BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BERKELEY UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018030517

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, naming Berkeley Unified School District on March 12, 2018. A first amended complaint was filed on April 24, 2018. OAH granted the parties' joint request for continuance on June 11, 2018.

Administrative Law Judge Rebecca Freie heard this matter in Oakland, California on July 31, and August 1 and 2, 2018.

Natashe Washington, Attorney at Law, represented Student. Mother was present throughout the hearing. Student did not attend.

Sterling Elmore, Attorney at Law, represented Berkeley. For part of the hearing Ms. Elmore was assisted by a certified law student interning with her law firm, Elizabeth Schwartz.[1] Dr. Jan Hamilton, Executive Director of Special Education for Berkeley

[1] Lenore Silverman, Attorney at Law and a member of Ms. Elmore's law firm, observed the hearing for part of the second day.

attended the hearing as Berkeley's representative.

At the parties' request, a continuance was granted to August 20, 2018, to allow them to file written closing arguments. Student and Berkeley timely filed written closing arguments, and the record was closed and the matter was submitted for decision on August 20, 2018.

ISSUES[2]

1) Did Berkeley deny Student a FAPE from March 13, 2016 to July 28, 2017, by failing to fulfill its child find obligations to Student and failing to assess her for emotional disturbance or mental health services?[3]

2) Did Berkeley deny Student a free appropriate education from March 13, 2016, to July 28, 2017, by failing to assess Student in all areas of suspected disability, specifically emotional disturbance and mental health, upon Parent request?

SUMMARY OF DECISION

Berkeley failed to meet its child find obligation from March 13, 2016, to July 28 2017. The evidence established that when Student enrolled at Berkeley on January 21, 2016, it was aware that she had longstanding mental health and school avoidance issues with which Student had struggled since elementary school. At the time of enrollment

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[2] The order of the issues has been reversed from that in the order following the prehearing conference for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

[3] March 13, 2016, is the beginning of the two-year statute of limitations period preceding the filing of the complaint. (Ed. Code § 56505, subd. (l).)

Mother requested an assessment of Student to see if she was eligible for an individualized education program. Mother subsequently signed an assessment plan on March 14, 2016, but Berkeley did not make any attempt to dissuade Mother from revoking consent to assess on April 5, 2016, and did not make any attempt to regain Mother's consent to assess when Student stopped attending school in mid-April 2016. Further, although Mother again signed consent for Student to be assessed on August 2, 2016, Berkeley never assessed Student and never held an IEP team meeting. Had Student been assessed and an IEP team meeting held, she would have been found eligible for special education under the criteria for emotional disturbance. The extent of Student's mental health issues, coupled with school refusal, required placement at a residential treatment center.

Berkeley denied Student a FAPE. Mother is entitled to reimbursement for the costs of Spring Ridge Academy, a therapeutic boarding school for emotionally disturbed teenagers in Arizona. In addition, Mother is entitled to reimbursement for the services provided by Coyote Coast Youth and Family Counseling, Inc., a Bay Area counseling agency, which coordinated services with Spring Ridge in preparation for Student's return home, and as compensatory education reimbursement for Coyote Coast's services following her return, up to the time she received her high school diploma in December 2017.

FACTUAL FINDINGS

JURISDICTION

1. Student is currently 18 years of age. She assigned her educational rights to Mother on her 18th birthday. At all times at issue, Student's residence was within

Berkeley's boundaries.[4]

STUDENT'S SCHOOL AND MENTAL HEALTH HISTORY

2. When Student enrolled at Berkeley High School in January 2016, she had a history of school anxiety and depression, coupled with school refusal. Student's school refusal began in second grade. From the time Student began kindergarten until she began attending Berkeley High, she had multiple school changes, rarely attending the same school for two consecutive school years. Only one of the schools she attended was a public school, and she attended this school for just one year for third grade. Student often refused to go to school and complained of illness to avoid going to school. She had several incidents where she physically attacked her Mother both at home and in the car driving to or from school, beginning in second grade and she began counseling at Kaiser at that time. She struggled with regulating her emotions in multiple settings, and had low self-esteem.

3. When she was 10, in 2011, Student was privately assessed by a center for gifted children and scored in the gifted range on all of the subtests that comprise the Wechsler Intelligence Scale for Children, Fourth Edition, with the exception of processing speed which was in the average range. A 13-page written report was issued which showed the test results, and contained many recommendations to address Student's chronic school refusal and low self-esteem. Student was also tested in 2011 by an audiologist and found to have an auditory processing disorder.

4. Later in 2011, Student and her family began counseling at the Masonic

[4] As discussed in the Legal Conclusions, Student's legal residence continued to be with Mother, within Berkeley's boundaries, even when she was attending a therapeutic wilderness program and Spring Ridge.

Center for Youth and Families. Shortly after counseling began, Student was psychologically assessed by the Masonic Center and diagnosed with depression and an anxiety disorder. A seven-page written report was produced. Student and her family continued counseling at the Masonic Center until the summer of 2015. Student began taking medication for depression and anxiety when she was 13.

THE 2015-2016 SCHOOL YEAR

First Semester High School Attendance at Parochial School

5. Student attended a private parochial high school during the 2014-2015 school year for ninth grade, on a scholarship, and she was academically successful. In 2014, Father was diagnosed with cancer, and Mother was diagnosed with a chronic debilitating illness. Father died a few weeks before Student began 10th grade at the parochial school in 2015.

6. Student lost a significant amount of weight following Father's death, and as the first semester of the 2015-2016 school year progressed, Student's grades began to fall. She began having panic attacks, began to refuse to go to school, and stopped turning in assignments. Student developed somatic symptoms to avoid going to school, and on one occasion burned her hand by pouring boiling water on it so she could not go to school. During the fall, she also began going to Kaiser almost daily since Mother told her that if she woke up feeling sick, her choice was to go to school, or go to the doctor. Kaiser was concerned that Student had developed an eating disorder.

7. Student began running away from home for one to two nights at a time, often ending up in a part of town with a high incidence of crime. Sometime between the end of November and early December 2015, Student's Kaiser psychiatrist recommended that she attend a Kaiser intensive outpatient program for emotionally disturbed youth, but Student's medical insurance would not cover it. Student did not attend school at all

during December 2015, and disenrolled from the parochial school in mid-December 2015, with failing grades in most of her classes. Her scholarship had been rescinded. Mother changed the family's insurance carrier and Student was able to go to the intensive outpatient program for two weeks in January of 2016. The purpose of the program was to stabilize the young patients with acute mental health issues.

Enrollment at Berkeley High School and Request for an IEP

8. When Student entered the Kaiser program in January of 2016, Mother signed a form permitting Kaiser to release information to Berkeley High. A Kaiser caseworker in the outpatient program told Mother that Student could best be helped in her education by going to a public school and having an individualized education program developed since the family did not have funds for a private school or program. The caseworker helped Mother draft the letter. Mother took the letter to Berkeley's administrative offices on January 21, 2016. In the letter Mother cited Student's history of school refusal and history of anxiety and depression, Student's recent attendance in the Kaiser outpatient program, and the fact that Student was being discharged from the program that day. Mother asked for an IEP assessment, and that a 504 plan be drafted so Student would have accommodations pending assessment.[5] Berkeley staff at the administration offices told Mother she needed to go to Berkeley High School and enroll Student, and then give them the letter, which Mother did that same day.

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

9. Student could not attend school until she met with a counselor, to arrange her class schedule, so on January 26, 2016, Student and Mother met with Terrance Christianson, a guidance counselor at Berkeley High. Mr. Christianson holds a pupil personnel services credential, and considers the best part of his job to be providing personal counseling to students. He developed a class schedule for Student, and showed her where all the classrooms were. Student began attending Berkeley High that day. On that date, mother shared Student's history of anxiety and depression with Mr. Christianson.

10. Initially Student was successful at Berkeley High. She already had many friends there, and did very well in her classes. She was well-liked by her teachers. At some point during the first few weeks after Student began attending Berkeley High, Mother gave Mr. Christianson a copy of the 2011 private assessment from the gifted center, as well as the assessment from the Masonic Center completed the same year. Mr. Christianson put both assessments in Diane Colborn's mail box at Berkeley High.

11. Ms. Colborn, who is now retired, was a special education program manager for Berkeley, primarily responsible for the administration of all special education services for high school-aged students who resided within Berkeley's boundaries. She had both special education and administrative credentials. She supervised approximately 40 certificated and classified staff members, including the school psychologists at Berkeley High. One of her responsibilities was keeping track of students' outside assessments, which she would scan into the computer.

12. Mother and Student both developed a good relationship with Mr. Christianson. Student would check in with him several times a week, albeit mostly to complain about Mother, and Mother, in turn, would contact Mr. Christianson about her concerns about Student's behavior. These contacts included personal visits to his office by both Mother and Student, as well as emails and telephone calls.

13. In early 2016, Student auditioned for a hip-hop dance group and was accepted. The dance team leaders explained to Student that she needed to eat to continue with the troupe, and she began eating and regained lost weight. Student attended rehearsals at least three times per week, with rehearsal time increasing as the troupe moved toward March and April public performances.

14. In March 2016, Mother realized that she had heard nothing from Berkeley about an IEP for Student. On March 9, 2016, Mother contacted Berkeley and was told it had no record of the January 21, 2016 letter, so she took a copy of the letter to Berkeley High and gave it to Ms. Colborn. Shala Jones, a Berkeley High school psychologist, was assigned to do the assessment, and Ms. Jones made an appointment to meet with Mother. Ms. Jones received her pupil personnel services credential as a school psychologist in 2014, and began working for Berkeley as a school psychologist the same year.

15. Mother and Ms. Jones met on March 14, 2016. Ms. Jones interviewed Mother and gave her an assessment plan. Mother signed it, indicating her consent to the plan. The assessment plan called for Student to be assessed in the areas of academic achievement, intellectual development, and social-emotional. Ms. Jones saw the letter dated January 21, 2016, and was aware of Student's previous diagnoses of depression and anxiety, as well as her recent treatment at the intensive outpatient hospitalization program.[6]

16. Over the next three weeks Ms. Jones interviewed Student and observed her at school. Ms. Jones gave both Mother and Student rating scales to complete from the Behavior Assessment System for Children, Second Edition. Both completed the

[6] There was evidence at hearing that Mother was provided with the notice of procedural safeguards when required, and that was not an issue.

rating scales, but there was no evidence that anyone scored them and what those scores revealed. Mother authorized the Masonic Center to release Student's records to Ms. Jones. As previously noted, Mother had executed a release of information for Kaiser to release records to Berkeley High in January. Ms. Jones asked Mr. Christianson for the private assessments from 2011 that Mother had given him earlier. He told her he had sent them to Ms. Colborn; however, Ms. Colborn had no record of receiving the assessments from Mr. Christianson, and she was unable to locate copies for Ms. Jones. Ms. Jones also informed Mother that she could not complete her assessment of Student until Mother provided her with medical evaluations of Student's vision and hearing.

Revocation of Consent to Assess and Development of a 504 Plan

17. On April 5, 2016, Mother sent an email to Berkeley saying she no longer wanted an IEP for Student. Mother's April 5, 2016 email, stated that she now believed Student could be best served by a 504 plan, rather than both an IEP and a 504 plan. Student had told Mother she did not want an IEP as she thought it meant she would have an aide following her around all day. Both Ms. Jones and Mr. Christianson had independently told Mother they did not think Student needed an IEP.[7] Mother believed Student was doing quite well at Berkeley High, and was pleased that Student had developed a good relationship with Mr. Christianson, as demonstrated by the fact that she checked in with him more than once a week. Mr. Christianson had referred Student

[7] Berkeley disputes the veracity of Mother's recollection, and both Ms. Jones and Mr. Christianson disputed this when they testified. However, based on Student's success at Berkeley High at that time as well as the knowledge Ms. Jones and Mr. Christianson had that Student had previously been identified as being gifted, it is more likely than not that both of them told Mother they did not believe Student needed an IEP.

to the Health Center for more in depth mental health counseling than he was qualified to provide, but Student chose not to go, preferring to drop in on Mr. Christianson periodically for informal discussion, and complaints about her relationship with Mother.

18. Berkeley interpreted Mother's email as a revocation of her consent for an assessment. Ms. Colborn asked that Mother write on the assessment plan form itself that she was revoking consent for an assessment. Mother did so and signed it. It became clear during the hearing that Mother did not understand that Student had to be assessed and found eligible for special education before an IEP could be developed.

19. After Mother revoked consent for a special education assessment, Mr. Christianson independently developed a 504 plan for Student hoping that it would address her needs in that her school attendance had slipped and she needed time to catch up. There was no 504 team meeting involving Mother, Student, the vice principal in charge of 504 plans at Berkeley High, Mr. Christianson, or any of Student's teachers. Mr. Christianson sent the 504 accommodations list he had developed to the teachers, and also sent a copy of the entire plan to Mother and Student so they could sign it, which they did on or about April 12, 2016. The 504 plan gave Student more time to complete her work, additional time for tests, and allowed Student to make up work she missed when absent.

Student's New Attendance and Behavioral Issues

20. Student began to have some school attendance issues in March 2016, when she missed four days of school between March 14, and March 25, 2016. The following week was spring break, with school resuming April 5, 2016. Some of Student's early attendance issues in March and April were due to her performance schedule with the dance troupe she had joined, and a knee injury she suffered dancing. However, in April, Student again began refusing to attend school, complained she was not feeling well, and simply stayed in bed all day either sleeping or watching YouTube. She missed

two days of school the week of April 11, 2016, four days of school the following week, and after attending on April 18, 2016, she missed all but two days of school (she attended May 2 and 3, 2016) to the end of the school year, June 17, 2016. Student was severely depressed. She began leaving home at night again, refusing to tell Mother where she was going, and on one occasion, at 3:00 a.m., Mother discovered Student and a young man Mother didn't know, eating pizza in Student's bedroom. On another occasion Student left the house doors and gate unlocked and open when she left late at night. These incidents were concerning to Mother, but more concerning was Student's school refusal, and Kaiser's determination that Student was severely depressed and required hospitalization.

21. On days when Student did not attend school, Mother would get a recorded message from the school stating Student had been absent and saying which class periods she missed. Mother contacted Mr. Christianson many times in April and May 2016 to ask for advice on how to get Student to come to school, including detailed emails on April 28, and May 17 and 22, 2016. Mr. Christianson discussed the situation with Berkeley High's dean in charge of attendance, and offered to come to Student's home to talk to her about the need to attend school, but this did not occur. However, occasionally Student would come to see Mr. Christianson at school, and he talked to her on the telephone. In late April 2016, Kaiser suggested a possible two week inpatient hospitalization to address Student's depression, however, the program was full. Mr. Christianson was aware of the severity of the concerns about Student's mental health, including Kaiser's recommended in-patient treatment. However, at no time did he discuss Student's attendance issues with Ms. Jones, nor did he consider referring Student for a special education assessment. He did not talk to Mother to see if she was again willing to have Student assessed.

22. Although Mother had some concerns for her own safety since strangers

were being invited into the house at odd hours and Student was leaving the house with doors unlocked and sometimes open when she eloped in the middle of the night, she was far more concerned about Student's mental health status and her inability to attend school. In mid to late May 2016, Mother took Student to Santa Cruz to stay with a family friend who had some expertise working with troubled teens thinking she might be able to help Student. However, less than two weeks later the friend had to travel for work, so Student returned to the Bay Area, although Mother would not let her stay in the family home. Instead Student stayed with family friends. Mother realized the severity of Student's mental health issues and began to research possible treatment programs, since the program Kaiser was recommending was still full.

WILDERNESS THERAPY PROGRAM

23. Mother heard of a wilderness program in Utah, Wingate Wilderness Therapy, which had been successful working with a friend's child who had mental health issues. Mother had recently received proceeds from a life insurance policy on Father. She contacted Wingate on June 3, 2016, and arranged for Student to attend the program. She picked up Student at her friend's home on June 4, 2016, and told Student they were driving to a camp. They arrived in Utah at 3:00 a.m. the next morning, and checked into a motel. At 7:00 a.m., on June 5, 2016, staff from Wingate picked up Student from the motel, and took her to the program.

24. There was no evidence about the Wingate program, other than how much it cost, and the fact that Student was there for 12 weeks, four weeks longer than the usual stay. There was no evidence that Wingate provided educational services to its attendees, and therefore it is not necessary to calculate the cost from the documents presented as evidence. Student had some improvement in her mental health after she had been at Wingate for several weeks, but she was still showing signs of significant depression, as well as anger when she left. In anticipation of Student's completion of the

Wingate program, Mother worked with an educational consultant to find a school for Student that would address her mental health issues and school refusal. On August 31, 2016, Student was driven from Wingate to Spring Ridge, a therapeutic boarding school in Arizona. Neither Wingate nor Spring Ridge are certified by the California Department of Education as nonpublic schools or nonpublic agencies to provide special education services.

RENEWED REQUEST FOR AN IEP AND UNILATERAL PLACEMENT NOTICE

25. During the summer of 2016, Mother contacted the Kaiser outpatient program Student had previously attended for advice regarding assistance for Student after completion of the Wingate program. They told Mother that if she could not find another program, it was likely Student would be returning to Berkeley High when she finished the Wingate program. Kaiser told Mother she should renew her request for an IEP for Student. Therefore, on August 2, 2016, Mother went to Berkeley High to do this.

26. During the due process hearing, it was apparent, even after the hearing had begun, that Mother still did not understand the IEP process. She did not understand that the IEP would be developed at a meeting after an assessment had been completed. Instead it appeared that she believed Berkeley would independently develop an IEP document for Student, much like Mr. Christianson developed the 504 plan, and then present it to her for consent.

27. Berkeley High was on summer break on August 2, 2016, when Mother went there to renew her request for an IEP. Ms. Colborn was one of the few people in the Berkeley High offices when Mother arrived. Mother told Ms. Colborn she was renewing her request for an IEP. Ms. Colborn found a copy of the initial assessment plan developed in March 2016 by Ms. Jones, and had Mother sign it again and date it. Mother wrote on the document, "Note: this is 3rd request for an IEP for [Student]." Ms. Colborn checked an additional box on the assessment plan to ensure Student would be

assessed in the area of post-secondary transition by a resource specialist, and wrote on the form, "60 Day timeline will start 7.30.16[.] Assessment Due October 29.16[.]"[8] Ms. Colborn also noted on the form that Mother told her Student was currently in a wilderness program, and that Student had had problems the entire school year before.

28. At some point in the spring or summer of 2016, Mother became involved with an organization called Willows in the Wind for parents of struggling teens who were in residential programs. Therefore, when Mother decided that Student would need placement in a residential program when she left Wingate, she was told by another parent she needed to give her school district a 10-day notice of unilateral placement. On August 19, 2016, Mother took a short letter to the special education department at Berkeley's administrative offices in which she gave Berkeley the 10-day notice of unilateral residential placement, and advised them that she believed Berkeley had denied Student a FAPE, and would be seeking reimbursement for that placement. Mother did not give the name of the residential program since she had not chosen one at that time.

Prior Written Notice

29. After receiving Mother's 10-day notice, Lisa Graham, Berkeley's special education director at the time, assigned Ms. Colborn the task of drafting a prior written notice refusing payment for the residential placement. In the prior written notice sent to Mother, Berkeley refused to provide reimbursement, giving as a reason, "The District believes that there is not sufficient evidence that [Student] requires the highly restrictive setting of a residential treatment program." Ms. Colborn testified that this response was

[8] It was apparent that noting the 60-day period began July 30, 2016 was a mistake because the 2016-2017 school year did not begin until August 30, 2016.

the usual response when Berkeley received notice of unilateral placement of a student who was not known to the Special Education Department. Ms. Colborn explained in the prior written notice that Berkeley still needed to assess Student and "[Mother] must make [Student] available for academic and psychological assessment and should notify the District as soon as possible regarding this availability." The prior written notice was sent to Mother on September 5, 2016.

Contact with Mother to Arrange Assessment of Student

30. A few days after Mother had again signed the assessment plan, Ms. Colborn contacted Ms. Jones and asked that she contact Mother so arrangements could be made to assess Student. On August 31, 2016, the day after the 2016-2017 school year began, Ms. Jones emailed Mother stating, "I received your request to reinitiate psychoeducational assessment, and before beginning testing with her, I wanted to check in about her eyesight. The last time we spoke, she was to be scheduled for an eye exam because she was complaining of blurriness. Was she given a pair of glasses or was there anything of notable concern that came up in the exam?" The subject line of the email stated "Assessment MX," but there was no testimony about what the acronym "MX" meant.

31. On September 7, 2016, Ms. Jones telephoned Mother because she had not received a response to the email of August 31, 2016. She left a voicemail asking when testing of Student could begin. On September 14, 2016, Ms. Jones again called Mother about when to test Student, but there was no answer and the voicemail box was full.

32. On September 19, 2016, Ms. Jones sent another email to Mother with a subject line, "Assessment at BHS." The email read, "I wanted to check on [Student]'s availability to resume testing," and asked Mother to call Ms. Jones. Mother did not respond. Ms. Jones telephoned Mother on September 28, 2016, October 18, 2016, and December 5, 2016, but each time Mother stated she did not have time to talk.

33. After telephoning Mother on December 5, 2016, Ms. Jones sent another email to Mother with the subject line "Checking in." She asked if Student would be returning to Berkeley for the holidays, and if so, was it possible testing could be done then. Mother did not respond to the email. Although she could not remember when, at one point Ms. Jones asked her supervisor, Ms. Colborn, for guidance on what to do, given Mother's failure to respond, but Ms Colborn did not provide any assistance, or give her any advice.

34. Ms. Jones telephoned Mother on January 5, 2017. Notes from Ms. Jones's Parent/Student Contact Log regarding this case show that Mother answered and told her Student was still out of the state, and she did not know when she would return. Ms. Jones asked her to notify Berkeley "when she has an update," and Mother said "'OK' and hung up."

35. Ms. Jones telephoned Mother on March 10, 2017, and left a message asking when Student would return, and reminded Mother that the school year would be ending soon. She then sent Mother another email on March 10, 2017. Again, the subject line was "Assessment at BHS." The email said, "Hi [Parent], I was hoping to reach you earlier as I wanted to see if/when [Student] would return before the end of the school year so we could begin assessment. Please give me a call. Thanks." Mother did not respond to either the telephone call or the email.

36. On April 20, 2017, Mother answered the telephone when Ms. Jones called, and told her Student had just had surgery and was in town, and then ended the telephone call saying someone was at the door. On April 28, 2017, Ms. Jones again telephoned and left a message asking about Student's recovery and asked to schedule the assessment since Student was in the area. She also sent an email. Mother did not respond to either. There was no evidence as to the content of either the voicemail, or the email, as the Ms. Jones's contact log did not contain the information, no copy of the

email was admitted into evidence, and Ms. Jones, when she testified, had no specific recollection of the content.

37. Ms. Jones telephoned Mother again on May 12, 2017, and left a message asking how Mother wished to proceed regarding the assessment, and again there was no response. Ms. Jones last contacted Mother on August 29, 2017, by telephone. Mother answered and said Student was doing fine, but would not be returning to Berkeley High School, and ended the call.

MOTHER'S CREDIBILITY

38. In its closing argument Berkeley raised questions about the veracity of Mother's testimony. Mother was a very credible witness. She testified at length about Student's history of school problems, school changes, and emotional dysregulation. She answered questions asked on both direct and cross-examination in a clear manner, and if she did not know or could not remember something she said so. It was obvious that the year after Father's death, was extremely painful for Mother given Student's depression and related behaviors, and Mother's own chronic illness and grief about Father's death. Understandably Mother had difficulty remembering specific dates when certain events occurred without reference to certain exhibits. However, there was nothing in her demeanor when she testified that was deceptive or evasive. When Mother described driving Student to Utah in early June 2016, she became genuinely overwhelmed with emotion and a recess had to be called.

39. As previously discussed, it was apparent during the hearing that Mother did not understand the IEP process, or know that Berkeley had to assess Student before an IEP could be developed. After Student was placed out of state, Mother believed Berkeley could only assess Student when Student was home from school, because that was what Berkeley personnel told her directly, or intimated. Home visits from Spring Ridge did not begin until February 2017 and were heavily orchestrated and structured.

At no time did anyone from Berkeley tell Mother that it might be possible for Berkeley assessors to travel to Arizona and assess Student at Spring Ridge. In fact no one from Berkeley ever asked Mother the name and location of the school Student was attending, or asked her to sign a release of information to talk to the school, although the evidence established that she would have done so. By the beginning of the 2016-2017 school year, Mother did not believe Berkeley was willing to, or required to provide Student with any services, or to reimburse Mother for the placement at Spring Ridge especially after she received the September 5, 2016 prior written notice. Therefore, she was not motivated to respond to Ms. Jones's attempts at contact.

STUDENT'S PLACEMENT AT SPRING RIDGE ACADEMY

40. Student arrived at Spring Ridge on August 31, 2016. At Spring Ridge she was academically challenged, and able to take courses such as calculus and other advanced placement courses. She was required to attend all classes, and work her way through a system of levels by demonstrating improved behavior and self-control. As she advanced through the levels she was given greater freedom. Upon arrival, Student made up several weeks of classes she missed because Spring Ridge's school year had begun several weeks before her arrival. Student took a full load of academic classes at Spring Ridge, and received A's in every class she took, including calculus and advanced placement classes. She acquired many of the credits she needed for high school graduation at Spring Ridge. Student had perfect school attendance at Spring Ridge.

41. Student arrived at Spring Ridge angry and depressed. She was assessed and met the criteria for five different diagnoses from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.[9] Listed in order of severity, the first was major

[9] This is a diagnostic tool published by the American Psychiatric Association, and is used by mental health professionals to assist them in diagnosing mental disorders

depressive disorder, the second unspecified anxiety disorder, the third was unspecified neurodevelopmental disorder (referring to auditory processing), the fourth was uncomplicated bereavement, and the fifth was parent-child relational problem.

42. The therapeutic program at Spring Ridge required Student to have at least one individual therapy session per week, and at least one group session per week. Therapists were also available at other times for individual work. Individual sessions were 60 to 90 minutes in length. Student had written assignments to complete as part of the therapeutic process and therapeutic workshops in which she was required to participate. In addition, there were family sessions in which Mother, and sometimes Student's sibling, participated. Mother primarily participated via telephone or Skype. Mother, sometimes with Student's sibling, would visit Spring Ridge for sessions with other families lasting several hours. Mother also participated in parent workshops as part of the Spring Ridge therapeutic program. Student began highly structured home visits in February 2017. Student saw a psychiatrist regularly for medication regulation at Spring Ridge.

43. It was clear from the Spring Ridge therapy notes that both Mother and Student worked very hard during therapy, and both developed healthier communication skills, and insight into each other. Student learned to self-regulate her emotions, and healthy ways to deal with frustration and disappointment. Although the usual stay at Spring Ridge was 15 to 18 months, Student completed her program at Spring Ridge and was discharged and able to return home on July 28, 2017, 11 months after she arrived.

44. Spring Ridge charged Mother an upfront fee of $17,500, and then charged $8,000 per month for Student's stay. Mother initially paid $17,500, and then an additional $8,000 per month, totaling $48,000 up to March 1, 2017. However, at that

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and determining treatment for them.

time Mother ran out of funding to pay Spring Ridge. Thereafter, anonymous donors contributed $25,000, and Willows in the Wind contributed $1,500, so Student could continue the placement at Spring Ridge. The evidence at hearing established that Mother paid $1,200 per month for April, May, and June 2017, and a final payment of $5,133. Student provided evidence that Mother paid a total of $74,483 for Student's placement at Spring Ridge. There are no outstanding charges.

STUDENT'S RETURN HOME FROM SPRING RIDGE

45. In preparation for Student's return home, Spring Ridge coordinated services with a Bay Area agency, Coyote Coast, which provides wrap-around services for families with struggling children. In late April 2017, Coyote Coast personnel began working with Spring Ridge to facilitate Student's return home. There were individual and family therapy sessions involving both Spring Ridge and Coyote Coast therapists. When Student returned home a family therapist was already involved with the family, providing weekly family therapy sessions, as well as being on call when there were emergencies for 10 to 12 hours per day, Monday through Friday. Student was assigned a "mentor" from Coyote Coast, a licensed therapist who spent two hours a week with Student in a community setting, to help her navigate her return to a less structured environment and life than the one she had at Spring Ridge. While Student was still at Spring Ridge, Coyote Coast charged a total of $3,040 for transition services which was paid by Mother. Coyote Coast charged $8,935 for services after Student returned home, through December 2017, when Student received her high school diploma. Mother paid these charges.

46. When she returned home, Student enrolled in a program at a local community college for struggling high school students. She tested out of the remaining classes she required for a high school diploma, and was able to take college classes, with the ongoing support of the struggling student program which she attended daily

to ensure completion of assignments as well as other unspecified support. Student received her high school diploma in December 2017. At the time of the due process hearing, Student was preparing to begin college at an out-of-state university, with plans to major in engineering.

EVIDENCE REGARDING STUDENT'S ELIGIBILITY AND RESIDENTIAL PLACEMENT

47. Rebecca Schilling, Ph.D. testified regarding Student's need for assessment and eligibility for special education and related services. Dr. Schilling received her doctorate in psychology in 2009, and has been in private practice since 2011. When she obtained her doctorate she specialized in three different areas: assessment, child psychology, and cognitive behavior therapy. She specializes in assessing school-aged children, and averages about 40 assessments per year. Dr. Schilling attends approximately 30 or more IEP team meetings per year, and she has assessed approximately 15 students who have had primary or secondary special education eligibility under the category of emotional disturbance to determine whether they required residential placement. In some cases she found they did not require such a restrictive placement, but rather could be placed in a local public school program for emotionally disturbed children such as a counseling-enriched special day classroom.

48. Dr. Schilling answered all questions posed to her candidly and in a very even-handed manner. In preparation for her testimony, Dr. Schilling reviewed Student's entire mental health treatment record from Kaiser, and the 2011 evaluations of Student. She reviewed emails between Berkeley personnel and Mother, the 504 plan, the assessment plan and more recent school transcripts. She also reviewed records from Wingate and Spring Ridge, and interviewed Mother. Although she had not met Student or assessed her, Dr. Schilling determined that based on Student's school refusal in the fall of 2015, and failure to complete her classes, as well as the participation in the intensive outpatient program in January 2016, Berkeley should have realized the need to

assess Student for special education when she entered the district as a student. In Dr. Schilling's opinion it would also have been important to conduct an educationally related mental health services assessment.

49. Based on all of the information available to her, and this information was also available to Berkeley, Dr. Schilling testified Student would have met the criteria for special education under the category of emotional disturbance. Student had a longstanding history of school challenges and an early mental health diagnosis requiring medication, as well as the history of risky behavior and possible eating disorder in the fall of 2015 following the death of Father. Student had a pervasive depressed and angry mood, as well as symptoms of anxiety, and significant somatic complaints. All of these factors impeded her school attendance and ability to receive educational benefit. Dr. Schilling opined that services that could have benefited Student based on her school refusal included home-based wrap-around services (such as those provided by Coyote Creek), designed to get her up and off to school, and possibly transportation services. In addition, Student should have received school based services such as counseling, and even though she was gifted, resource services for assignment tracking could have been beneficial.

50. Dr. Schilling testified that by the time Mother placed Student at Wingate, and then at Spring Ridge, Student had a definite need for these programs due to her significant depression. Dr. Schilling noted Kaiser had recommended residential placement for Student. In Dr. Schilling's opinion, placement at Wingate was necessary so that Student could be stabilized, and subsequent residential placement at Spring Ridge was both necessary and beneficial for Student both therapeutically and academically. At Spring Ridge Student learned to regulate her mood, and her straight A grades showed she received educational benefit. Although Dr. Schilling had not met Student, or assessed her, her testimony established that Student met the special education criteria

for emotional disturbance, and Student required placement at a therapeutic residential school such as Spring Ridge to obtain educational benefit. Berkeley presented no evidence or testimony to refute Dr. Schilling's testimony.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT [10]

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006);[11] Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related

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

[11] All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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]."

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School District,* 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. (*Endrew F. v. Douglas County School District* (*March 22, 2017, No. 15-827*) 580 U.S.____ [137 S.Ct. 988, 999; 197 L.Ed.2d 335] (*Endrew F.*).). The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.*, and this has always been the standard applied in the Ninth Circuit. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1201.)

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).) 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].) In this matter, Student had the burden of persuasion on the issues decided.

CHILD FIND

6. Student contends that Berkeley still had a child find obligation even after Mother revoked consent to assess Student in April 2016. Student argues that when she stopped attending school in April 2016, Berkeley should have made another referral for assessment. Further, Student argues that this was a continuing obligation, even when she was in residential treatment in another state. Berkeley argues that it was not obligated to assess Student in the spring of 2016, because Mother withdrew her consent to the assessment plan, and then, according to Berkeley in its closing argument, Student was "sent to Santa Cruz . . . indefinitely in May 2016." Then Student went into out-of-state placement. Berkeley argues that its child find obligation was triggered only for a seven week period beginning in April 2016, and ended when Student went to Utah.

District's Duty to Assess Regardless of Parent Request

7. Failure of a parent to request special education testing does not relieve a school district from its responsibility to determine if a student should be assessed for special education. A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children,

wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171, 56301, subds. (a) & (b).) This duty to seek and serve children with disabilities is known as "child find." "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.) A district's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194 (*Cari Rae S.*).) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

8. 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.) 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. (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1209 (*Hellgate*).)

9. A local educational agency must assess a student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

10. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S.*, *supra*, 158

F.Supp.2d at p. 1196; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031.)

Residency

11. Although Berkeley appears to argue that it no longer was obligated to assess Student once she went to Utah, this is not the law. Under the IDEA, a local education agency is charged with "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law requires students, between the ages of 6 and 18, to attend school in the school district in which either the student's parent or legal guardian resides. (Ed. Code § 48200; *Orange County Dept. of Educ. v. California Dept. of Educ.* (9th Cir. 2011) 668 F.3d 1052, 1056; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57.) The IDEA's residency determination is made under state law and is no different from the residency determination in other types of cases. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525 (*Union*).) In *Union*, the Ninth Circuit rejected arguments that the physical location of a child during the school week determines the residency of that child, and found that California Education Code provisions addressing a school district's responsibility to a child do not relieve it from its responsibility to disabled children who reside in the district and receive their free appropriate education outside the district. (*Ibid.*) Berkeley's child find obligation continued even after she was placed at Wingate, and subsequently at Spring Ridge.

12. Berkeley had knowledge that Student might be disabled when Mother enrolled her at Berkeley High on January 21, 2016, and gave it the letter asking for an IEP and a 504 plan. Further, Mother told Mr. Christianson five days later about Student's history of school refusal, her longstanding diagnoses of anxiety and depression, and the fact that she had been released after two weeks in the intensive outpatient hospitalization program. On that date, or shortly thereafter, Mother also gave the two

assessments from 2011 to Mr. Christianson, and he put them in Ms. Colborn's box. Had Berkeley begun its assessment of Student within 15 days of enrollment and Mother's initial request that Student be assessed for special education, as will be discussed below, Student would have been found eligible for special education and had an IEP in place when her attendance issues began in April 2016.

13. Although Student seemed to do well initially at Berkeley High, she was checking in so frequently with Mr. Christianson that he referred her to the Health Center for counseling. Mother also was calling, and emailing Mr. Christianson about her concerns about Student, and sometimes she would come to the school to see him in person.

14. When Mother met with Ms. Jones on March 14, 2016, Ms. Jones had seen the January 21, 2016 letter. In addition, Mother told Ms. Jones when she signed the assessment plan on March 14, 2016, about Student's history of depression and anxiety, and her history of school refusal.

15. Student's attendance began to suffer the last two weeks in March 2016 before spring break when she missed four days, but both Mr. Christianson and Ms. Jones separately suggested to mother that Student did not need an IEP, that a 504 plan would be sufficient. Therefore Mother withdrew consent for the assessment on April 5, 2016. However, this did not extinguish Berkeley's ongoing child find obligation. Almost immediately after Mother and Student signed the 504 plan, Student's attendance at Berkeley High became increasingly erratic, and between April 18, 2016, and the end of the school year on June 17, 2016, Student had only attended two days of school. Mother's contacts with Mr. Christianson increased as she was concerned about Student's attendance issues.

16. Mr. Christianson knew by mid to late April that Student was not regularly attending school, and spoke to the dean of attendance to see what could be done to

get Student to school. He offered to come to the home to meet with Student. However, there was no evidence that Mr. Christianson spoke to Ms. Jones about Student's attendance issues, nor did he suggest to Mother that perhaps Student did need to be assessed for special education after all. He did not make his own referral for assessment.

17. When Mother renewed her request for assessment in August 2016, she told Ms. Colborn that Student was in a wilderness program, and later that month Mother notified Berkeley that she was putting Student in a residential program. Although Ms. Jones emailed Mother and telephoned Mother frequently at the beginning of the 2016-2017 school year, and less frequently thereafter, she took no further steps to ensure Student was assessed.

18. Student met her burden of proof that Berkeley did not meet its child find obligations in relation to her from March 13, 2016, through July 28, 2017. Berkeley's child find obligation began when Student enrolled on January 21, 2016, and Mother presented the letter requesting assessment. Had Student been timely assessed, she would have been found eligible for an IEP because met the eligibility criteria for emotional disturbance. When Student's attendance issues became apparent in mid-April 2016, IEP supports could have addressed this, but because Berkeley did not meet its child find obligation, an IEP did not exist. This resulted in Student being denied a FAPE from April 18, 2016, through July 28, 2017.

Failure to Assess after Receiving Consent

19. Student argues that after Mother renewed her request for an IEP on August 2, 2016, and re-signed the March 2016 assessment plan, Berkeley was obligated to assess her within 60 days from when the 2016-2017 school year began, notwithstanding the fact that Student was in an out-of-state residential placement. Berkeley contends that after Mother renewed her request for an IEP on August 2, 2016, she did not make Student available for assessment, even though Student was returning

to Berkeley for home visits monthly, and Mother's lack of cooperation in making Student available excuses its failure to assess.

Assessment and IEP Deadlines

20. A written proposed assessment plan and a copy of procedural safeguards must be provided to a parent within 15 days of the referral for assessment. (Ed. Code, § 56321(a).) The parent shall have at least 15 days from the receipt of the proposed assessment plan to arrive at a decision and the assessment may begin immediately upon receipt of the consent. (Ed. Code, § 56321(b)(4).)

21. An IEP required as a result of an assessment of a student must be developed within a total time not to exceed 60 days from the date of the receipt of parent's written consent, not counting days between the student's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56344.) Therefore, if a parent consents to an assessment during a break from regular school sessions, the assessment must be completed and the IEP must be developed within 60 days after school is back in session. Because Mother signed consent to the assessment plan for the second time during summer break, Berkeley was required to complete the assessment and hold an IEP team meeting no later than October 29 2016, as Ms. Colborn noted on the assessment plan. A school district cannot condition its assessment on a parent obtaining a medical exam for the student. (*Union, supra* 15 F.3d 1519, 1524.)

22. A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability constitutes a procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist. supra* 464 F.3d 1025, 1032-1033; *Orange Unified School Dist. v. C.K.* (C.D. Ca.) 2012 WL 2478389, p.8.)

23. However, not all procedural flaws result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479,

1484, superseded on other grounds by statute (*Target Range*).) A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or (2) caused a deprivation of educational benefits to the student, thus denying her a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d 1479, 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

24. The Ninth Circuit has held that a procedural error that causes a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1047.) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Id.* at p. 1047, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

25. When Mother renewed her request for assessment on August 2, 2016, Berkeley was required to assess Student and hold an IEP team meeting no later than October 29, 2016, 60 days after the 2016-2017 school year began on August 30, 2016. Berkley did not assess Student during the 2016-2017 school year, nor did it even attempt to convene a timely IEP team meeting after Mother renewed her request for assessment on August 2, 2016.

26. On August 2, 2016, Ms. Colborn had written on the assessment form that Mother was required to produce Student for assessment, and although Ms. Colborn knew Student was in a wilderness program, she did not ask the name of the program or the location. When Mother then notified Berkeley on August 19, 2016, that Student was now to be placed in residential placement, no one from Berkeley sought any further information from Mother such as the name of the program or its location. Further, in the

prior written notice of September 5, 2016, Berkeley conclusively stated it did not believe Student required residential placement, although it had never assessed Student.

27. After the 2016-2017 school year began on August 30, 2016, all of the communication from Berkeley to Mother stated that Student could not be assessed unless she returned to Berkeley; and it was Mother's responsibility to contact Berkeley to schedule assessments. Berkeley never asked Mother where Student was placed. There was no evidence that Mother would have withheld this information from Berkeley had she been asked. No one asked Mother to sign a release of information for the wilderness program or the residential treatment center. There was no evidence that Mother would not have signed such a release, especially since she had signed one in January 2016 for Kaiser to release information to Berkeley, and in the spring of 2016 for the Masonic Center to release information to Ms. Jones.

28. Ms. Jones's first step in trying to assess Student, after Mother renewed her consent on August 2, 2016, was to email Mother on August 31, 2016, asking if Student had had an eye examination. A school district cannot require a private medical exam prior to assessing a student. Other telephone calls and emails from Ms. Jones to Mother through December 2016, merely asked when Student was returning to Berkeley so Ms. Jones could assess her. Although Ms. Jones told Ms. Colborn that she was not getting a response from Mother, Ms. Colborn gave Ms. Jones no guidance. The IEP team meeting to discuss Student was required to be held before October 29, 2016, but no one made any attempt to notice expected participants, which would have included Mother or to convene such a meeting. Based on Mother's limited understanding of the IEP process, getting the notice that an IEP team meeting was going to be held would very likely have motivated her to attend, and a substantive conversation about where and when Student could be assessed could have occurred.

29. From January 2017 to the end of the 2016-2017 school year, Berkeley's

attempts to assess were limited to telephone calls and emails seeking updates on when Student would be returning to her home in Berkeley. Mother was not knowledgeable about the IEP process, and based on the prior written notice of September 5, 2016, Mother really had no expectation that Berkeley was actually going to assess Student, or had any legal obligation to do so.

30. Once it realized that Mother was not being responsive to its emails and telephone calls, Berkeley should have made more vigorous efforts to inform Mother that in fact it was obligated to assess Student, and was making a serious effort to do so, and should have documented those efforts. This situation is analogous to one when a parent is sent an assessment plan for an initial assessment and does not respond. A school district must make reasonable efforts to obtain informed consent from the parent for an initial evaluation. (34 C.F.R. 0.300(a)(1)(iii); Ed. Code § 56321, subd. (c)(1).) To meet the "reasonable efforts" requirement of title 34 of the Code of Federal Regulations, part 300.300(a)(1)(iii), the school district must document its attempts to obtain parental consent, using the procedures in title 34 of the Code of Federal Regulations, part 300.322(d). (34 C.F.R. § 300.300(d)(5).) These procedures consist of keeping a record of its attempts to obtain consent, such as keeping detailed records of telephone calls made or attempted, and the results of those calls; copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d).) California's Education Code has the same requirements. (See Ed. Code, § 56321, subd. (g).)

31. When Berkeley had difficulty contacting Mother to arrange the assessment, it could have sent a letter to Mother by registered mail with return receipt requested explaining the assessment process, and asking her for information about where Student was placed and asking her to sign a release of information. School

districts often use registered mail with return receipts to document efforts to engage parents in the IEP process where it appears there has been a breakdown in communication or parent resistance. Yet Berkeley did not do this. Instead, it simply continued to send Mother emails or make telephone calls every few weeks asking when Student was returning to Berkeley so she could be assessed. Ms. Jones kept a parent contact log and copies of most the emails. However, Ms. Jones never asked Mother if she could meet with her, which would have been another way Berkeley could have communicated why it felt the urgent need to assess Student. Although Berkeley claims Mother was uncooperative and therefore it should not be faulted for failing to assess Student during the 2016-2017 school year, Berkeley did not establish that it made a reasonable effort to engage Mother and educate her as to the importance of assessing Student as required by state and federal special education law.

32. Student established that Berkeley failed to assess Student after Mother re-requested assessment on August 2, 2016, and Mother was not responsible for its failure to assess.

STUDENT'S ELIGIBILITY

33. As previously noted, procedural violations of special education law do not always result in a denial of a FAPE. They deny FAPE if they: (1) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or (2) result in a deprivation of educational benefit. Further, when a student is ineligible for special education, procedural violations of child find are not actionable, because Student is not entitled to a FAPE, and is not deprived of educational benefit. (*R.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942.) Therefore, unless Student established that she would have been found eligible for special education had she been assessed, she is not entitled to a remedy for Berkeley's procedural violations of child find and assessment requirements. The fact that Student

was never previously found eligible for special education does not relieve Berkeley of its obligation to offer her a FAPE, if it is found she would have been eligible had she been assessed. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 247 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*).)

Emotional Disturbance Criteria

34. A student is eligible for special education and related services if she has a qualifying disability, such as an emotional disturbance, and, as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b) [uses term "individual with exceptional needs"].) A student may qualify for special education benefits under more than one of the eligibility categories. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2014) 758 F.3d 1162, 1175-1176.)

35. A student's impairment constitutes an emotional disturbance when she exhibits one or more of the following characteristics over a long period of time, and to a marked degree, which adversely affects her educational performance: (a) an inability to learn which 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; or (e) a tendency to develop physical symptoms of fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(4)(a)-(e).)

36. The law does not define what constitutes exhibiting the delineated symptoms for a "long period of time." An advice letter from the United States Department of Education states that a generally accepted definition of "a long period of time" is a range of time from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. (*Letter to*

Anonymous (OSEP 1989) 213 IDELR 247.) This letter also states that the qualifier "to a marked degree" generally refers to the frequency, duration, or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and/or school and community norms. (*Ibid.*)

37. If Student had been timely and properly assessed by Berkeley, she would have been found eligible for special education because she met the criteria for emotional disturbance. Her lack of school attendance in the fall of 2015, led to her failing most of her classes at the parochial school although she had previously been found to be gifted. She could not learn because she was not attending school and completing classwork and homework, and this was also true when she stopped attending Berkeley High in April 2016. Thus Student exhibited the first characteristic for a child to be found eligible for special education under the category of emotional disturbance.

38. There was no evidence that Student could not build and sustain interpersonal relationships with peers and teachers, because the evidence was clear that she could. However, Student's inability to get out of bed and go to school, beginning in March or April 2016, was inappropriate behavior, as were her showing signs of an eating disorder in the fall of 2015, pouring boiling water on her hand to avoid going to school, and her periodic disappearances from home at night. Thus Student exhibited the third characteristic for a child to be found eligible for special education under the category of emotional disturbance.

39. Student had a longstanding history of mental health issues. In 2011 she was diagnosed with depression and began taking medication for it when she was 13. The evidence established that Student had shown signs of depression for several years, and was doing so during the fall of 2015. By December 2015, Student was considered so disturbed that she was admitted to an intensive outpatient mental health program

through Kaiser in January 2016. Berkeley was made aware of Student's mental health history at the time Student was enrolled, and by the end of April 2016, Mother informed Mr. Christianson that Kaiser had diagnosed Student with depression and was considering hospitalization. Thus Student exhibited the fourth characteristic for a child to be found eligible for special education under the category of emotional disturbance.

40. Finally, when Student engaged in school refusal, both in the fall of 2015, and the spring of 2016, she would explain to Mother that she could not go to school because of some physical complaint, thus meeting the last characteristic of a student requiring special education services based on meeting the criteria for emotional disturbance. Student exhibited four of the five characteristics of emotional disturbance. By the end of April 2016, Kaiser was considering hospitalizing her due to her severe depression. The evidence, supported strongly by Dr. Schilling's unrefuted testimony, established that Student met the special education criteria for emotional disturbance throughout the 2015-2016 school year, and the following school year.

41. Mother was denied meaningful participation in the IEP process because Berkeley did not assess Student or hold an IEP team meeting. This deprived Mother of important information concerning Student's needs and resulted in Mother not being provided with opportunities for educational support to assist her in getting Student to attend school. Student was deprived of the educational benefits Berkeley could have conferred on her by developing an appropriate IEP, and thus she was deprived of the supports she needed to be able to access her education.

REMEDIES

1. Berkeley failed to meet its child find obligations in regards to Student from March 13, 2016, to July 28, 2017, and failed to assess her after Mother signed the assessment plan on August 2, 2016. Had Berkeley met its child find obligation, after Student enrolled in January 2016, and this was a continuing obligation, Student would

have been assessed, found eligible for special education because she met the criteria for emotional disturbance, and would have had an IEP plan in place by the time her attendance issues began in April 2016. Student established that she was denied a FAPE from April 18, 2016, to July 28, 2017.

2. Student requests a total reimbursement of $142,418 for the costs incurred at Wingate and Spring Ridge, and the services of Coyote Coast through July 2018. Berkeley believes it owes nothing. It argues that Wingate was not an educational placement. Further it points out that the California Department of Education has not certified Wingate, Spring Ridge, or Coyote Coast as nonpublic agency providers of related services, or as nonpublic schools. Berkeley also questions whether Mother herself actually paid the costs incurred in its closing argument. Berkeley also argues that residential programs are the most restrictive placements on a continuum of placements, and Student did not require such a restrictive placement.

3. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [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*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra* 557 U.S. 230, 240.)

4. In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, at p. 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].) Appropriate relief means

"relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup*, *supra*, 31 F.3d. at p. 1497.)

5. 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. (Ed. Code, §56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra,* at 471 U.S. 359, 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 in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [, 114 S.Ct. 36, 1126 L.Ed.2d 284] (*Florence County*) (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement 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).)

6. When Student was placed by Mother at Wingate Wilderness Therapy Camp, she was not attending school, and therefore she was not receiving an education. Based on the evidence presented it was established that before Student could be placed in a school setting, her mental health issues needed to be addressed, and she needed to be stabilized. However, even as she left Wingate, she was angry and depressed. There was no evidence, however, that Wingate provided Student with educational services. Therefore, Berkeley is not obligated to reimburse Mother for the cost of Wingate.

7. Evidence established that Student was extremely depressed and angry,

when she arrived at Spring Ridge Residential Treatment Center on August 31, 2016, and she would likely have resumed her school refusal had she returned to Berkeley and Berkeley High right after leaving Wingate. Student required residential placement for educational reasons. She met the Diagnostic and Statistical Manual's criteria for five mental health conditions, the most serious being a major depressive disorder, and the least serious parent child relational problem. Spring Ridge was a structured environment where students were required to attend classes, and make therapeutic progress. The structure supported educational progress. Students had to achieve specific goals in order to advance on the level system to earn privileges and opportunities for more independence. Spring Ridge provided the structure Student required for both mental health and educational reasons. She made remarkable therapeutic and educational progress at Spring Ridge. Dr. Schilling agreed that Spring Ridge was an appropriate placement for Student at that time, and her testimony was unrefuted. Student was able to complete missing credits for both 10th and 11th grades at Spring Ridge, thus, Student received educational benefit from Spring Ridge. Student's subsequent educational progress that allowed her to graduate from high school five months after she returned home substantiates the finding that Student required this placement for educational reasons.

8. Mother is entitled to reimbursement for Spring Ridge because Berkeley denied Student a FAPE, and Student proved she required residential placement at a therapeutic facility such as Spring Ridge in order to receive educational benefit. (*Burlington* (471 U.S. 359); *Forest Grove* (557 U.S. 230.).) Although Spring Ridge was not certified by the California Department of Education as a nonpublic school, *Florence County* (510 U.S. 7) supports this award. Mother paid a total of $74,483 to Spring Ridge for Student's 11 months of placement. Student presented statements from Spring Ridge which showed the amounts she paid. Although Berkeley argued that Mother did not

provide proof that she actually paid this amount, she credibly testified she did; the statement she presented from Spring Ridge reflected the $1,500 payment from Willows in the Wind and the $25,000 paid by anonymous donors, and Mother is not asking for reimbursement of those amounts. Mother paid Spring Ridge by credit card and testified that she has the credit card statements to prove her expenditures. There was no evidence that any of these costs were covered by insurance.

9. Mother is also entitled to reimbursement for the $3,040 she paid to Coyote Coast for transition services it provided to the family while Student was still at Spring Ridge. This reimbursement is also due because Berkeley denied Student a FAPE as discussed above.

10. A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra, at p.* 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup, supra,* at p. 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

11. The wrap-around services provided by Coyote Coast when Student returned home were also necessary to aid Student's transition back home and were critical to Student's ability to attain her high school diploma, and Mother is entitled to reimbursement for them as compensatory education. Without these services it is

unlikely that Student's return home would have been as successful as it was. Student's support from Coyote Coast helped her to readjust to living in the less structured environment of home, and attend school. She was able, with the help of Coyote Coast, to maintain the stability necessary to not fall back into depression and to deal with the anxiety, which contributed to her school refusal in the past. Thus Student was able to obtain to final credits necessary to complete her high school education.

12. If Berkeley had met its child find obligation and timely assessed Student and correctly found her eligible for special education in the spring of 2016, wrap-around services such as those provided by Coyote Coast would likely have eliminated the subsequent need for residential treatment. Instead Student could have remained at home, and attended school locally. Therefore, as compensatory education Mother is entitled to reimbursement of the $8,935 she paid for Coyote Coast's services, from the time Student returned home from Spring Ridge, until her high school graduation in December 2017. Mother shall not be reimbursed for the Coyote Coast services she paid for after Student obtained her high school diploma.

13. Staff training is an appropriate compensatory remedy under these facts. The IDEA does not require compensatory education services to be awarded directly to a student. Staff training concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils can be an appropriate compensatory remedy, and is appropriate in this case. (*Park, supra,* at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].)

14. Berkeley shall provide all staff at Berkeley High with one hour of training as to their obligations related to child find mandates pursuant to the IDEA and related state statutes. Furthermore, special education staff at Berkeley High shall be provided with one hour of training as to the steps they should take if they have difficulty

obtaining parental cooperation for the assessment of a child, and steps to be taken for assessing a child in residential placement. This training shall not be provided by Berkeley personnel, or any attorney or law firm that represents Berkeley. Training shall be provided no later than December 1, 2018.

ORDER

1. Within 45 days of this Decision, Berkeley shall reimburse Mother $86,458 for costs of Spring Ridge and Coyote Coast.

2. Berkeley shall provide all staff at Berkeley High with one hour of training as to their obligations as related to child find. This training shall not be provided by Berkeley personnel, or any attorney or law firm that represents Berkeley, and shall be completed no later than December 1, 2018.

3. Berkeley shall provide all special education staff at Berkeley High who are part of an assessment team with one hour of training as to the steps they should take if they have difficulty obtaining parental cooperation for the assessment of a student, and steps to be taken to assess a student in residential placement. This training shall not be provided by Berkeley personnel, or any attorney or law firm that represents Berkeley, and shall be completed no later than December 1, 2018.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: September 13, 2018

/s/

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings