BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021030255

PARENT ON BEHALF OF STUDENT,

V.

LOMPOC UNIFIED SCHOOL DISTRICT.

DECISION AFTER PARTIAL REMAND

April 30, 2021

This is a decision after partial remand from the United States District Court, in Case No. 2:20-cv-00765-RGK-JPR. Attorneys Andrea Marcus and Dan Robinson represented Student. Attorney Sarah Garcia represented Lompoc Unified School District. Lompoc Unified School District will be referred to as Lompoc Unified.

PROCEDURAL HISTORY

Student filed a due process complaint with the Office of Administrative Hearings in Case No. 2019060655 on June 13, 2019, naming Lompoc Unified. The Office of Administrative Hearings will be referred to as OAH.

In October 2019, OAH held a due process hearing before Administrative Law Judge Adrienne L. Krikorian on the two issues raised in Student's complaint. Administrative Law Judge will be referred to as ALJ. OAH issued a Decision on November 19, 2019. On Issue 1, OAH determined that Student did not prove Lompoc Unified denied Student a free appropriate public education by failing to find Student eligible for special education from June 13, 2017, until the date the complaint was filed. A free appropriate public education will be referred to as a FAPE. On Issue 2, the ALJ concluded Student did not prove Student required an educational placement in a residential treatment center, at Lompoc Unified's expense, to access her education.

Student filed an action in United States District Court in Case No. 2:20-cv--00765-RGK-JPR, appealing the OAH Decision. In the District Court action, Lompoc Unified filed a motion for summary judgment, or in the alternative, for summary adjudication of claims. By its motion, Lompoc Unified argued that it was entitled to summary judgment with respect to Issues 1 and 2 of the November 19, 2019 OAH Decision.

On February 19, 2021, the District Court issued an Order granting, in part, the Lompoc Unified motion. The Court upheld the ALJ's conclusion in Issue 1. Student did not prove Lompoc Unified denied Student a FAPE during the two-year period preceding June 13, 2019, by failing to find Student eligible for special education. The Court

pointed out that Student did not dispute the ALJ's finding that no assessments were ready for review by June 13, 2019, the day the complaint was filed, and that "a school district cannot find that a child has a disability until 'completion of the administration of assessments and other evaluation measures.'"

On Issue 2, the District Court denied Lompoc Unified's motion for summary judgment and remanded the case back to OAH for clarification. The Court did not reverse the ALJ's finding that Student did not prove she required an educational placement in a residential treatment center at any time before the complaint was filed on June 13, 2019. Instead, the Court stated: "Had the ALJ determined whether [Student] *presently* [emphasis in original] had a disability, the ALJ may have found that [Student] was entitled to special education. Had the ALJ found [Student] eligible for special education, the ALJ may have found [Student] requires placement in an RTC to access her education."

The District Court held that Issue 2 required the ALJ to determine two issues on remand: whether Student established she had an IDEA-qualifying disability as of November 19, 2019, and, if so, whether Student requires placement in a residential treatment center to meet her educational needs. The issues will be referred to as Remand Issue 1 and Remand Issue 2.

ISSUES

Remand Issue 1: Did Student establish that she had an IDEA-qualifying disability as of November 19, 2019?

Remand Issue 2: If Student had an IDEA-qualifying disability, does Student require residential placement to meet her educational needs?

OAH JURISDICTION

The administrative hearing was held under the Individuals with Disabilities Education Act, referred to as the IDEA, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are to ensure:

- 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 further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Lompoc Unified did not consent to any issues outside of those

defined by the parties on the first day of hearing, which were stated in the November 19, 2019 OAH Decision under "Issues."

Student had the burden of proof in the underlying administrative matter. (*Schaffer v. Weast*, *supra*, 546 U.S. at p. 62.) Accordingly, Student has the burden of proof on remand by the District Court. The factual statements in this Decision after Partial Remand constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

AUTHORITY OF OAH IN THE UNDERLYING ADMINISTRATIVE CASE

Education Code section 56504.5 authorizes OAH to decide matters brought under the IDEA. (20 U.S.C. § 1400, et seq, and 34 C.F.R. § 300.511 (2006).) The Administrative Procedure Act states that, "[t]he governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding." (Gov. Code, § 11415.10, subd. (a).)

Title 20 United States Code section 1415(b)(6)(B) addresses the right of a parent to present a complaint that alleges violations of the IDEA that occurred "not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint" subject to a state's explicit timeline and the exceptions stated in title 20 United States Code section 1415(f)(3)(D). The California statute of limitations for due process requests is also two years. (Ed. Code, § 56505, subd. (l).)

In the interests of speedy resolution of special education cases, both the federal and California legislatures have limited the statute of limitations in IDEA cases to two

years and provided only two very specific exceptions. (20 U.S.C. §§ 1415(f)(3)(C) and (D); Ed. Code § 56505(l).) Student did not plead or argue that either exception applied.

Special education law does not require that parties must bring all special education claims at the same time in one action. (See, 20 U.S.C. §1415, 34 C.F.R. § 300.507 and §300.508; Ed. Code, § 56505).) Student had the right to seek permission, up to five days before the October 2019 due process hearing, to amend the complaint to allege new or supplemental claims. (20 USC § 1415(c)(2)(E).) Student did not seek leave to amend the complaint or supplement the issues to add claims based on events occurring after June 13, 2019, the date the original complaint was filed. Thus, the relevant time period for the claims raised in the complaint was limited to June 14, 2017, through June 13, 2019.

California's implementing regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs." (Cal. Code Regs., tit. 5, § 3042, subd. (a).) If a student prevails at an administrative hearing on claims of eligibility, and appropriate evidence is offered at hearing, an ALJ may find that a residential placement for educational reasons is an appropriate remedy for a denial of FAPE. (See *M.S. by and through R.H. v. Los Angeles Unified School Dist.* (9th Cir. 2019) 913 F.3d 1119, 1121, 1135 (*M.S.*).) The ALJ may then order placement at a private residential placement at the school district's expense. (*Ibid*). Where the level of services provided by a residential treatment center is needed for a student to access FAPE, in other words necessary for educational purposes, a student's individualized education program would appropriately reflect the need for residential placement. (*MS, supra,* 913 F.3d at pp. 1121, 1136.)

Notably, in *M.S.* the student was already eligible for special education during the relevant time frame. That was not the case here. The ALJ concluded in the November 19, 2019 OAH Decision, and the District Court agreed, that Student did not meet her burden of proving that Lompoc denied Student a FAPE by failing to find her eligible at any time before the complaint was filed on June 13, 2019.

Student was therefore not entitled to any benefits under the IDEA, including a residential placement for educational purposes at public expense. (20 U.S.C. § 1400, *et seq.*; cf., *D.G. v. Flour Bluff Independent School Dist.* (5th Cir. 2012) 481 Fed.App'x 887, 891-894 ["To be eligible for special education a student must: (1) have a qualifying disability; and, (2) because of that disability, *need* special education."; "In any event, IDEA does not penalize school districts for not timely evaluating students who do not *need* special education." [Italics in original.]; *M.A. Torrington Board of Education* (D. Conn. 2014) 980 F.Supp.2d 279, 287 ["[P]laintiffs cannot succeed on their claim for tuition reimbursement as there was no finding that M.A. was eligible for special education."].)

In the context of the two-year period at issue in Student's case, Issue 2 of Student's complaint addressed whether Student had a right to relief under the IDEA based upon the events that occurred on or before the date the complaint was filed. Specifically, Student was seeking as a remedy a residential placement at Lompoc Unified's expense if Student was or should have been found eligible for special education during the same two year period before the complaint was filed.

Eligibility for special education and related services was then, and is now, a fundamental prerequisite for entitlement to benefits under the IDEA. (See, *D.G. v. Flour Bluff Independent School Dist.*, *supra*, 481 Fed.App'x 887, 891-894; *M.A. Torrington Board of Education, supra,* 980 F.Supp.2d 279, 287.) Student did not prove she had the

right to relief, including a residential placement, at the time OAH issued the November 19, 2019 Decision.

REMAND ISSUE 1: DID STUDENT ESTABLISH STUDENT HAD AN IDEA-QUALIFYING DISABILITY AS OF NOVEMBER 19, 2019?

Focusing on Issue 2 of the underlying case, the District Court asked OAH to clarify on remand whether Student established at hearing that she had an IDEA- qualifying disability as of November 19, 2019. The District Court also directed OAH to consider whether Student required residential placement for educational purposes if Student had a qualifying disability as of November 19, 2019.

On remand the ALJ considered the administrative record, the pleadings the parties filed with the District Court relevant to the remanded issues, as well as written and oral argument on remand from the parties. The administrative record, including the ALJ's findings of facts and legal conclusions, was enough to enable the ALJ to reach the necessary conclusions, independently and notwithstanding Student never amended her complaint. This Decision after Partial Remand relies on the factual findings in the administrative case but does not repeat the entire factual history, for the sake of brevity.

BASES FOR ELIGIBILITY

CONTENTIONS

Student contended on remand that the District Court only affirmed the November 19, 2019 OAH Decision to the extent the District Court agreed that Student did not prove Lompoc Unified denied Student a FAPE by failing to find Student eligible for special education during the two-year statutory period. Student contended that the

remand Order requires the ALJ to make an independent determination of eligibility both looking back at the entire two-year statutory period over which OAH had jurisdiction, and, as the District Court ordered, looking forward after the statutory period until the Decision issued on November 19, 2019.

Student argued that the evidence at hearing proved Student should have been eligible for special education as a child with emotional disturbance dating back to June 13, 2017, notwithstanding that the District Court granted Lompoc Unified's summary judgment motion on Issue 1. However, Student did not dispute that the District Court affirmed the ALJ's finding that Lompoc Unified did not deny Student a FAPE by failing to find Student eligible for special education between June 13, 2017 and June 13, 2019. Lastly, Student argues, as a factual matter, she was eligible under the eligibility category of emotional disturbance based upon a single medical diagnosis of "schizophrenia" in May 2019.

Lompoc Unified contended the November 19, 2019 OAH Decision, affirmed in part by the District Court, determined that Student did not prove she was eligible for special education at any time before June 13, 2019, thus supporting the conclusion that Lompoc Unified did not violate the IDEA by failing to find Student eligible. Lompoc Unified argued that the ALJ thoroughly considered Student's evidence regarding eligibility in the underlying matter and reached the conclusion that Student did not prove eligibility, resulting in a favorable decision for Lompoc Unified. Lompoc Unified also argued that, in the absence of eligibility, Lompoc Unified was not required to fund residential placement. Lastly, Lompoc Unified contended that Student offered no persuasive evidence at hearing that proved she was eligible for special education as of November 19, 2019.

IDEA REQUIREMENTS FOR EDUCATIONALLY BASED ASSESSMENTS

Student had the burden of proving she had an IDEA-qualifying disability that would have supported eligibility, thus entitling her to the benefits of the IDEA. (*Hacienda La Puente Unified School Dist. v Honig* (9th Cir. 1992) 976 F.2d 487, 492 (*Honig*).) An IDEA-qualifying disability refers to the disability criteria for determining a student's eligibility for special education under the Individuals with Disabilities Education Act. (Cal. Code Regs. tit. 5, § 3030 subd. (b) (2014).)

A student who has not been previously identified as disabled may raise the alleged disability in a due process hearing. (*Id.* at p. 492).) In *Honig*, the Ninth Circuit held that eligibility may be raised in an IDEA administrative due process hearing. However, *Honig* did not relieve the student from meeting the burden of proof of eligibility if the student challenged the school district's failure to find the student eligible. (See, *Schaffer v. Weast, supra,* 546 U.S. at p. 62)

To determine eligibility, school districts assess students to assist an individualized education program team, called an IEP team, in determining eligibility. (20 U.S.C. § 1414(a); Ed. Code, § 56320.) When a school district assesses a child, the IDEA requires the school district to assess for all suspected disabilities. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons in accordance with testing requirements set forth in Education Code section 56320 subdivisions (a) through (i). (Ed. Code, §§ 56320 & 56322.)

A district assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The 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 district assessment must be:

1) selected and administered so as not to be discriminatory on a racial or cultural basis;
2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally;
3) used for purposes for which the assessments are valid and reliable;
4) administered by trained and knowledgeable personnel; and
5) administered in accordance with any instructions provided by the producer of such assessments.

(20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

District assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area". (Ed. Code, §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all the child's needs for special education and related services whether commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

As part of an initial evaluation, the IEP team, and other qualified professionals, as appropriate, must ensure that assessments and evaluation materials used to assess a child for eligibility include current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers. (34 C.F.R. § 300.305(ii) and (iii).) Specifically, observations of the interaction between students and teachers are critical to a determination as to what a student's educational needs are, how they perform in the classroom, and what are their interactions between fellow students and teachers. (See, for example, 34 C.F.R. § 300.310.) A determination as to whether a child is eligible considers information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, as well as social or cultural background and adaptive behavior. (34 C.F.R. § 300.306(i).)

The IDEA does not necessarily require a private evaluator to follow the criteria applicable to district assessments. However, the criteria are foundationally instructive when considering the credibility of Student's selected expert, the testimony of district personnel familiar with Student, and whether Student met her burden of proof related to special education eligibility.

Here, Mother consented to assessments by Lompoc Unified a few days after filing the underlying complaint, but Student was not available for assessment. Therefore, Lompoc Unified did not have an opportunity to determine Student's initial eligibility under the IDEA and state law before November 19, 2019.

DR. RICHARD KATZ'S MEDICAL EVALUATION WAS NOT PERSUASIVE

Student offered evidence at the four-day hearing including expert testimony and an expert's report attempting to establish that Student was eligible for special education during the statutory period. Student's arguments and evidence at the administrative hearing focused only on the eligibility category of emotional disturbance based on a May 2019 private medical evaluation performed by Dr. Richard Katz, and only as to the time period before the complaint was filed on June 13, 2019.

Dr. Katz was a private clinical psychologist and associate professor of clinical psychology at California State University at Northridge. Mother retained Dr. Katz to perform a psychological assessment to provide diagnostic clarity and recommendations for eligibility and intervention.

Although Student argued on remand that Dr. Katz was a highly respected psychologist and university professor, Dr. Katz's educational background did not include any formal training, certification or work experience as a public school special education teacher or educational psychologist, thus impacting his credibility as to eligibility. Dr. Katz taught courses in varied aspects of psychology, including psychological testing administration techniques, to college students. He had no work experience performing multi-disciplinary psychoeducational evaluations for school districts.

Katz spent approximately 10 hours over three days in mid-May 2019 assessing Student in a private office in Thousand Oaks, California. Student was 15 years old and in her second year of ninth grade at that time. Student cooperated during the assessment. Dr. Katz interviewed Mother, who gave him verbal consent to contact school district staff.

Dr. Katz learned from Student's mother that Student's family was "homeless" and living in an undisclosed safe house at the time of Dr. Katz's assessment. Student became a runaway in December 2018 and did not want to return. Student sporadically attended school after December 2018. In April 2019 Student became a victim of sex trafficking. Student's father died in her presence when she was young. She was referred to counseling as a younger teenager after she witnessed her father's death but was not seeking private counseling in December 2018. Student's relationship with her younger siblings was not healthy.

Student admitted to Dr. Katz that Student had used a variety of drugs ranging from marijuana to methamphetamines. Based on a recent drug test, Student was reportedly free of any recent drug use during Dr. Katz's assessment.

Dr. Katz reviewed Student's cumulative school file from June 2008 through April 2014, including grade reports and disciplinary records dating back to middle school, as part of his assessment to reach his conclusions. After performing his assessment, Dr. Katz completed a written report dated July 2, 2019, and testified at the October 2019 hearing regarding his conclusions. However, Student never provided the report to anyone at Lompoc Unified, except to its attorney for purposes of Student's due process hearings against Lompoc Unified.

In his report, Dr. Katz made recommendations for an intensive, residential treatment setting with a strong trauma-focused therapy component, psychological and therapeutic supports, and a 12-step program to cope with Student's history of substance abuse. Significantly, Dr. Katz speculated that Student would "likely" qualify as a student with an eligibility classification as emotional disturbance. He included a list of accommodations and curriculum modifications, in a residential placement, that "could prove helpful."

Dr. Katz's opinions lacked credibility relating to Student's eligibility as a student with a disability under the IDEA. Dr. Katz's assessment tools did not focus on the relationship between his diagnoses and Student's educational needs. Dr. Katz's recommendation for a therapeutic residential placement was instead based largely on Student's homelessness, drug use, and the need for a safe place to live.

Dr. Katz did not administer multiple comprehensive educationally related assessment tools in such a way as to obtain reliable information about Student's educational needs, which rendered his assessment incomplete. Dr. Katz's medical diagnoses and opinions regarding Student were based upon several non-educationally related assessment tools. Relying on the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, called DSM-5, Dr. Katz concluded that, at the time of his evaluation, Student fell within medical diagnostic categories including post-traumatic stress disorder, attenuated psychosis disorder, cannabis and methamphetamine use disorder, and "encounter for mental health services for a victim of non-parental child sexual abuse".

Dr. Katz administered the Wechsler Intelligence Scale for Children to examine Student's cognitive strengths and weaknesses. Student's intellectual functioning was

average. Dr. Katz administered the Woodcock Johnson Tests of Achievement, 4th Edition to assess current levels of academic functioning. Student's composite scores were in the average range, although Student struggled with math. Dr. Katz generally opined, based only on his review of records, that Student's grades deteriorated as her psychological symptoms worsened.

Dr. Katz administered the Behavior Assessment System for Children, Third Edition, to Mother and Student, to evaluate Student's social emotional wellbeing. However, Dr. Katz reported he did not seek a response to the Behavior Assessment rating scale from any teachers, counselors or other staff at Lompoc Unified, because Student "was not in school." As a result, Dr. Katz had no input from school personnel regarding Student's educationally related behavioral functioning. This rendered his assessment fatally defective.

Dr. Katz's assessment was unreliable because it did not include any input from Student's teachers, counselors or other school staff who knew Student. Dr. Katz did not reach out to any staff at Lompoc Unified as part of his assessment to discuss Student's educational needs as they may have related to her behavior. Dr. Katz opined at hearing that, although talking to school staff was generally important, he did not do so in Student's case. He offered the invalid reason that he did not believe he would find any useful information because Student had not recently attended school. However, his assumptions were incorrect. Testimony at hearing established that Student came to school and interacted with school staff at least a few times in the spring of 2019. As discussed below, because Dr. Katz failed to talk to or seek input from Student's counselor, the vice-principal and or one or two teachers during his assessment, he failed to obtain whatever insight they could have provided as to Student's historic behaviors at school of missing classes, fighting at school, and the ability to learn.

Dr. Katz did not observe Student in the school setting, which was particularly concerning. Based on Dr. Katz's review of school records, he knew that Student used marijuana at school, engaged in fights with peers, had multiple suspensions for truancies, and had failing grades. He had no current information based upon his own observations of Student's interactions with other students or staff at school, including in the classroom.

The DSM-5, relied upon by Dr. Katz, is not the standard used to determine whether a child is eligible for special education under the eligibility category of emotional disturbance under the IDEA. (Ed. Code, § 56320.) California Code of Regulations, title 5, section 3030 subdivision (b) identifies 13 separate categories of eligibility for special education. Section 3030 subdivision (b)(4) defines emotional disturbance for the purpose of eligibility for special education. Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

A. An inability to learn that cannot be explained by intellectual, sensory, or health factors.
B. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
C. Inappropriate types of behavior or feelings under normal circumstances.
D. A general pervasive mood of unhappiness or depression.
E. A tendency to develop physical symptoms or fears associated with personal or school problems.

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

(Cal. Code Regs. tit. 5, § 3030 subd. (b)(4) (2014).)

Inappropriate behavior under normal circumstances is behavior that is atypical for the student and for which no observable reason exists. As an example, running away from a stressful situation, or taking drugs or using alcohol under normal conditions, is not qualifying inappropriate behavior. *Letter to Anonymous*, (OSEP 1989) 213 IDELR 247.) "The essential element appears to be a student's inability to control its behavior (*citation omitted*) and conform its behavior to socially acceptable norms." (*Ibid.*)

Dr. Katz loosely applied his diagnostic impressions to several eligibility categories under the IDEA, which led him to the conclusion that Student would "likely" be eligible only under the IDEA category of emotional disturbance. Dr. Katz opined at hearing that, in May 2019, Student presented with a significant tendency to develop physical symptoms associated with personal problems. Dr. Katz also reported Student presented with a general pervasive mood of unhappiness or depression.

Notably, Dr. Katz declined to opine, because he could not say with certainty at hearing, that Student had exhibited any of the IDEA criteria for emotional disturbance over "a long period of time" and "to a marked degree that adversely affected her performance." Dr. Katz did not know if Student's depression began before May 2019 or when or how Student manifested depression at school. Dr. Katz did not know whether Student showed a "tendency to develop physical symptoms or fears associated with personal or school problems" before May 2019. By Dr. Katz's own admissions, Student did not meet the long-term or marked degree criteria for eligibility as emotionally

disturbed at the time Dr. Katz assessed Student in May 2019 and as of Dr. Katz's testimony in October 2019. Nevertheless, Dr. Katz unpersuasively concluded in his report that Student "clearly meets [IDEA] eligibility criteria for an emotional disturbance."

Significantly, Dr. Katz did not observe Student between June 15, 2019, and his testimony at the administrative hearing in October 2019. Dr. Katz had no updated relevant data upon which he could rely to credibly conclude Student was eligible after June 13, 2019. The only new data he had was Mother's June 2019 responses to the Behavioral Assessment, which Mother belatedly provided to Dr. Katz delaying the completion of his report. Mother's responses were insufficient to rescue the inadequacy of Dr. Katz's report and his conclusions. A single measure from a parent never provided to a school district is insufficient to establish IDEA eligibility. (20 U.S.C. § 1414(a)(1), (b)(2)-(3); see also *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1109.). In fact, Dr. Katz concluded Mother's scores were "not a cause for alarm."

Student failed to prove through Dr. Katz's medical evaluation or testimony that Student exhibited, at any time before November 19, 2019, one or more of the foundational characteristics of emotional disturbance, over a long period of time and to a marked degree, that adversely affected her educational performance. Dr. Katz's conclusions relating to the nature and reasons for Student's historic behaviors at school were not convincing because he failed to conduct an appropriate evaluation to determine Student's educational needs.

TESTIMONY FROM LOMPOC STAFF DID NOT PROVE STUDENT MET ELIGIBILITY CRITERIA

None of the other evidence relied on by Student was enough to prove that Student was eligible for special education as of November 19, 2019. The testimony at hearing by school staff, including Student's counselor, the school vice-principal, and the school security officer, was credible and important because of their regular interactions with and personal knowledge of Student at school. Multiple witnesses credibly testified that, until December 2018, when Student became a runaway, Student's attendance and performance in class and her behavior and personal relationships at school did not raise a concern among school staff that Student suffered from any qualified disability under the IDEA or that Student required special education related placement, services and supports.

For example, in the fall of the 2017-2018 school year, Student was assigned to Administrative Assistant Principal Celeste Pico's caseload at Lompoc High School when she began ninth grade. Pico worked for 20 years in education, both as a teacher and administrator. Her duties as an administrative assistant principal included oversight of ninth grade discipline and attendance. She served as a member of behavior intervention teams. Pico provided oversight of the counseling department. She was the direct line of contact for school counselors when they had concerns about students. Pico was part of the staff team that referred students for special education assessments. She attended IEP team meetings, including those for students with the disability of emotional disturbance. Pico's testimony was confident and credible based upon her experience and knowledge of Student. Her testimony was given significant weight at

hearing based upon Pico's training and experience in education and numerous interactions with Student.

Dr. Katz never spoke to Pico, who was familiar with Student and frequently interacted with Student at school during both school years at issue. Pico and Student talked almost daily at school. Student was cheerful when she engaged with Pico. Student told Pico during the 2017-2018 school year and first semester of 2018-2019 school year she felt safe at school but did not like going to class. Pico never saw signs of distress or depression from Student. Although Student was guarded, she did not appear to Pico as pervasively unhappy over a long period of time.

Pico opined at hearing that Student wanted to succeed. When Student was in school, she was sociable and had friends. Pico also opined at hearing, based upon what Pico knew about Student and reports from Student's teachers, that Student was academically capable of performing and had access to resources to help her learn, if she chose to use those resources. Pico frequently observed Student on campus outside of the classrooms during classroom time. She occasionally escorted Student to the classroom. Student went willingly but did not always stay in the classroom. Pico occasionally observed Student in the classroom during instruction. During those observations, Pico observed Student perform, absorb information and demonstrate learning.

Student began engaging in fights with her peers at Lompoc High during her first semester of ninth grade in 2017. She was frequently truant. She was referred to detention several times and signed conduct and "hands off" contracts. Student was retained in ninth grade because of lack of enough credits to matriculate to 10th grade. Students behavior continued into the 2018-2019 school year. Between November 14

and December 13, 2018, Student had four behavior reports, involving failure to dress for gym and excessive tardiness. Student served in-school detention or suspension for these incidents. Student also had suspensions in December 2018, for tardiness and smoking marijuana, before she became a runaway.

Pico opined that, based on her knowledge of Student and conversations with her, Student made planned choices resulting in truancy and fighting. Pico also opined, based on reports from Student's brother, Student's choices were influenced in part by her environment outside of school, including in the home. Pico also opined that Student's physical violence at school was not abnormal because in Pico's experience fighting among teenagers at Lompoc High School was not unusual. Pico's testimony was consistent with other Lompoc Unified staff members who knew Student.

Dr. Katz also never spoke to school counselor Kala Huyck. Huyck was assigned to Student for the 2017-2018 and 2018-2019 school years. She testified at hearing and had knowledge about Student's educationally based behavior. Huyck was lead counselor at Lompoc High School in the eight years before the hearing. Her job duties included oversight of the counseling department. Huyck's work focused on her students' academic, personal, social, and career goals. She was familiar with Student based on four or five meetings with her during the 2017-2018 and 2018-2019 school years. Huyck's testimony at hearing was credible and persuasive based upon Huyck's background and experience as a counselor, and knowledge of and interactions with Student.

Student first came to Huyck's attention because Student's grades were dropping. Student was not participating in a program that was designed to help her post-high school planning. Student ended the 2017-2018 school year with D's and F's. She ended

the first semester of the 2018-2019 school year with all F's. Student informed Huyck in the spring of the 2018-2019 school year she did not want to be at school and that she did not feel any connection with school. When Student occasionally returned to school in spring 2019, Huyck counseled Student to obtain outside counseling services from Santa Barbara County Department of Behavior Wellness, and Coast Valley Substance Abuse Treatment Center. Student did not obtain the recommended counseling services.

Student did not demonstrate any atypical behaviors when she was with Huyck, other than those associated with drug and alcohol use. Student's grade deficiencies were the result of her poor attendance at school. Huyck opined at hearing that Student needed outside counseling because of her drug use, but not for educational reasons.

School Resource Officer Anye Mache Agbodike corroborated the testimony of school personnel regarding Student's fighting and truancy at school. She was employed by the Lompoc Police Department patrol division, which contracted with Lompoc Unified to provide school resource officers. Officer Agbodike was assigned to Lompoc High School. She knew Student from seeing her on campus daily and interacting with her after fights at school. Officer Agbodike was also informed when Student missed class and was aware that Student was disciplined for marijuana possession. Officer Agbodike credibly opined, based on her experience as a school resource officer and consistent with Pico and Huyck, that high school students at Lompoc Unified commonly did not want to go to class, and fights among students on that campus were not unusual.

According to Officer Agbodike, Student was a "known wanderer" at school, meaning she was often seen on campus outside of the classroom during class time. During one conversation, Student reported to Officer Agbodike that she ran away from

home because of conflict at home. During another conversation, Student reported she was still "processing" her father's passing. When Officer Agbodike encountered Student out of class, Student reported to Officer Agbodike that Student had difficulty concentrating in class, did not like being at school and did not like being around other students. Student did not sound paranoid to Officer Agbodike when they communicated.

School psychologist Dr. Michael Shaf testified at hearing. Dr. Shaf received Dr. Katz's report from Lompoc Unified's attorney in July 2019, in preparation for an earlier due process hearing between Student and Lompoc Unified. Dr. Shaf never met Student but became familiar with her school records and history beginning in April 2019. Dr. Shaf, based upon his knowledge and work experience as a school psychologist, credibly found deficiencies in and disagreed with some of Dr. Katz's reported conclusions as they related to his conclusion of Student's likely eligibility for special education under the category of emotional disturbance.

Dr. Shaf opined that lack of feedback from teachers in Dr. Katz's report was significant because, when considering eligibility, one must consider the educational impact of a medically acute or chronic disability. Dr. Shaf declined to opine at hearing on eligibility, based only upon school records and Dr. Katz's report, without having the benefit of a school psychologist meeting Student and thoroughly assessing her, and an IEP team considering all test results as they related to an educationally related disability qualifying Student for eligibility under the IDEA.

Dr. Katz never contacted any of Student's teachers to acquire their feedback relating to Student's educational performance. On March 27, 2019, a meeting of the Student Absence Review Board, known as the SARB board, was held because of

Student's extensive absences. Dr. Katz reviewed the SARB report as part of Student's records. Two of Student's teachers reported to the SARB board that Student usually reported to class late and only performed superficially. One teacher reported that Student could pass if she attended class on time and regularly.

NO EDUCATIONALLY BASED ASSESSMENTS WERE AVAILABLE

Student offered no evidence that anyone at any relevant time conducted any educationally based assessments to supplement Dr. Katz's medical report or support his conclusions. If Mother wanted Student to receive special education under the IDEA, she was obliged to permit Lompoc Unified to administer testing. (*Gregory K. v. Longview School Dist.*, (9th Cir. 1987) 811 F.2d 1307, 1315.)

Student's attorney requested assessments in late March 2019. Lompoc Unified made three separate efforts to obtain parental consent for assessments, through mid-May 2019, during the same time Mother took Student to Dr. Katz for a private assessment. Mother did not respond to Lompoc Unified's request for consent to assess Student until months later, on June 20, 2019, and only after Student filed an earlier request for due process hearing against Lompoc Unified in late April 2019 alleging failure to assess.

THE TOTALITY OF STUDENT'S EVIDENCE WAS INSUFFICIENT TO PROVE ELIGIBILITY

Student was a victim of a tragic, dangerous and unfortunate lifestyle in 2019. As unfortunate and tragic as Student's personal circumstances were, Student had the burden of proving that she was eligible for a special education placement by meeting the criteria of one or more of the 13 eligibility categories California Code Regs. title 5,

§ 3030 subd. (b). To the extent the Remand Order requires the ALJ to decide eligibility extending beyond the end of the statutory period through November 19, 2019, this Decision on Remand finds Student did not meet her burden of proof.

Student did not establish eligibility based upon emotional disturbance through Dr. Katz's flawed report relying on § 3030 subdivision (b)(4)(F) and diagnosing her with attenuated psychosis disorder. Student also did not establish, for example, that Student's personal issues, drug use, school history of fighting, and indifference about receiving an education met any of the criteria for any of the 13 categories of educationally related disabilities.

Student did not prove eligibility under emotional disturbance based upon school records reporting historic behaviors or selected anecdotal testimony from school staff. Student did not prove her reported behaviors met, "over a long period of time and to a marked degree that adversely affects Student's educational performance," any one or combination of the six criteria for educationally related emotional disturbance under California Code Regs. title 5, § 3030 subd. (b)(4).

The underlying administrative record was void of consistent and credible persuasive evidence supporting special education eligibility during the two years before Student filed her complaint with OAH, as of the time of hearing, at the time the record closed in late October 2019, and as of November 19, 2019 when the OAH Decision issued.

STUDENT WAS NOT ELIGIBLE FOR SPECIAL EDUCATION AS OF NOVEMBER 19, 2019

Student was not eligible for special education as of November 19, 2019. Student did not establish by a preponderance of evidence that Student met the eligibility criteria under any one or more of the 13 categories for special education eligibility specified in California Code of Regulations, title 5, section 3030, subdivision (b) as of November 19, 2019.

REMAND ISSUE 2: IF STUDENT ESTABLISHED SHE HAD AN IDEA-QUALIFYING DISABILITY AS OF NOVEMBER 19, 2019, DOES STUDENT REQUIRE RESIDENTIAL PLACEMENT TO MEET HER EDUCATIONAL NEEDS?

Here, Student did not establish the threshold issue defined by the District Court, specifically that Student had "an IDEA qualifying disability" as of November 19, 2019. While the facts in this case are tragic, a district's responsibility under the IDEA is to remedy the learning-related symptoms of a disability, not to treat other, non-learning related symptoms. (*Forest Grove School District v. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-39 [no abuse of discretion in denying parent reimbursement where district court found parent sought residential placement for student's drug abuse and behavior problems.].)

An analysis of whether a residential placement is required must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d

635, 643.) If "the placement is a response to medical, social, or emotional problems ... quite apart from the learning process," then it cannot be considered necessary under the IDEA. (*Ibid.*, accord *Ashland School Dist. v. Parents of Student R.J.* (9th Cir. 2009) 588 F.3d 1004, 1009.)

Because Student was not eligible for special education under the IDEA as of November 19, 2019, Student did not prove Student required a residential placement under the IDEA to meet her educational needs. Student did not meet her threshold burden of proof on Remand Issue 2.

CONCLUSIONS AND PREVAILING PARTY

Remand Issue 1: Student did not establish that Student had an IDEA-qualifying disability as of November 19, 2019. Lompoc Unified prevailed on Remand Issue 1.

Remand Issue 2: Because Student did not prove that Student had an IDEA-qualifying disability as of November 19, 2019, Student did not require a residential placement under the IDEA to meet her educational needs. Lompoc Unified prevailed on Remand Issue 2.

ORDER

All relief sought by Student in OAH Case Number 2019060655, through November 19, 2019, pursuant to the Order on remand, is denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Adrienne L. Krikorian

Administrative Law Judge

Office of Administrative Hearings