

104. Dr. Kaler did not address in her 2016 assessment, or in her testimony at hearing, whether District did or did not have other schools and/or classrooms that could meet Student's needs. She did not assess Student after May 2016, and did not observe

him either in his classroom at Wilbur Charter or at Bridges. Dr. Kaler therefore did not have any evidence to present on what Student's needs were at the time of the hearing, which took place 16 months after she assessed him. Dr. Kaler did not recommend any certified non-public schools that would also be able to meet his needs.

#### Testimony of Dr. Jessum

105. Student began receiving individual therapy from Dr. Jessum in October 2016, soon after he began attending Bridges. Dr. Jessum's therapy concentrated on addressing Student's impulsivity, affect, motor restlessness, arousal, staying on task, focus, lack of organization, and difficulty with self-regulation. He explained during his testimony that Student had difficulty modulating his feelings, had trouble self-soothing, had difficulty seeing his part in problems, and in finding language for what he was feeling. Student had difficulty self-censoring his comments or realizing that what he was saying was inappropriate.

106. Student continued to have these difficulties through the course of the 2016-2017 school year. Dr. Jessum opined that Student could not control his behavior and could not find the language to express what he was feeling, so he acted out. Student had low self-esteem in the past and continued to demonstrate the same as of the time of the hearing. His low self-esteem resulted in Student bragging and engaging in self-inflating behaviors. Student's anxiety was related to his sense that he could not do things well, which was independent of his high cognition. Since Student could not control his behaviors, he constantly felt out-of-control.

107. Dr. Jessum stated that Student's school refusal was still present to some extent after Student began attending Bridges, but was nowhere near the extent it had been the previous school year. Dr. Jessum was familiar with Bridges as he had other patients who attended school there. He attributed the decline in Student's anxiety and refusal to attend school to the small-class instructional model at Bridges and the non-

traditional ways of teaching, such as permitting pupils to sit in bean bag chairs or lie on the floor. Dr. Jessum also opined that staff at Bridges was trained to address the needs of pupils with emotional issues, such as anxiety, and who had attention disorders. Additionally, Bridges had a psychologist and counselors on staff to serve its pupils. The trained teachers, counselors, and psychologist provided a program that addressed the pupils' emotional, social, and psychological needs.

108. Neither Dr. Jessum, nor any other witness, testified as to what specific type of counseling services Student received at Bridges during the 2016-2017 school year. Dr. Jessum did not observe Student at Wilbur Charter or at Bridges.

#### PARENTS' UNILATERAL PLACEMENT OF STUDENT AT BRIDGES ACADEMY FOR FIFTH GRADE AND OTHER COSTS CLAIMED

109. Parents followed Dr. Kaler's recommendation to place Student at Bridges. Parents gave notice to District on May 27, 2016, by Mother's email to Ms. Greene that they intended to privately place Student at Bridges if the school accepted him. Parents could no longer cope with Student's constant anxiety and refusal to attend school. They also felt that he needed a classroom with fewer pupils so that he would get individual attention, which would reduce his anxiety. Parents enrolled Student at Bridges at the beginning of the 2016-2017 school year. Student remained at Bridges through the time of the hearing. The parties stipulated that Bridges is not certified by the State of California as a non-public school.

110. Student's class had nine students with at least two other adults supporting the classroom. Student only missed a few days of class during fifth grade. Although he still complained of being anxious, once at Bridges, Student no longer complained much of having stomach aches and headaches. He did not vomit before school. Parents no longer had to physically drag him into the car to take him to school. His teachers indicated to Ms. Laucis that Student was making good academic progress in school, and

that he benefitted socially from interacting with his peers, who had similar behavioral and/or social/emotional challenges.

111. The total cost for Student's fifth grade year for the 2016-2017 school year at Bridges, including enrollment costs and other fees, was \$42,990. Parents paid the tuition costs as soon as they could after the costs were due. Parents provided proof of payment through exhibits at hearing as well as through Father's testimony of the amount they paid.

112. Student presented documentary and testimonial evidence that Parents paid \$1,800 for Dr. Kaler's May 2016 Brief Psychoeducational Evaluation. They also presented documentary and testimonial evidence that they paid Dr. Jessum \$6,120 from October 2016 through August 2017, for individual counseling sessions for Student.

113. Although Student requested compensatory education as a remedy, he failed to put on any evidence whatsoever of the type, amount, and duration of compensatory education, or why he would be entitled to compensatory education in addition to reimbursement for his tuition at Bridges or the cost of his counseling with Dr. Jessum. He did not address the issue of compensatory education in his closing brief, other than to assert he was entitled to it in an amount and type to be determined by the ALJ.

114. Student failed to submit persuasive evidence at hearing as to why Bridges, and the psychology and counseling staff at Bridges, did not adequately address any emotional or social issues he had, including his school anxiety, or why he needed additional counseling services in order to access his education at Bridges.

115. In his closing brief, Student did not request that OAH order any type of prospective placement for him if this decision found him eligible for special education. In any case, Student failed to put on evidence of his present needs as of the time of the hearing. He failed to address whether District did or did not have any type of classroom

or program that would meet his needs. Dr. Kaler opined that Student required a classroom with few pupils and opportunities for one-on-one instruction, and therefore should not return to the general education classroom at Wilbur Charter. However, shed did not testify as to whether District had classrooms or programs that met the small-classroom setting she believed Student required.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>7</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)<sup>8</sup> 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 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.) "Special education" is instruction specially designed to meet

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<sup>7</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>8</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



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 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)(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.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.\_\_\_\_ [137 S.Ct. 988, 997-1002; 197 L.Ed.2d 335] (*Endrew F.*), the Court stated that the IDEA guarantees a

FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. The Court re-affirmed its earlier findings in *Rowley* that any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. The Court stated that it would not attempt to elaborate on what “appropriate” progress will look like from case to case. “It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Id.* at 1001.) The Ninth Circuit further refined the standard delineated in *Endrew F. in M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1201.) The court stated that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities to enable progress commensurate with non-disabled peers, taking into account the child’s potential.

5. 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).) Subject to limited exceptions, a request for a due process hearing in California must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l); *M.M. & E.M. v. Lafayette School Dist.* (N.D.Cal., Feb. 7, 2012 Nos. CV 09–4624, 10–04223 SI) 2012 WL 398773, \*\* 17 – 19, *aff’d in part and reversed on other grounds at M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842.) At the hearing, the party filing the complaint

has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student carries the burden of persuasion.

6. A district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making its decision. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*); *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439 (*J.W.*.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time.

7. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

8. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational

program. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*), *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.) Citing *Rowley, supra*, the Ninth Circuit recognized the importance of adherence to the procedural requirements of the IDEA, but determined that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) This principle was subsequently codified in the IDEA and Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) The Ninth Circuit Court of Appeals has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3; *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Fed. Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652.)

## DETERMINATION OF ISSUES

Issues 1(a), 1(b), 2(b), 2(c), and 3: District's Child Find Obligation, Duty to Assess, and Student's Eligibility for Special Education

9. Student stated his contention that District did not meet its child find obligation to him from April 15, 2015, (two years prior to the filing of his complaint) through the end of the 2016-2017 school year, in several of his issues for hearing. For this reason, those issues are analyzed collectively here. Student fundamentally contends that District failed to meet its child find obligation and therefore denied him a FAPE, by failing to assess him for special education eligibility prior to beginning the assessment process in May 2016. Thereafter, District denied him a FAPE by failing to find him

eligible for special education as a child with other health impairment and an emotional disturbance. Student contends that District's assessments failed to acknowledge that his attention deficit hyperactivity disorder caused him to be unfocused, inattentive and, at times, out-of-control in class. Student contends that he also had a high level of anxiety that manifested in his refusal to go to school and in physical symptoms, which had no underlying medical basis. Student contends that although District found that he met a criterion for emotional disturbance, District's failure to find that the emotional disturbance impacted his educational performance was incorrect. Student contends that his lack of attendance at school was the direct result of his disabilities, which District should have found qualified him for special education.

10. District generally contends that it successfully met Student's needs through section 504 accommodations plans and that Student's high grades demonstrated that he was accessing his education without special education supports. Student therefore did not require an IEP. District contends that its assessments of Student properly determined that he was not eligible for special education.

#### Applicable Law on Child Find

11. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as "child find." California law specifically incorporates child find in Education Code section 56301. (Ed. Code, § 56301, subds. (a), (b).)

12. A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability and reason to suspect that special education services may be needed to address that disability. A disability is

“suspected,” and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*); *Department of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*)) That notice may come in the form of concerns expressed by parents about a child’s symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child’s behavior. (*Timothy O., supra*, 822 F.3d at 1119-1120 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].) The threshold for suspecting that a child has a disability is relatively low. (*Cari Rae S. supra*, 158 F.Supp.2d at p. 1195.) A school district’s appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

13. California Code of Regulations, tit. 5, section 3021, subdivision (a) requires that “all referrals for special education and related services shall initiate the assessment process and shall be documented. When a verbal referral is made, staff of the school district, special education local plan area, or county office shall offer assistance to the individual in making a request in writing, and shall assist the individual if she requests such assistance.”

14. Education Code section 56321, subdivision (a) requires a school district to provide a parent with a written assessment plan within 15 days of a referral for assessment. This section also states that if a referral is made 10 days or less before the end of the school year, the district must develop an assessment plan within 10 days of the start of the next school year.

15. Special education law does not recognize the doctrine of continuing violations. (71 Fed. Reg. 46697 (Aug. 14, 2006); *J.L. v. Ambridge Area School Dist.*

(W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *Moyer v. Long Beach Unified School Dist.* (C.D.Cal., Jan. 24, 2013, No. CV 09-04430 MMM AJWx) 2013 WL 271686; *Patrick B. v. Paradise Protectory and Agricultural School, Inc.* (M.D.Pa., Aug. 6, 2012, No. 1:11-CV-00927 ) 2012 WL 3233036, p. 6; *Baker v. Southern York Area School Dist.* (M.D. Pa., Dec. 8, 2009, No. 1:CV-08-1741) 2009 WL 4793954, p. 5; *Evan H. v. Unionville-Chadds Ford School Dist.* (E.D. Pa., Nov. 4, 2008, No. 07-4990) 2008 WL 4791634, p.5.)

#### Applicable Law For Emotional Disturbance

16. A child with emotional disturbance exhibits 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; and (e) a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

#### Applicable Law For Other Health Impairment

17. A child is eligible for special education and related services in the category of other health impairment if he or she is a pupil with limited strength, vitality or alertness, due to chronic or acute health problems which adversely affect his or her educational performance. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)<sup>9</sup> Attention Deficit Hyperactivity Disorder may be a qualifying health condition for other health impairment eligibility, but all the requirements of the definition above still must be met. (Ed. Code, §

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<sup>9</sup> The regulation lists various other health impairments that are not relevant to this decision.

56339, subds. (a), (b).) Eligibility criteria also require a student to be unable to access the school program without the instruction or placement that is provided by a FAPE. (Ed. Code § 56026, subds. (a), (b).)

#### Analysis of Child Find: 2014-2015 School Year

18. Student argues that District was on notice during spring 2015 that he was a child who might have disability based on four contentions: 1) Mother asked District to assess Student approximately two years earlier in her letter dated June 7, 2013; 2) Mother provided District with Dr. Kaler's summer 2013 psychoeducational evaluation in 2013, and District never responded to it; 3) Mother asked District, through Mr. Price, to assess Student before he began third grade at the beginning of the 2014-2015 school year; and 4) Student's off-task and disruptive behaviors during third grade in Ms. Stern's class should have alerted District that it should have assessed Student, at least by April 15, 2015. Student failed to meet his burden of persuasion as to the 2014-2015 school year.

19. District had an obligation to assess Student when Mother requested the assessment on June 7, 2013. Student resided within District's boundaries and Mother was an appropriate person to refer him for assessment. The fact that Student was not enrolled in a District school at the time is irrelevant as District's responsibility for child find extended to all children living within its boundaries. However, District's failure to assess based on Mother's June 7, 2013 letter is outside the applicable two-year statute of limitations and Student specifically limited his issues to those arising within the statute of limitations. Likewise, Mother's request for assessment to Mr. Price, made at the beginning of the 2014-2015 school year, is outside the statute of limitations. Parents were aware they made the request for assessment in both cases and were aware of assessment and IEP procedures because Student's older sibling was already eligible for special education and had an IEP. Parents were therefore aware of the facts giving rise



to District's failure to assess when Mother requested the assessments, but chose not to file for due process.

20. Mother's submission of Dr. Kaler's summer 2013 psychoeducational assessment is also outside the statute of limitations. More significant, however, is the fact that Dr. Kaler's assessment did not find Student eligible for special education, did not suggest that Parents pursue obtaining an IEP from District, and specifically found that Student required a section 504 accommodations plan instead. During her testimony, Dr. Kaler reiterated her earlier determination that Student did not demonstrate indications of a disability that required special education intervention in second grade. Therefore, Dr. Kaler's summer 2013 psychoeducational assessment did not put District on notice that Student might be a child with a disability. There was no reason for District to have assessed Student based upon Dr. Kaler's 2013 assessment.

21. The question is therefore whether District should have assessed Student after April 25, 2015, when the two-year statute of limitations began to run. District developed a section 504 accommodation for Student at the beginning of third grade when he enrolled in District and was placed in Ms. Stern's classroom. Student states that District should have assessed him at least by the end of the 2014-2015 school year based upon his off-task and disruptive behaviors in class. Student points to the correspondence between Mother and Ms. Stern addressing Student's behaviors. However, there is nothing in the correspondence that suggests Ms. Stern was not implementing the section 504 plan successfully or that she was somehow unable to address Student's issues. Student's grades remained high. He was not tardy often and rarely missed school. Mother indicated to Ms. Stern that when Student did miss school, it was the result of his negative reaction to new medications rather than based upon anxiety or other types of school refusal.

22. Significantly, Mother was in contact with Dr. Kaler frequently during the

2014-2015 school year. Mother discussed with her Student's behavior issues in Ms. Stern's class. Dr. Kaler never suggested to Mother that Student should be referred for a special education assessment or that Student had a disability that required special education intervention. At hearing, Dr. Kaler acknowledged that she did not believe that Student should have been assessed during the 2014-2015 school year or that District failed in its child find obligation to him any time during that school year. For these reasons, Student failed to meet his burden of persuasion that District should have assessed him and found him eligible for special education during third grade.

#### Analysis of Child Find: 2015-2016 School Year

23. Student had a successful first trimester in Ms. Greene's fourth grade class. His grades remained high, he was selected for the GATE program, and Ms. Greene successfully redirected his off task behaviors such as blurting out answers, interrupting others, failing to remain in his seat, and not working on assignments. At the March 9, 2016 section 504 team meeting, Father acknowledged that Student had loved going to school and had a great school year up to the winter break. Dr. Kaler was in frequent contact with Mother, who relayed facts concerning Student's behavior during the trimester. Dr. Kaler did not advise Mother to request an assessment and did not suggest that Student had a disability at any time during the first trimester in Ms. Greene's class. Student presented no persuasive evidence that District should have assessed him at that time.

24. However, after returning to school from winter break, Student's maladaptive behaviors in class increased significantly. His off-task behaviors increased as did his disruptions in class. He interrupted his classmates more; he blurted out answers more; he failed to complete assignments. Student's aggressive behaviors increased: he ran around the classroom and tried to get attention by doing things like attempting to trip classmates.

25. More significant was the anxiety Student began experiencing. While he had “loved to go to school” the first trimester, after winter break he began exhibiting extreme anxiety related to going to school and refused to go. Student could not do any of the projects assigned in his GATE class, which met once a week, because his anxiety prevented him from doing the work. His anxiety increased when Student became embarrassed that he was not able to do the work, exacerbating his reluctance to go to the class. Parents eventually withdrew Student from the GATE program because his anxiety prevented him from participating at all in the program.

26. Student began having headaches and stomach aches, had diarrhea and vomited, in the mornings before school. At times, Parents would have to physically carry Student to the car, lock the doors so he could not exit the car, and force him to go to school. Once, they took him to school in pajamas. On another occasion, special education teacher Mr. Wise had to coax Student from the car. During the second school trimester, Student missed almost 20 percent of school days, primarily because his anxiety caused him to exhibit physical symptoms of illness and/or because Mother could not get him into the car to take him to school. District ignored the fact that Student missed 11 days of class during the second trimester because Student, due to his high cognition, was able to maintain high grades. District failed to question the cause of Student’s absences or intervene even though school attendance is compulsory.

27. Mother conveyed her concerns to Ms. Greene, but Ms. Greene did not act on them other than to reassure Mother that Student was still doing well academically. Since District did not respond to Student’s increased in-class behaviors or his absences, Mother requested a section 504 team meeting. At that meeting, Ms. Greene acknowledged that Student’s behavior was “off the charts” beginning after the winter break. She told Parents that Student was off-task at least 50 percent of the time, and constantly talked in class about anything other than what the assignment was at the

time. Although Ms. Greene gave Student catch-up time pursuant to Student's section 504 plan, Student was not finishing work, particularly long-term assignments such as class reports. Student constantly tried to trip his classmates if they walked by him, although Ms. Greene had counseled him numerous times that he could hurt someone by the behavior. Ms. Greene told Parents at the meeting that Student would rather be disruptive in class than do his work. He needed attention, even if it was in a negative way. Ms. Greene told Parents that Student's behavior was more aggressive in class and more mean-spirited than it had been previously.

28. Ms. Greene's response to Student's behavior in class was often to require him to remain in class during recess time or during the "Friday Fun Time," and make Student write eight-paragraph essays reflecting on his behavior. Instead of helping Student, this caused him more anxiety as he did not know why he engaged in the behaviors and did not know how to control them.

29. At the March 9, 2016 meeting, Parents described Student's headaches, stomach aches, vomiting and diarrhea before school. They explained how difficult it was to get Student to go to school and that they often had to physically lift him together to place Student in the car.

30. Ms. Carter, who is a special education specialist, attended the March 9, 2016 meeting. She acknowledged to Parents then, and acknowledged at hearing, that there were things that Student could not control and that Student had to be taught how to control them. However, in spite of Ms. Greene's description of Student's in-class behavior, and the implication that she could not address the behaviors because they continued to increase, and in spite of Parents' description of Student's school refusal anxiety, District did not refer Student for assessment at that time. Rather, it merely added provisions to Student's section 504 plan, although Ms. Greene had already tried implementing some of the new provisions unsuccessfully.

31. As stated above, the actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, must be evaluated in light of information that District knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education*. (3rd Cir. 1993) 993 F.2d 1031, 1041.) The inquiry is not whether Student actually was eligible for special education, but a lower standard of whether there were indications that a he *might be* eligible. Violations of child find are procedural violations of the IDEA and the Education Code. (*Cari Rae S., supra*, 158 F.Supp. 2d 1190 at p.1196).)

32. Here, District had more than enough information to suspect that Student might be a child with a disability as of the March 9, 2016 section 504 team meeting. His off-task and disruptive behaviors in class had substantially increased and become more aggressive. Ms. Greene acknowledged the increase, which implied that she was not able to address the behavior. Parents explained the physical symptoms Student demonstrated every day before school. They explained their difficulty in getting Student to attend school. During the second trimester of school, which ended about two weeks prior to the March 9 meeting, Student had missed 11 days of school, primarily because of school related anxiety. This was sufficient notice to District that it should have assessed Student.

33. Therefore, Student met his burden of proof of establishing that District's child find obligation was triggered on March 9, 2016, obligating District to offer an assessment plan at that time. (*Cari Rae S., supra*, 158 F.Supp. 2d 1190 at p.1196).) District should have prepared an assessment plan for Parents to sign and offered it to them in a timely manner. District did not offer the assessment plan until May 13, 2016, after Mother requested an assessment in her letter of April 27, 2016.

34. The delay in assessment significantly prejudiced Student and Parents. The

most significant result of the delay was that District did not complete its assessment of Student prior to the end of the 2015-2016 school year. In fact, the majority of District's assessment was administered after the beginning of the 2016-2017 school year, when Student had already begun to attend school at Bridges. If District had properly referred Student for assessment after receiving the information from Ms. Greene and Parents at the March 9, 2016 section 504 team meeting, it would have had 15 days, or until March 24, 2016, to present Parents with an assessment plan. Parents would have had another 15 days, or until April 8, 2016, to sign the plan. District would have had 60 days, by June 7, 2016, to complete the assessment and convene an IEP team meeting. Therefore, had District timely referred Student for an assessment, the assessment would have been completed and an IEP team meeting convened prior to the end of the 2015-2016 school year.

35. The timing of District's assessment is significant. Parents were deprived of District's assessment information for four months because, once District did offer an assessment plan, the intervening summer break tolled the 60-day assessment timeline. Parents, concerned about Student's anxiety, lack of school attendance, and his behaviors in class, withdrew Student from District because District had not responded timely to their concerns. They were faced with either returning Student to District for another school year to await District's assessment results while watching Student's anxiety and school refusal increase, or finding a way to address Student's disabilities on their own, which they did by enrolling him in Bridges.

36. The timing impeded Student's right to a FAPE, because, had District completed the assessment before the end of the 2015-2016 school year, Student's anxiety symptoms would have been ongoing and the fact that he missed 17 days of school during the third trimester even more apparent. As discussed below, Ms. Laucis made her decision on Student's lack of eligibility as a child with an emotional

disturbance and as other health impaired due to his attention deficit hyperactivity disorder, in the context of Student's progress at Bridges, which is not a general education school. Student's lack of physical symptoms at Bridges, and the fact that his issues in class were being addressed by the staff at Bridges, diminished Ms. Laucis' ability to assess Student within the context of a public school. Had her assessment taken place the previous spring, her conclusions would have been different. For these reasons, Student met his burden of proof that District's failure to refer him for assessment on March 9, 2016, denied him a FAPE.

#### Eligibility For Special Education Under Emotional Disturbance

37. As a result of her assessment, Ms. Laucis found that Student had an emotional disturbance because of his somatization. That is, Student had experienced physical symptoms of stomach aches, headaches, vomiting, and diarrhea, over a long period of time and to a marked degree. This corresponded to the criterion for emotional disturbance that Student had a tendency to develop physical symptoms or fears associated with personal or school problems. This anxiety was exacerbated by Student's feelings of failure when he was unable to complete work and unable to participate in the GATE program,

38. Ms. Laucis found, in spite of this, that Student did not qualify for special education because his educational performance was not affected. Ms. Laucis, and other District staff and IEP team members, incorrectly focused on Student's continued strong academic performances, totally discounting the affect his anxiety had on his ability to attend school. Their determination that Student was not eligible as a child with an emotional disturbance focused solely on "academic performance" rather than focusing on Student's overall "educational performance" as required by statute.

39. Contrary to District's focus on Student's academic performance, a school district is required to broadly construe a pupil's educational needs as including his or

her social, health, emotional, behavior, communicative, physical, and vocational needs, in addition to his or her academic needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. 49, 56-58, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, educational needs include functional performance. (Ed. Code § 56345, subd. (a)(1).) The “educational benefit” to be provided to a child requiring special education is not limited to addressing the child’s academic needs, but also 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 (*San Diego*).) For these reasons, a pupil’s IEP must target all of his or her unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *San Diego, supra*, 93 F.3d at p. 1468.)

40. District’s conclusion that Student’s emotional disturbance did not affect his access to his education as a whole is contradicted by the fact that Student missed almost 20 percent of classes during the second trimester of the 2015-2016 school year, and missed over 25 percent of classes during the third trimester, primarily because of his school refusal anxiety. It is incorrect to find that a child can miss school because of a disability but then conclude that his educational performance has not been affected. If such were the case, school would not be required of any child who could pass tests without attending.

41. In addition to academic achievement and attendance at school, educational performance consists of a variety of other components. These include a



pupil's ability to manage his or her time in class; completing assignments and projects; keeping school and homework materials organized; and completing homework. Student's anxiety interfered with all of these aspects of educational performance except his academic achievement.

42. For these reasons, Student met his burden of persuasion that District should have found him eligible for special education as a child with an emotional disturbance by the end of the 2015-2016 school year.

#### Eligibility For Special Education Under Other Health Impairment

43. Student also met his burden of persuasion that District should have found him eligible under the category of other health impaired because of his attention deficit hyperactivity disorder and because of his anxiety. District's failure to do so denied Student a FAPE.

44. During the second and third trimesters of the 2015-2016 school year, Student had limited strength, vitality or alertness, due to his chronic attention deficit hyperactivity disorder and accompanying anxiety, which affected his educational performance. Student required some type of special education intervention, in the form of some of his instruction being given in a smaller class environment than the 37-pupil general education classroom at Wilbur Charter. Student also required counseling to address his anxiety, inattention, disruptive behaviors and lack of focus. Ms. Greene acknowledged as much during the March 9, 2016 section 504 team meeting, when she stressed that Student's behavior was "off the charts," and that she was not able to address the behaviors in her classroom of 37 pupils.

45. It is inconsequential that Student's behavior improved during the 2016-2017 school year while he was at Bridges. First, District should have assessed Student and found him eligible for special education by the end of the 2015-2016 school year, while he still attended Wilbur Charter. Second, Student's improvement the following

school year may be attributable to the small class size at Bridges, the teachers and staff trained to address the needs of pupils with disabilities, and the counseling and psychological component of the instruction available at Bridges.

46. Student's attention deficit and anxiety caused him to feel stupid, unable to finish work, and always got him "in trouble." District's attempt to use the section 504 plan to address Student's anxiety and maladaptive behaviors in class were ultimately unsuccessful. There is no evidence as to how the 504 accommodations were to be accomplished or how Ms. Greene was supposed to be taught to implement them. There is no evidence that the accommodations were successful. Dr. Kaler's opinion that general education interventions, modifications, and accommodations were appropriate when Student initially started Wilbur Charter, but were unsuccessful as of March 2016, was more persuasive than the opinion of District witnesses to the contrary, given the evidence at hearing. The evidence supports a finding that Student's chronic attention deficit and accompanying anxiety interfered with Student's access to his education and made him eligible for special education under the category of other health impairment. For the foregoing reasons, Student met his burden of persuasion that District should have found him eligible by the end of the 2015-2016 school year under the category of other health impairment, and that District's failure to do so denied Student a FAPE.

#### Issue 1(c): Appropriateness of District's Initial Assessment

47. Student contends that District's psychoeducational assessment denied him a FAPE, because: 1) Ms. Laucis did not personally interview Ms. Greene or Mother; 2) Ms. Laucis failed to obtain critical information about Student; 3) Ms. Laucis discounted Student's school refusal, anxiety about attending school, and his many absences; and 4) District did not fully assess Student's sensory-motor integration difficulties. District contends that its assessment met all legal standards.

## Applicable Law

48. School Districts 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 tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (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].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

49. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is eligible for special education services. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304 (b)(1).) The assessment must use technically sound instruments that assess the relative contribution of cognitive, behavioral, physical, and developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessment materials must be used for purposes for which they are valid and reliable. (20 U.S.C. § 1414(b)(3)(A)(iii)); 34 C.F.R. § 300.304(c)(1)(iii); Ed. Code, § 56320, subd. (b)(2).)

50. Assessments must be administered by trained and knowledgeable personnel and in accordance with any instructions provided by the author of the assessment tools. (20 U.S.C. § 1414(b)(3)(A)(iv), (v); 34 C.F.R. § 300.304(c)(1)(iv), (v); Ed. Code, §§ 56320, subd. (b)(3).) Persons knowledgeable of the student’s disability shall conduct assessments. (Ed. Code, § 56320, subd. (g).)

## ANALYSIS

51. Student failed to meet his burden of proof on this issue. District’s health

assessment was conducted by the school nurse; there is no evidence that she was not qualified to do her portion of the assessment. Mr. Wise, a credentialed special education teacher, administered the academic section of the assessment. Ms. Kazandjian, also a credentialed special education teacher, wrote the academic assessment report. There is no evidence that they were not qualified to assess Student or interpret the academic assessment results. Student put on no evidence that either District's health assessment or its academic assessment failed to meet statutory standards or failed to assess Student thoroughly in those areas.

52. Student's criticisms of Ms. Laucis' assessment are also not supported by the preponderance of the evidence. Ms. Laucis was qualified to assess Student. Her assessment met all statutory requirements. She used a variety of assessment tools and strategies to assess Student. The testing instruments she used were either standardized measures or other sound assessment strategies. There is no evidence that the tests were biased. There is no evidence that Ms. Laucis improperly scored the results. The tests were administered in English, Student's native language.

53. Student complains that Ms. Laucis did not know what occurred at the March 9, 2016 section 504 team meeting, did not know that he had to withdraw from the GATE program due to his anxiety, and did not know the extent of the problems Student had in Ms. Greene's classroom. However, the lack of this information was not due to Ms. Laucis' lack of diligence but rather to the failure of those people she contacted, namely Mother and Ms. Greene, to provide Ms. Laucis with complete information. Ms. Laucis provided Mother and Ms. Greene with an opportunity to provide written input on Student's needs, present levels, and deficits. There was no reason for Ms. Laucis to believe that the information she received was incomplete.

54. Student contends that because his score on the sensory-motor integration portion of the assessment was low, Ms. Laucis should have pursued additional testing to

tease out any deficit. Student's low score was the only indication of any sensory needs Student might have. Neither of Dr. Kaler's assessments presented sensory-motor as an area of need for Student. Dr. Kaler never commented upon it in her reports. There is no evidence that Student demonstrated sensory-motor deficits in Ms. Greene's classroom. Student's teachers at Bridges did not indicate any sensory-motor deficit needs in their responses to the rating scales they prepared or in any communications with District or with Parents. Student put on no persuasive evidence that he had a sensory motor need either through independent assessment or the testimony of any expert in that area. District's failure to further assess Student in the area of sensory-motor integration did not deny him a FAPE.

55. Student's remaining criticism of Ms. Laucis' assessment report concerns her conclusions and recommendations and do not undermine the validity of the assessment itself.

56. In his due process complaint and in his issues for hearing, Student also contended that District failed to conduct an appropriate initial assessment because the assessment did not adequately assess: 1) his intellectual functioning, including area of attention, concentration, executive functioning, and information processing; 2) language processing, including development and use of language; 3) academic functioning; 4) social-emotional functioning; and 5) behavior.

57. Student presented no persuasive evidence in support of a finding that District's psychoeducational assessment was deficient in any of these five additional areas. Dr. Kaler did not address any of these alleged inadequacies in the assessment and Student presented no additional witnesses in support of his contentions. Student did not address these five additional areas in his closing brief. As discussed above, Student met his burden of persuasion that District's conclusion that he was not eligible for special education was incorrect. However, Student failed to show by a preponderance of

the evidence that District's psychoeducational assessment itself did not meet all statutory requirements or failed to adequately assess him in all areas of unique need, only that District's ultimate determination that he was not eligible for special education was in error.

#### Issue 2(a): Failure to Timely Review and Consider Third Party Assessments

58. Student's contention that District should have considered Dr. Kaler's 2013 assessment is outside the two-year statute of limitations. Even if the issue were considered on its merits, as stated above, Student failed to demonstrate that Parents' right to participate in his IEP process was significantly impeded, or that he lost educational benefit, or was denied a FAPE, by District's failure to review the assessment. Dr. Kaler did not find Student eligible for special education as a result of her 2013 assessment and did not recommend Parents request an assessment for Student. The assessment would not have informed District of any information that should have caused it to believe that Student might be a child with a disability and to have done anything more than what Dr. Kaler recommended at the time, which was that Student's attention deficit could be addressed through general education classroom accommodations.

59. Student has also failed to meet his burden that District failed to timely review and consider Dr. Kaler's May 2016 assessment. It is unclear from the evidence when District received a copy of Dr. Kaler's report. Ms. Laucis reviewed the report as part of her assessment process. She referenced the report in her own assessment report. Dr. Kaler was a member of Student's IEP team in September and October 2016, when the team reviewed District's assessment and Dr. Kaler's assessment. A school district is not required to adopt an independent assessor's findings and recommendations; it is only required to consider the independent assessor's report and recommendations. The entirety of the evidence demonstrates that District met this obligation. Therefore,

Student failed to meet his burden of persuasion as to this issue.

#### Issue 2(d): Failure to Make a Formal, Specific, Written Offer of FAPE

60. It is unclear what Student contends with this issue. It appears to be derivative of his child find issue and his contention, which he has successfully proven, that District should have found him eligible for special education. Had District done so, it would have been required to develop an IEP for Student that included an educational program, necessary related services, and, if necessary, classroom accommodations and modifications to Student's curriculum.

#### APPLICABLE LAW

61. In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement: "We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." (*Union, supra*, 15 F.3d at p. 1526 see also *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

62. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union*,

*supra*, 15 F.3d at p. 1526.)

#### ANALYSIS

63. Student's IEP team convened on September 15, 2016 and October 17, 2016. District developed an IEP document as a result of those meetings. The document indicated Student's present levels of performance. It reviewed the results of his assessments. It indicated who attended the meetings. It memorialized the position of Parents and Dr. Kaler that Student qualified for special education and memorialized the fact that the District IEP team members did not believe that he did. The IEP document was clear and concise that District did not believe that Student was eligible for special education either as other health impaired or as a child with an emotional disturbance. Parents understood that District took that position. They understood that District was not offering Student a FAPE because it did not believe Student qualified for special education. There is no doubt as to those facts in the IEP document. Parents' testimony at hearing, as well as the fact that they thereafter filed a due process complaint because District did not find Student eligible, further demonstrate they had no doubt of District's position or what the IEP document stated. For these reasons, Student has failed to meet his burden of persuasion that the September 15, 2016 and October 17, 2016 IEP document was not concise or specific.

#### REMEDIES

1. Student partially prevailed on Issues 1(a), 1(b), 2(b), 2(c), and 3, all of which allege the same thing: that District denied Student a FAPE by first failing to timely assess him and then failing to find him eligible for special education. Student is therefore entitled to a remedy for this violation. Parents timely notified District on May 27, 2016, that they intended to privately place Student at Bridges the next school year. Student seeks reimbursement to Parents for the cost of his tuition at Bridges for the 2016-2017



school year, in the amount of \$42,990. He also seeks reimbursement for the cost of his individual counseling with Dr. Jessum during the same period of time, in the amount of \$6,120, and reimbursement for the cost of Dr. Kaler's Brief Psychoeducational Evaluation, in the amount of \$1,800.

2. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

3. 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 *Burlington, supra*, 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement found to be reimbursable where it had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade, and where expert testimony showed that the student had made substantial progress].)

4. District argues that, even if this Decision finds District denied Student a FAPE on any of the issues presented, Parents are not entitled to reimbursement for their costs for placing Student at Bridges because Student failed to prove that Bridges was an

appropriate placement. District argues that there is no evidence to support the placement at Bridges because no one from Bridges testified at the hearing about its program or the credentialing of its teachers, and because Bridges is not certified as a non-public school. District contends that there is no evidence that Bridges follows Common Core, the instructional modality required by the California Department of District for public Schools. District also contends that Parents had no intention of moving Student from Bridges back to a District placement even had District found him eligible for special education.

5. District is incorrect that no persuasive evidence supports a finding that Bridges was an appropriate placement for Student. Dr. Kaler, Dr. Jessum, and Mother each testified as to elements of Student's program at Bridges and each testified that he or she considered the placement appropriate. District had an opportunity to rebut this testimony but failed to do so.

6. District's argument that Bridges is not certified as a non-public school and does not follow the Common Core is equally unavailing. The Ninth Circuit has specifically found that a private placement need not provide all services that disabled pupil needs as a prerequisite for reimbursement for the costs of the placement. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155.) The Court reiterated this finding in *S.L. v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159, where it found that costs of parents' private placement at a parochial school was entitled to reimbursement even though the school was not certified, and even though the primary benefit obtained by the student was social rather than academic.

7. Finally, District's argument that Parents had no intention of returning Student to a District school had District offered him an IEP is speculation. District did not ask Parents at hearing if that was indeed their plan, and District provided no documentary or testimonial evidence in support of this assertion.

8. Student met his burden of proof that Parents are entitled to reimbursement for the cost of his tuition at Bridges for the 2016-2017 school year in the amount of \$42,990. The documents submitted as evidence and Father's testimony at hearing is adequate proof of the costs Parents have incurred.

9. Student has not, however, met his burden of proof that he is entitled to reimbursement for the individual counseling services Dr. Jessum provided during the 2016-2017 school year. Dr. Jessum's testified that Bridges had counselors and a psychologist on staff to meet the social, emotional, and psychological needs of its students. Student did not prove by a preponderance of the evidence that he needed more services than Bridges provided in order to access his education. District is not required to address Student's psychological or social needs applicable solely to his home environment.

10. Student also failed to meet his burden of proof that he is entitled to reimbursement for Dr. Kaler's assessment. First, Student was not entitled to request an independent educational evaluation until after District completed its assessment. Dr. Kaler assessed Student over approximately the same time District was assessing Student, not after District finished its assessment. Second, Dr. Kaler did not do a complete assessment. She did not do an academic assessment. She did not observe Student at either of his school placements. She did not contact Student's teachers. Finally, Dr. Kaler's assessment did not assess any area that District failed to assess or add any information not covered by District's assessment. The fact that her conclusions were different than District's is not grounds for ordering reimbursement for an incomplete assessment. Therefore, even had District failed to properly assess Student ordering reimbursement for Dr. Kaler's incomplete assessment would not be a proper remedy.

11. Finally, Student requests a bank of compensatory education hours in the areas of counseling, social skills, and behavioral intervention, with the number of hours

“left to the equitable discretion” of the ALJ.

12. It was Student’s burden to prove the amount, type, and duration of any compensatory education he requested. Student was reminded of this obligation in the Order Following Prehearing Conference OAH issued on August 30, 2017. Student failed to produce any evidence whatsoever in support of his request for compensatory education hours. Additionally, reimbursement to Parents for Student’s placement for a year at Bridges is sufficient compensation for District’s violation of its child find obligation, particularly given that Student has only partially prevailed on those issues, and as the denial of FAPE only pertains to the time period after March 9, 2016, rather than for the full two years prior to the filing of Student’s complaint. For these reasons, Student’s request for additional compensatory education is denied.

## ORDER

1. Student is eligible for special education placement and services, under the eligibility categories of other health impairment and emotional disturbance.

2. Within 45 calendar days of the date of this decision, District shall reimburse Parents for the cost of Student’s attendance at Bridges Academy for the 2016-2017 school year, in the amount of \$42,990. Documents submitted in this hearing constitute adequate proof of payment by Parents to Bridges Academy.

3. All of Student’s further requests for remedy are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student partially prevailed on Issues 1(a), 1(b), 2(b), 2(c), and 3. District partially prevailed on issues 1(a), 1(b), 2(b), 2(c), and 3. District fully prevailed on issues 1(c), 2(a) and 2(d).

## RIGHT TO APPEAL THIS DECISION

This was a final administrative Decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: November 8, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearing