

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MOTHER and FATHER, ON BEHALF OF
STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2007070438

DECISION

Administrative Law Judge (ALJ) Darrell L. Lepkowsky, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter at the OAH offices in Laguna Hills, California on April 14, 15, 16, and 17, 2008. Kathleen M. Loyer, Esq., represented Student and her Parents (herein Mother and Father or, collectively, Parents). Either Student's Mother or Father, or both, attended all days of hearing. Educational consultant G. Robert Roice represented the Capistrano Unified School District (District). District Legal Specialist Kim Gaither attended all days of hearing.

Student filed her complaint on July 16, 2007, naming as respondents the District and the Orange County Health Care Agency (OCHCA). On September 4, 2007, Student filed her first motion to continue the proceedings; OAH granted her motion the day Student filed it. On December 5, 2007, OAH granted Student's request to dismiss OCHCA as a party. After granting several more continuance requests, OAH set the hearing to commence on April 14, 2008. The hearing began as scheduled on April 14, 2008. The ALJ received oral and documentary evidence during the hearing. At the hearing, the ALJ granted the parties' request to file written closing arguments. Upon

receipt of written closing arguments on May 16, 2008, the matter was submitted and the record was closed.¹

PROCEDURAL ISSUES

FAILURE TO RECORD PORTIONS OF THE PROCEEDINGS

On Tuesday, April 15, 2008, the ALJ realized that a portion of the hearing had not recorded. After reviewing the official recording, the ALJ informed the parties that missing from the record was approximately one and one-half hours of testimony, encompassing the full testimony of witnesses Romy Shafkind, who testified by telephone, and Leslie Schuda, who testified in person. Kathleen Loyer, counsel for Student, had indicated at the beginning of the hearing that she would also digitally be recording the hearing. Ms. Loyer offered to provide to the ALJ and to the District's representative copies of her recordings of Ms. Schuda's and Ms. Shafkind's testimony. The ALJ therefore ordered that Ms. Loyer's recording be made a part of the official record of the hearing unless the District filed an objection to the recordings after having had an opportunity to review them. Ms. Loyer provided copies of her recordings to OAH on May 2, 2008. The District has not filed any objections to having these recordings adopted as the official record. The ALJ has arranged to have the recordings uploaded as part of the official hearing record. The ALJ therefore finds that Ms. Loyer's recordings of the testimony of Ms. Shafkind and Ms. are the official record of that testimony.

¹ In her closing brief, Student references additional reimbursement documentation that her counsel intended to submit separately. OAH received the additional information on May 20, 2008. The documentation appears to be clearer copies of information already included in Student's Exhibit H and I. The additional documentation is accepted into the record as a replacement to exhibits H and I.

Additionally, for clarification of the record, the ALJ has marked the recordings as Petitioner's Exhibit L.

MATTER RAISED FOR THE FIRST TIME IN STUDENT'S CLOSING BRIEF

In her closing brief, Student raises for the first time the contention that, as a proposed resolution of this case, the ALJ find that Student qualifies for special education under the eligibility category of emotional disturbance (ED), in addition to the category of specific learning disability. Student did not allege in her complaint, filed July 16, 2007, that an issue for hearing is whether she meets the criteria for ED, and did not propose it as a resolution to this case. The prehearing conference order, issued by OAH on April 7, 2008, does not reference ED as an issue for decision by the ALJ, or as a proposed resolution. Additionally, Student did not present evidence at hearing, through either documents or testimony, that specifically address the issue of Student's eligibility for special education under the category of ED. Finally, Student's brief does not contain any argument specifically addressing her eligibility under ED.

Generally, a party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Unlike a request for compensatory education or reimbursement, a finding of eligibility is not an equitable remedy that the ALJ can order at her discretion. Rather, a request for an eligibility finding can only be made based upon sufficient evidence in the record. In this case, the District was not under notice that ED was an issue for decision, and therefore did not

address the issue at hearing or argue it in its closing brief. The ALJ therefore declines to make any findings as to Student's eligibility under the category of ED.²

ISSUES³

1. Should the applicable statute of limitations be waived for the period of September 1997 through June 2005 because the District failed to properly advise Student's Parents of their rights under the Individuals with Disabilities Education Act (IDEA)?

2. Assuming the statute of limitations is waived, did the District deny Student a free appropriate public education (FAPE) by failing to assess her and find her eligible for special education services from September 1997 through June 2005?

3. Assuming the statute of limitations is waived, did the District properly fail to consider the May 2000 evaluation⁴ report from Dr. Michael Elliott, which resulted in

² The District did present as evidence an assessment of Student conducted by school psychologist Dr. Wally Ernsdorf, dated November 27, 2006. Based upon his testing of her, Dr. Ernsdorf concluded that Student did not meet the educational criteria for an emotionally disturbed student. This is the only evidence in the record regarding the issue of Student's eligibility for under the category of ED. Student did not present any documentary or testimonial evidence that rebutted Dr. Ernsdorf's conclusion that Student does not qualify for ED.

³ The ALJ has restated and, in some cases, combined, the issues from the due process complaint and prehearing conference order for purposes of organizing this decision.

⁴ The District and other assessors sometimes refer to assessments as "evaluations." The terms "assessment" and "evaluation" are synonyms. Federal statutes

an infringement of the right of Student's Parents to participate fully in the individualized education program (IEP) process?

4. Did the IEP dated June 15, 2005, deny Student a free appropriate public education (FAPE) because it failed to:

- (a) establish Student's present levels of performance;
- (b) contain measurable goals and objectives;
- (c) address all of Student's unique needs;
- (d) provide Student with appropriate services;
- (e) include an appropriate individualized transition plan (ITP)?

5. Did the IEPS dated January 2006, April 2006, and January 2007, deny Student a FAPE because they failed to:

- (a) address all of Student's unique needs;
- (b) offer Student appropriate placement, accommodations, and services;
- (c) establish Student's present levels of performance;
- (d) contain measurable goals and objectives;
- (e) include an appropriate ITP?

6. Did the District deny Student a FAPE by failing to provide a timely referral to the Orange County Health Care Agency for mental health services in January 2006 through March 2006?

and regulations generally use the term evaluation. California statutes and regulations generally use the term assessment. This decision will use the terms interchangeably, in accord with the terminology used in the assessment or evaluation being addressed.

REQUESTED REMEDIES

In addition to declaratory relief, Student requests reimbursement to her Parents of monies they paid for Student's private tutoring, counseling services, management of medication, and private assessments. Additionally, Student requests that the District reimburse her Parents for their out-of-pocket costs for her residential placements at Youth Care and Pine Ridge Academy in the state of Utah, including transportation costs for Student and her Parents, and hotel stays for her Parents when they visited Student in Utah. Finally, Student requests that the ALJ order the District to reimburse her Parents for the costs of her attendance at the New Vista School, Student's present private school placement.

CONTENTIONS OF THE PARTIES

This case arises from several disagreements between the parties as to when the District should have found Student eligible for special education and related services and, once it did find her eligible, whether the District offered Student a FAPE. Student contends that the District was aware that she required special education assistance in order to obtain educational benefit from her schooling as early as 1997, when Student was in first grade, but that the District failed to assess Student at that time, leaving Student's Parents with the responsibility of obtaining assistance for her through private tutors. Student asserts that between 1997 and 2000, the District did not provide her Parents with any notice of their rights to contest the District's failure to assess her and failure to find her eligible for special education, and either ignored or rebuffed all their requests for assistance for Student. Student therefore avers that the District's actions fall under an exception to the statute of limitations, and alleges that the statute must therefore be waived. Student also contends that the District waived its right to raise the

statute of limitations as a defense because it did not move to dismiss her pre-June 2005 claims.

Student contends that based upon the District's failure to assess her, her Parents obtained an independent assessment from a private psychologist, who found that Student suffered from attention deficit hyperactivity disorder (ADHD) and a possible unspecified learning disorder, and who made recommendations to address Student's deficits. Student alleges that when the District finally held an IEP meeting for her in November 2000, it failed properly to consider the recommendations of Student's private assessor and improperly found that Student did not qualify for special education.

Student further contends that the District should have assessed her and found her eligible for special education services between 1997 and June 2005, when the District ultimately found that Student was eligible to receive services under the category of specific learning disability, as it related to Student's math processing disorder. Student asserts that the IEPs the District developed for her from June 2005 to January 2007, all failed to offer her a FAPE because they failed to address her unique needs, particularly her social/emotional and mental health needs, and procedurally failed to include all necessary components of valid IEPs. Additionally, Student alleges that the District denied her a FAPE because it did not timely submit a mental health referral for her to OCHCA. Student contends that because of the District's failures to address all her needs, her Parents were forced to place Student in residential treatment centers in Utah, where her needs could be met. Student contends that the District is obligated to reimburse her Parents for the costs of Student's placement in the private residential treatment centers in the state of Utah, from approximately June 2006, through January 2007. Student also asserts that the District is obligated to reimburse her Parents for the costs of her non-residential private school placement from January 2007, to the present.

The District disputes Student's contention that it failed to advise Student's Parents of their rights at any time at issue. The District further contends that it properly evaluated Student for eligibility for special education, and properly found that while Student's deficits did not require special education intervention at the time, Student qualified for a Section 504 plan.⁵ The District denies that it failed to consider the outside assessment obtained by Student's Parents. The District maintains that the Section 504 plan adequately addressed Student's needs, as she successfully passed all her classes and progressed from grade to grade.

The District additionally asserts that its subsequent assessments of Student at the end of her eighth grade were proper, and that the finding that Student minimally qualified for special education services was also proper. The District contends that all the IEPs it developed for Student procedurally and substantively offered her a FAPE. It contends that it offered placements and services that the District individually designed to meet Student's unique educational needs. Therefore, the District asserts that neither Student nor her Parents are entitled to any remedy.

Finally, the District maintains that the decision of Student's Parents to place her in out-of-state residential treatment centers was based on Students' escalating substance abuse and her anger toward her mother. The District contends that there was no educational basis to support the out-of-state residential placement. It also asserts that reimbursement is not appropriate because Parents refused to permit it to assess Student before placing her out-of-state and because Parents failed to investigate and consider

⁵ Section 504 plans are authorized by the federal Rehabilitation Act. (29 U.S.C. § 794 (1973).) Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more of life activities, or if they have a record of or are regarded as having such impairment. (Ibid.; 34 C.F.R. § 104.3(j) (2004).)

other placements. Therefore, Student's Parents are not entitled to any reimbursement for the expenses associated with Student's placement. The District also contends that Parents are not entitled to reimbursement for costs associated with Student's current private placement.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 17-year-old female who was born on January 27, 1991. At all relevant times Student and her Parents were residents of the District. The parties do not dispute that, at a minimum, Student presently qualifies for special education and related services based upon a specific learning disability. Student is attending the New Vista School, a private school where her Parents enrolled her, that has not been certified by the state of California.

1997 THROUGH 2000

2. Student enrolled at the District's Bathgate Elementary School in 1997 for first grade after having attended a private kindergarten. Mother credibly testified that Student had some difficulties at school with reading, writing, and remaining focused. Student's first grade teacher, Ms. Henschel,⁶ held a goal setting conference with Mother and Student, and developed goals for Student to assist with some of the areas in which Student demonstrated weaknesses. Ms. Henschel's goals were for Student to develop confidence, to strengthen her use of sight word vocabulary, to use correct capitalization and punctuation, and to strengthen her math skills. Student's Parents also hired Ms. Henschel to tutor Student after school. There is no evidence that Student's Parents

⁶ Ms. Henschel did not testify at the hearing.

requested the District to assess Student during first grade, nor did Ms. Henchel refer Student for assessment. However, the District provided Student with a reading intervention program at school during the second semester of first grade. There is no evidence that Student's Parents were aware of any of their rights under the IDEA at this time.

3. The District was aware that Student's weaknesses in reading continued during second grade. The District continued providing Student with a reading intervention program twice a week during second grade. Parents also hired Student's second grade teacher, Ms. Jacques,⁷ to tutor Student after school. In January of 1999, Ms. Jacques referred Student for a child study screening due to Student's weaknesses in word attack, reading comprehension, written content, grammar, and spelling. Ms. Jacques noted on the form that Student had difficulty understanding directions, remembering material, copying information from the board, and completing work. Ms. Jacques further noted that Student had a short attention span and was easily distracted, although Student did not demonstrate impulsivity.

4. At the Student Study Team⁸ meeting (SST), the team, composed of Student's Parents, her teacher, and her reading intervention teacher, noted that Student's listening skills were improving, that she was excited about reading, and that

⁷ Neither Ms. Jacques nor the reading intervention teacher testified at the hearing.

⁸ The SST is composed of a child's parent(s), teacher, and perhaps a school administrator. The team reviews the progress of students who may be having academic difficulties in school to develop strategies to assist the student and to determine if the team should refer the child for assessments or for more formal intervention, such as to an IEP team.

Student and her Parents would read to each other to help Student improve her reading skills. Neither Ms. Jacques nor anyone else on the District SST referred Student for assessments. However, Student's Parents also informed the District (as noted by Ms. Jacques on Student's second grade cum card) that they did not want Student tested that year. In March 1999, the District created an intervention plan for Student to address concerns about her weaknesses in reading and written expression. In addition to recommending that Student continue to receive tutoring help and testing modifications, the District recommended that Student attend summer school. Mother credibly testified that Parents did not receive any notification of their rights under the IDEA during Student's second grade year.

5. Student continued to struggle with reading in third grade. Ms. Jarvits,⁹ Student's third grade teacher, filled out a SST fall watch report for Student in October 1999. Ms. Jarvits noted that Student was below average in comprehension, but average in writing skill and word attack as well as in math. She noted that although Student was slow to acquire new math concepts, she tried hard and eventually "catches on." Ms. Jarvits further noted Student participated in class, had friends at school, and continued with her District reading intervention program. Ms. Jarvits did not recommend that Student be referred to a SST during that year. On Student's parent/teacher conference summary, dated October 27, 1999, Ms. Jarvits noted that Student was working slightly below average in reading and math, that her spelling needed improvement, but that Student's language skills were average. Ms. Jarvits recommended that Student's reading intervention continue. She also noted Student's statewide-standardized test scores. On the STAR-9, Student obtained a score of 52 in reading, 51 in math, 82 in language, and 39 in spelling. On the fall 1999 CORE Level Test, Student scored in the 40th percentile in

⁹ Ms. Jarvits did not testify at the hearing.

reading, in the 42nd percentile in math, and in the 57th percentile in language. Student's CORE testing from the previous spring indicated that she had scored in the 50th percentile in reading, in the 29th percentile in math, and in the 53rd percentile in language. The scores indicate that Student's math comprehension had increased 13 percentile points. Ms. Jarvits did not recommend that Student be referred for assessment.

6. Concerned about what she identified as Student's struggles with reading and writing, Mother wrote to the District on November 12, 1999, explaining that she believed that Student might have a learning disability. Mother requested the District to review Student's testing and her school progress and then let Mother know if the District believed that it should assess Student for a potential learning disability. The District did not review Student's testing at this time and did not refer Student for an assessment, nor did the District give Student's Parents a copy of any procedural safeguards or otherwise inform them of their rights under the IDEA at this time.

7. The District held a SST meeting for Student on January 10, 2000. The team noted that Student continued to have difficulty reading and with spelling. The team recommended that interventions with Student continue. Specifically, the team recommended that Student's teacher continue to work with her on spelling in a one-on-one setting, that Student continue with small group work, that she use a dictionary, a word bank, and engage in making word activities, and that she continue with her twice-a-week reading intervention. The team noted that Student's Parents requested that Student be tested based upon her other test scores. However, the team disagreed and indicated that it felt testing was not necessary at that time; the team therefore did not refer Student for special education assessment. Student's Parents informed the team that they intended to pursue private assessment.

8. Mother wrote to the District shortly after the January 10, 2000 SST meeting reiterating her intent to obtain a private assessment for Student. Mother again requested assessment, asked what her rights were regarding requesting assessment for her daughter, and whether the District would reimburse Parents if they obtained an independent assessment. Mother did note that she saw improvement in Student's progress in school, but that she still believed that Student needed more intervention that Parents would pursue outside of the school level.

9. Bathgate Principal Pamela Watkins responded to Mother's letter on January 21, 2000. In her letter, and in her testimony at hearing, Ms. Watkins explained that the District believed Student was not a candidate for a referral for assessment in January 2000, because her CORE testing scores indicated that she was performing either at average or slightly below average in reading, math, and language (given that the 50th percentile was average). Therefore, the District declined to make the referral. Ms. Watkins did not send Student's Parents a copy of their rights in her letter declining to refer Student for assessment. At a March 2000 conference with Ms. Jarvits, Mother again informed the District that Student's Parents intended to obtain a private assessment for Student.

ASSESSMENT BY DR. ELLIOTT AND NOVEMBER 9, 2000 IEP TEAM MEETING

10. Student's Parents contracted with Dr. Michael Elliott, a licensed psychologist, to assess Student in May 2000. Dr. Elliott did not testify at the hearing; however, his report was admitted into evidence. Dr. Elliott administered the following tests to Student: the Wechsler Intelligence Scale for Children – III (WISC-III); the Wechsler Individual Achievement Test (WIAT); the Woodcock – Johnson, Revised (WJ-R); the Stroop Color and Word Test; the Conners Continuous Performance Test (CPT); the Wisconsin Card Sorting Test; the Lindamood Auditory Conceptualization Test; the Comprehensive Test of Phonological Processing (CTOPP); and a clinical interview.

11. With regard to the WISC-III, Dr. Elliott noted that Student's nonverbal reasoning abilities were much better developed than were her verbal reasoning abilities. Dr. Elliott's testing found Student's verbal reasoning to be in the 42nd percentile while her non-verbal reasoning was in the 96th percentile. Dr. Elliott found that Student's ability to sustain attention, to concentrate, and to exert mental control were less developed than her non-verbal reasoning abilities. However, he also found that Student's ability to exert mental control was in the 61st percentile, well within the average range. Dr. Elliott's tests indicated that Student performed much better than average on the picture arrangement subtest of the WISC-III, indicating a strong visual ability, and a strong ability to infer cause and effect in social situations. Student's best scores, which demonstrated her strengths, were among the verbal reasoning tasks on the Information subtest of the WISC-III. Her lowest scores were in the Comprehension subtest.

12. The WIAT tested Student's then-current level of academic functioning. In reading, Student scored in the high average range, scoring in the 70th percentile. In mathematics, Student scored in the average range, scoring better than 66 percent of students her age. In language, Student scored in the above-average range, scoring better than 94 percent of students her age. In writing, Student scored in the average range, obtaining a score better than that of approximately 55 percent of the students her age. Dr. Elliott further noted that Student achieved her best scores in oral expression, scoring in the above average range, and her lowest in mathematical reasoning, scoring in the average range, as compared to children her age.

13. Dr. Elliott compared Student's scores on the WIAT to the levels of achievement predicted for a student with Student's general cognitive ability, as indicated by her full-scale intelligence quotient (IQ) score of 111 on the WISC-III. Significantly, Dr. Elliott found that Student's WIAT scores were "commensurate with her

overall level of cognitive ability in all areas tested. No significant differences were observed between [Student's] WIAT scores and the levels of achievement expected of her, based on her Full Scale IQ score of 111." In contrast, Dr. Elliott also noted that Student's full-scale IQ score might not be the best indicator of her general cognitive ability because of discrepancies in Student's performance IQ and achievement.

14. Dr. Elliott administered the CPT to Student to rule out the presence of ADD. He found that the results of the test strongly indicated that Student had a possible attention problem warranting further investigation.

15. Dr. Elliott's report explained that the Lindamood Auditory Conceptualization Test measures the necessary auditory conceptualization skills to develop sound/symbol relationships required for language processing. Dr. Elliott stated that the test results indicate that Student's phonemic awareness ability, which is the ability to perceive the identity, number, and order of sounds within words, was relatively normal. However, he cautioned that further observation of Student's processing abilities was also warranted due to her difficulty in solving some of the final test items.

16. Dr. Elliott explained in his report that the CTOPP assesses phonological awareness, memory, and rapid naming. In measures, Student's scores ranged from a low of the 16th percentile for memory for digits, to a high of the 95th percentile for blending words. In supplemental measures, Student's scores ranged from a low of the 50th percentile for rapid color naming and phoneme reversal, to a high of the 91st percentile for blending non-words and segmenting non-words. Student's composite scores ranged from a low of the 16th percentile for phonological memory, to a high of the 97th percentile for phonological awareness.

17. Dr. Elliott's conclusion was that he could not easily summarize Student's overall cognitive ability because her nonverbal reasoning abilities were much better developed than were her verbal reasoning abilities. Dr. Elliott found that Student had

superior nonverbal reasoning abilities, while her verbal reasoning was in the average range. He found that Student had strengths in the picture arrangement subtest of the WISC-III and in the oral expression portion of the WIAT. Dr. Elliott found that Student's overall achievement was in the high average range as measured by her total WIAT score. Additionally, Dr. Elliott found that Student's overall reading scores were average although she also exhibited above-average abilities in overall language skills on the WIAT. However, based on some of the errors Student made on some of the tasks, Dr. Elliott also indicated that Student might have a possible central language processing difficulty. Dr. Elliott remarked that the reading intervention Student had received might account for her high level of performance.

18. Dr. Elliott further found that the test results indicated Student had an attention deficit. She made many errors on the CPT, indicating impulsive responding and poor attention to task. Dr. Elliott noted that Student had difficulty sustaining attention, and that her test responses indicated possible difficulties in perceptual sensitivity, focusing attention, concentration, and mental control. Dr. Elliott's conclusion was that it was possible that Student's attention and concentration problems might have been affecting her reading and comprehension, as the mental energy she had to expend to concentrate caused Student to become fatigued and thus interfered with her ability to attend or respond to certain tasks.

19. Dr. Elliott recommended that Student have extended time on tasks, that she receive medication to treat her ADHD/ADD, and that she be retested after a course of medication to determine if there was still evidence of a language processing deficit once her attention problems were addressed. Dr. Elliott also recommended that Student's teachers make accommodations to her learning environment. He recommended that Student have a distraction-limited teaching environment, that she use a tape recorder to tape lectures on test material, that she be given a teacher outline

or notes for studying for tests, and that Student sit in the front of the class to minimize distraction. Dr. Elliott also recommended that Student consider working with a visualization and verbalization¹⁰ program to help strengthen her language processing skills and to enhance her reading comprehension.

20. Neither Dr. Elliott nor any other psychologist testified at hearing to elaborate on Dr. Elliott's findings and recommendations. However, from Dr. Elliott's report, it is clear that he did not find, at the time of his testing, that Student had a language processing disorder and did not find that Student had a specific learning disability. He did not find that Student had a discrepancy between ability and achievement and did not find or recommend that Student should be found eligible for special education. He did find that Student suffered from ADHD of the predominately-inattentive type, and made his recommendations accordingly.

21. The District held another SST meeting for Student on June 22, 2000. The team reviewed Dr. Elliott's report and Student's latest report card, which indicated that Student was at grade level in all areas. The team recommended that Student sit in the front of her classroom and that she be encouraged to ask questions. The team further noted that Student's Parents were considering having her receive medication to address

¹⁰ Verbalization and visualization is a learning technique developed by the Lindamood Bell institute. The program is supposed to help students who have weak concept imagery, language problems, following directions, etc. The students are taught how to create images through the structure of words. It is a gradual progression from a small unit to a whole page, or a gestalt. The ultimate purpose is for the students to implement strategies for themselves. Verbalization and visualization is also known colloquially as "V & V." (Student v. Coronado Unified School Dist. (May 28, 2008) OAH Case No. 2007120415, at fn. 4.)

her ADD. The team did not adopt any other recommendations made by Dr. Elliott. The team did not refer Student for a special education assessment. Although Student's Parents signed a consent form at the SST meeting permitting the District to exchange information with Dr. Elliott, the District never contacted him.

22. The District apparently reconsidered its decision not to assess Student. Although no one at hearing addressed the basis for the District's decision to reconsider, the District administered the WJ-R test to Student on November 3, 2000, when Student was in fourth grade. Student's scores ranged from a grade equivalent low of 1.8 in a reading vocabulary subtest, to a grade equivalent high of 7.0 in a writing sample subtest. No one at hearing testified regarding the implications of these test scores. It is unclear if the District administered any other assessments to Student at this time. The District staff member who administered the WJ-R to Student did not testify at hearing. Principal Watkins, who was at the subsequent IEP team meeting, did not have much recollection of Student, the events leading up to the subsequent IEP meeting, or the meeting itself. Given that seven and one-half years had passed since the meeting, the ALJ finds credible Ms. Watkins' inability to recall specifics about Student.

23. The District held the initial IEP team meeting for Student on November 9, 2000. The purpose of the meeting was to review the results of the District's assessment, review Dr. Elliott's independent assessment, and to make a determination as to whether Student was eligible for special education. Present at the meeting were Student's Mother and Father, Principal Watkins, a special education teacher, and a general education teacher. Ms. Watkins completed a review of their rights with Student's Parents. The District gave a copy of parental rights and the procedural safeguards for special education to Student's Parents at the meeting. Mother initialed on the IEP document that she had been informed of those rights, had received a copy of them, and understood them.

24. Based upon the results of the District's testing and Dr. Elliott's testing, neither of which indicated a significant discrepancy between Student's ability and achievement, and Student's grades, which indicated that she was at grade level in school, the District IEP team members found that Student was not eligible for special education services. The team specifically found that "a disorder in concentration exists but does not create a significant discrepancy between ability and achievement." Student's Parents did not file a due process request or in any other way contest at this time the District's findings that Student was not eligible to receive special education services.

FOURTH THROUGH SEVENTH GRADES

25. The District subsequently developed a Section 504 accommodation plan for Student on April 5, 2001, while Student was still in fourth grade, based upon her diagnosis of ADD.¹¹ The plan notes that by that time Student was receiving the medication Adderall to address her ADD. The accommodation plan included many of the recommendations made by Dr. Elliott. The accommodations consisted of having Student sit in the front of the classroom; closely monitoring her group work; the creation of study guides; the continued work at home on homework, using a more kinesthetic¹² approach; moving Student to a quiet area away from distractions and having an aide or "sub" help Student take tests. The plan was designed to address Student's attention and concentration deficits. Mother, Student's teacher, and an assistant principal attended this Section 504 meeting. The District representative

¹¹ Student's records use the terms attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) interchangeably.

¹² There was no explanation as to what a "kinesthetic approach" to homework is.

provided Mother with a copy of her rights. Mother also signed the plan, indicating her agreement with it. Mother credibly testified that Student's teachers did not implement many of the accommodations listed in the plan.

26. The District held another Section 504 meeting for Student on June 26, 2002, on the last day of Student's fifth grade year. Student would be transitioning to middle school the following year for sixth grade. Student continued taking the medication Adderall to address her ADHD. The Section 504 plan developed by the District at this meeting was much more thorough than the previous year's plan. The accommodations now consisted of two comprehensive areas to address Student's ADHD. First, the presentation of Student's lessons was modified. The modifications consisted of having the teacher stand near Student when giving directions or lessons; breaking longer presentations into shorter segments; simplifying complex instructions; writing key points on the board and providing other visual aids; repeating key directions and having Student repeat them orally; and provision of written outlines. The other area of modification was to Student's assignments, worksheets and tests. The modifications consisted of modifying Student's curriculum as necessary; provision of structured routine in written form; extra time to complete tasks and tests; and short breaks between assignments. They also included provision of typewritten or computer printed assignments; other students to help check Student's work; provision of study skills training and remediation strategies; adjustment of the reading level of assignments if necessary; oral reading to Student of test items if necessary; fewer essay questions on tests; and open book exams. The plan also indicated that the school would maintain communication with Student's Parents by sending notes home, by email, and by phone calls on a regular basis. The plan also called for Student to be seated near her teachers and away from distractions. The plan also addressed what it defined as behaviors, such as cuing Student, providing peer assistance, permitting Student to leave her seat, and

implementation of a reward system for completion of schoolwork and homework. Finally, the plan indicated that homework would be modified and that Student would have assistance with writing in her planner. Mother signed her agreement to the plan.

27. Approximately a week before Student began sixth grade at Las Flores Middle School, Mother wrote to Student's academic advisor there. Mother provided a copy of Student's Section 504 plan, expressed her concerns about some of the discrepancies in Student's abilities noted in Dr. Elliott's report, and indicated that she wanted to ensure that Student's teachers implemented the Section 504 plan so that Student would be successful in middle school.

28. Mother attended a parent-teacher conference for Student on September 27, 2002, shortly after Student began sixth grade. The notes from that meeting indicate that Student was a great student, was quiet in class and appeared to feel comfortable there, and that she was involved in soccer and attended church regularly. The notes also indicate that Student was having difficulty recalling math facts. The notes further indicate that Student was seeing a counselor with Mother twice a month because Student was breaking rules at home and fighting with Mother. The notes indicate that Student had received an "A" on a school project. Finally, the notes indicate that the teachers were implementing several accommodations for Student, such as not giving her timed tests, seating Student in front of the class, sending her tests home to be signed, and using an agenda to help organize Student's work.

29. In order to address the difficulty Student had with math during the sixth grade, the District provided Student with before school tutoring at its "math village." The District also provided Student with supplemental reading intervention assistance in its "reading village" in a program called "SOAR to success." The District designed both classes to assist students who had demonstrated weaknesses in math and/or reading with passing the High School Exit Exam. For the first quarter of sixth grade, Student's

academic grades ranged from a high of an "A" in fine arts to a low of a "C+" in math. Her first quarter grade point average was 3.17. Her second quarter academic grades ranged from a high of "B" in fine arts to a low of a "C" in math; her grade point average was 2.67. For the third quarter of sixth grade, Student's academic grades ranged from a high of a "B" in fine arts to a low of a "C-" in math; her grade point average was 2.67. For the fourth quarter of sixth grade, Student's academic grades ranged from a high of an "A" in fine arts to a low of a "C-" in math; Student's grade point average was 3.0. Student's grades in language arts during the year fluctuated between a "C+" and a "B." Her grades in social studies fluctuated between a "B+" and a "C" and her grades in science fluctuated between a "C-" and a "B."¹³

30. The District developed another Section 504 plan for Student at the end of her sixth grade year. The plan included many of the modifications and accommodations from the prior year's plan. The District held another Section 504 plan meeting on September 23, 2003, soon after Student began seventh grade at Las Flores, and again on December 3, 2003, to address Parent's concerns regarding Student's progress at school. The District either continued modifications from the previous plans or adjusted the modifications to address Student's needs. Mother signed her agreement to all the plans.

31. Student's began seventh grade at Las Flores in the fall of 2003. Although Student contends that she continued to struggle academically, her grades do not support this assertion. For the first quarter of seventh grade, Student's academic grades

¹³ In her closing brief, Student states that she received 4 "Ds" during sixth grade. While she may have received those grades on individual examinations, her overall grades for each subject during each quarter of sixth grade were never lower than a C-; Student only received a C- in math.

ranged from a high of an "A+" in English to a low of a "B-" in pre-algebra; her grade point average was 3.33. For the second quarter of seventh grade, Student's academic grades ranged from a high of a "B+" in social science to a low of a "C-" in global communications; Student's grade point average was 2.83. For the third quarter of seventh grade, Student's academic grades ranged from a high of a "B" in social science and pre-algebra to a low of a "C" in technical processes and English; Student's grade point average was 2.83. For the last quarter of seventh grade, Student's academic grades ranged from a high of an "A-" in pre-algebra to a low of a "C" in English; Student's grade point average was 3.0.

32. Student continued to struggle at home doing her homework, and Mother was spending many hours (she testified to as many as four or five hours a day) assisting Student to complete her work. Mother was also concerned that the District was not implementing Student's Section 504 accommodations, and wrote to assistant principal Tim Brooks at the end of Student's seventh grade year to bring her concerns to his attention. She noted that Student was receiving low grades on some of her assignments, and that it appeared that Student's grades on assignments and tests were erratic. Mother was particularly concerned that the school was not consistently implementing Student's Section 504 plan and that, as a result, Student's schoolwork was suffering.

33. However, although Student had many difficulties completing homework, and Mother was expending excessive time and energy in getting Student to complete her assignments at home, the District was not experiencing these difficulties with Student in the classroom. The accommodations provided by the District, as well as the extra assistance through the reading and math "villages," in addition to the assistance Mother gave to Student at home, resulted in Student's success in the classroom during her first two years of middle school. Student's grades for her first two years of middle school indicate that she was successful in her classes, and was making satisfactory

progress, or better, in each of her academic subjects. Although Student apparently had faltered in her science class for some time, she ultimately received a "B+" in that class for her last quarter of the year. There was no concrete reason for the District at this time to believe that Student required any additional assistance in order to obtain educational benefit from her classes.

EIGHTH GRADE AND THE DISTRICT'S MULTIDISCIPLINARY ASSESSMENT

34. Although Parents did not request the District to assess Student between 2000 and 2004, prior to Student beginning eighth grade at Las Flores, Parents decided to obtain an independent evaluation for her from the Amen Clinic. Dr. Zhanna Verkh, a staff physician at the clinic, conducted the evaluation.¹⁴ The purpose of the evaluation was for Dr. Verkh to review what medications would be most appropriate to treat Student's ADD.

35. Dr. Verkh noted in her report, dated August 18, 2004, that Student's language development, as compared to her peers, was slightly below average. She also noted that Student had strong attachments to her family and had many close friends, although she did not work at maintaining those friendships, and that Student enjoyed participating in sports. With regard to Student's behavior, Dr. Verkh noted that Student was often non-compliant, that she lied and stole things, and often broke rules. She noted that Student was extremely impulsive and could be manipulative. However, there is no evidence that Student had engaged in any of these behaviors at school and there is no evidence that these behaviors had affected Student's ability to access her curriculum at school.

¹⁴ Dr. Verkh did not testify at the hearing.

36. Dr. Verkh also noted that Student was outgoing, active, and liked people. She noted that Student was a kind, compassionate and nurturing person. With regard to Student's school history, Dr. Verkh noted that Student had averaged "B" grades throughout her school career. Dr. Verkh noted that Student had continuing difficulties completing assignments and homework, often forgetting to write down assignments or forgetting to turn in completed work. She noted that Student's teachers found her a pleasure to have in class and that Student worked hard at school. Dr. Verkh noted that Student herself believed that she tried hard and did well when she received help to keep her focused.

37. Dr. Verkh's report found that Student had no delusions, no suicidal or homicidal ideation, no hallucinations, and no illusions. The only worries Dr. Verkh noted of Student's were about her performance in school and in sports.

38. The Amen Clinic gave several checklists to Student's Parents to complete. Clinicians also completed checklists developed by the clinic's founder based on his research in brain imaging. The checklists indicated that Student had attention problems and hyperactivity/impulsivity problems. The checklists also indicated what are identified as "brain system" symptoms. However, Student presented no testimony at hearing to explain what these findings were or what the findings implied. More significant is that Dr. Verkh noted that Student did not manifest significant symptoms of childhood depression.

39. The Amen Clinic also conducted brain scans on Student. Student presented no testimony at hearing to explain the results of the scans or the implications of the results.

40. As a result of the checklists, Student's clinical history and interview, and the brain scans, Dr. Verkh made several findings. She found that Student had concentration problems, had a non-specified mood disorder and a social anxiety

disorder, suffered from ADHD, and that bipolar disorder should be ruled out. Dr. Verkh recommended several strategies to deal with Student's symptoms. She recommended that Student take Omega 3 fatty acids (found in fish oil), that she take a supplement called "Teen Link" to calm hyperactivity in Student's brain, and that if Student's moodiness, irritability, and frustration increased, Parents switch Student from supplements to medications such as an anticonvulsant. If the poor attention and concentration persisted, Dr. Verkh recommended that Student's medications be changed to a stimulant treatment. Dr. Verkh also recommended that Parents change Student's diet by having her avoid caffeine and large amounts of simple sugars. Dr. Verkh also recommended that Student engage in aerobic exercise five times a week.

41. Dr. Verkh did not find that Student was depressed or had other mental health issues requiring medication or intervention. She also made no findings with respect to Student's educational programs, or lack thereof, and made no recommendations for implementation of any accommodations or modifications by Student's school. Dr. Verkh did not address at all whether Student's concentration issues related to any deficiencies in her educational program at school.

42. Student's grades for the first quarter of eighth grade were comparable to her grades in seventh grade. They ranged from a high of a "B" in global communication technology to a low of a "C" in English and Algebra; her grade point average for the quarter was 2.50. However, Student's grades began to decline substantially by the end of her second quarter in eighth grade. By the end of that quarter, she was barely passing social science with a "D" and was failing college preparatory algebra. Her grade point average for the quarter was 1.83.

43. The District held another Section 504 meeting for Student on January 21, 2005. The meeting notes indicate that Student was struggling in math, at least in part due to missing assignments and tardiness to class. The notes indicate that Student's low

social studies grade was due, in part, to the fact that she was not going in before or after school to re-take tests. With regard to science, the notes indicate that Student's grade had started strong, but had declined throughout the semester. The notes indicate that when Student studied consistently, she seemed to do well. For language arts, the notes indicate that Student was creative and focused, but had low quiz and test grades. The 504 plan contained several accommodations, particularly with regard to taking tests.

44. Student's grades continued to decline in eighth grade. On April 22, 2005, Mother wrote an email to Las Flores Principal Holly Feldt expressing her concerns with Student's declining grades. Mother was extremely frustrated, and expressed that the District had not addressed her concerns with Student's struggles at school. She was specifically upset that the District had failed fully to implement Student's Section 504 plan. Mother stated in her email that she had been trying without success to get the District to acknowledge that Student had a disability and for them to address that disability.

45. Although it is unclear from the record as to when the District made the decision, it apparently decided at some point before Mother wrote to Ms. Feldt to administer assessments to Student; Mother's email to Ms. Feldt references the tests. Ms. Feldt responded to Mother's email by letter dated May 5, 2005. Ms. Feldt referred to some of the assistance that the District had provided to Student during her middle school years and noted that she could not find any record of a request for assessment made by Parents during the three years Student had attended Las Flores. Ms. Feldt explained that she had referred Student for the assessments for the purposes of investigating whether Student had special education needs based upon her declining grades. Ms. Feldt explained to Mother that credentialed professionals would administer the assessments and the results would be discussed in open forum at an IEP meeting that would include Parents.

46. District psychologist Marcelene Camou¹⁵ administered a psychoeducational evaluation to Student on May 19, 2005. Ms. Camou's evaluation report indicates that one of the purposes of the testing was to determine if Student was eligible for special education. The report notes that Student was currently taking two medications for her ADHD and that she was receiving private counseling with a therapist.

47. Ms. Camou administered the following assessments to Student: the WISC-IV, the Beery Test of Visual Motor Integration (VMI); the WIAT-II, and the WJ-III. Student does not dispute the validity of the tests or their results.

48. Ms. Camou's report explained that the WISC-IV was designed to measure intellectual functioning in students. The test consists of five subtests in verbal comprehension, perceptual reasoning, working memory, processing speed, and full-scale IQ. Student's score on the verbal comprehension subtest was in the 61st percentile, within the average range, indicating that Student had no difficulty in understanding verbal information, thinking with words, or expressing thoughts in words. The perceptual reasoning subtest measured Student's ability to solve problems using logical reasoning and hand-eye coordination, and measure the ability to work quickly and efficiently with visual information. Student scored in the 75th percentile, in the high average range. The working memory subtests involved sequencing, auditory short-term memory, attention, and concentration. Student scored in the 55th percentile on this subtest, in the average range. Ms. Camou indicated that the processing speed subtest measured Student's mental capacity, reasoning, and efficient use of working memory. Student scored in the 79th percentile, indicating she was in the high average range. Student's full scale IQ was 113 (similar to the full-scale IQ result of 111 obtained five

¹⁵ Ms. Camou did not testify at the hearing.

years earlier by Dr. Elliott), placing Student in the 73rd percentile, in the high average range.

49. Ms. Camou's report indicates that Student scored in the average range of the VMI test. With regard to Student's academic achievement, using results from the WIAT-II, Ms. Camou noted that Student scored in the average range for students her age in word reading, and in the low average range in reading comprehension. Student's performance in spelling was in the average range although her writing samples were below average. On the WJ-III, which measured reading speed and fluency, Student scored in the average range. With regard to math skills, Student scored below average, particularly on the applied problems subtest.

50. In order to assess Student's social, emotional, and behavioral needs, Parents completed the Behavior Assessment System for Children (BASC) rating scales. Ms. Camou explained in her report that the BASC facilitates the diagnosis and classification of a variety of emotional and behavioral disorders in children so that treatment plans can be developed. The results of the BASC completed by Parents indicated that Student often forgot things, acted without thinking, and never volunteered to help with things.

51. Parents also completed the Child Behavior Checklist. The results of their reporting indicated that Student was in the clinical range¹⁶ in total problems and externalizing. Student was also in the clinical range for attention problems and rule-breaking behaviors. However, Student was in the normal range in her scores for being anxious/depressed, withdrawn/depressed, somatic complaints, social and thought problems, and aggressive behavior syndromes.

¹⁶ "Clinical range" means that the student was at high risk of having the problem indicated.

52. Ms. Camou also noted that the Connors' Rating Scales completed by Parents and Student's teachers indicated that Student demonstrated signs of ADHD at home and at school. Student's own rating on the Connors indicated that she rated herself with conduct problems, as inattentive, with ADHD and with an anger control problem.

53. Ms. Camou made no specific recommendations in her report as to Student's eligibility for special education.

THE JUNE 15, 2005 IEP

54. The District convened an IEP team meeting for Student on June 15, 2005. Since Student was about to transition from Las Flores Middle School to Capistrano Valley High School for ninth grade, the IEP team members included staff from both the middle school and the high school. Ms. Feldt attended, as did Ms. Camou, and Leesa Shults-Amon, a high school special education case carrier. Student and Parents also attended the meeting. At the meeting, the District offered Mother a copy of the IDEA procedural safeguards. Mother waived the reading and review of the procedural safeguards and also indicated that she had a previous copy of her parental rights and waived reading and review of those rights.

55. The team noted that Student was failing English, algebra and social science. Her teachers believed that Student was capable of doing the schoolwork but that she did not follow through with assignments and was overly involved with the social aspects of school. Student's English teacher had noted that Student was capable of writing at grade level but did not perform as well when she lost interest or lacked effort. The team reviewed Student's assessment results. Based upon the assessments, the team determined that Student met the "minimum criteria for special education eligibility as a student with a psychological processing deficit in Attention." The team

also noted that Student had been diagnosed with ADHD, mood disorder, and social anxiety disorder.

56. The June 15, 2005 IEP contained Student's present levels of performance based upon teacher observations and the results of Student's assessments and her state-mandated testing. The present levels indicated that Student was reading at grade level, but was failing three of her classes. The present levels noted that part of the reason for Student's failing grades was her problem turning in homework and class assignments. The present levels page further identified Student's scores on her assessments indicated she had average ability in written expression but that her math scores were below average. Therefore, the present levels indicated that Student required goals and objectives to address her deficits in math. The team also indicated on the present levels of performance that Student was inconsistent in turning in homework and class assignments and therefore required a goal to address that deficit.

57. At hearing, high school case manager Leesa Shults-Amon credibly testified that the present levels of performance were a starting point for Student since this was the first time the District had found her eligible for special education. Ms. Amon testified that other baselines would be reviewed once Student began high school. Student asserts that the District should have collected other data in order to develop Student's present levels of performance. However, Student did not present any evidence as to what that the data should have consisted of, how the District should have obtained it, or why Student's assessment results were not appropriate indicators of Student's present levels of performance in math, reading, and written expression. Nor did Student present any evidence as to how any alleged deficiencies in how the District wrote the present levels had affected Student's right to a FAPE. The present levels of performance are only required to provide information about a student's current level of functioning; the present levels in Student's June 15, 2005 IEP met that standard.

58. Student's IEP was also required to contain annual goals and objectives and a means to measure progress toward her annual goals. Goal number one for Student addressed her math goals based upon her present levels of performance. The annual goal stated that "when given a set of word problems at [Student's] independent reading level, [Student] will be able to create a visual representation as an aid in estimating an unknown quantity and solve the problems using algebraic techniques with 75% accuracy." The first benchmark stated that when given a set of word problems, Student would be able to underline words that represent number operations and create a visual representation to aid in calculation with 75 percent accuracy in three of four trials by November 30, 2005. The second benchmark stated that when given a set of word problems, Student "will solve the problems using algebraic strategies with 75% accuracy in 3 of 4 trials" by February 28, 2006. Ms. Amon stated that she would pre-test and post-test Student in order to determine Student's progress toward her math goals. The 75 percent goal was measurable since it could be determined from Student's math tests.

59. The difficulty with this goal, however, is that the District did not include a baseline for measuring Student's progress. The baseline states "[Student] has difficulty interpreting and reasoning through algebra problems, but does better when using visual aides." This does not give a baseline of Student's present abilities with algebra; it states a present level of performance. In other words, was Student presently able to solve algebraic problems 25 percent of the time or 70 percent of the time? There was simply no specific baseline against which Student's progress toward the goal of 75 percent accuracy could be measured and thus no way to determine how far Student needed to progress in order to meet that goal.

60. However, Student presented no evidence at hearing, through documents or testimony, which addressed what the implications were of the District's failure to properly define a baseline for Student's math goal. There was no testimony indicating

that Student's education has been impacted or compromised by the District's failure to include a proper baseline for Student in math and no testimony as to how the District's special education plan for Student was negatively affected by the improper baseline.

61. The IEP also does not include any present levels of performance or goals in the area of social or emotional needs. However, Student presented no evidence that the District should have been aware in June 2005 that she had needs in that area that needed to be addressed through special education or related services. Although the District IEP team acknowledged that Student had a mood disorder and some social anxiety, there was no evidence that either were manifested at school. The assessment that Ms. Camou administered to Student did not indicate any present need for either school counseling or any behavior interventions. The Amen Clinic did not make specific recommendations for any counseling or other interventions, in or out of school. Student's teachers all found her to be well behaved and sociable. Student's IEP included written comments from her eighth grade teachers. One teacher stated that Student got along well with the teacher and with other students. The teacher stated that Student never was disruptive, that she was very polite, and that she was capable of working independently. Another teacher stated that Student was very social with peers although he noted that Student was resistant to teacher requests and that she seemed unconcerned about her grades and efforts. Still another teacher wrote that Student was friendly with her peers and respectful of her teacher. The last teacher to add a written response to the IEP also stated that Student got along well with her peers and with the teacher. Student had no significant behavior incidents during eighth grade, no problems in class, no problems with teachers, and no problems with peers.

62. Dr. Kevin Fenstermacher, who later evaluated Student after her Parents placed her at a residential treatment center in Utah at the end of ninth grade, stated in his report that Student began using alcohol, over-the-counter medications, and

experimenting with prescription drugs sometime during eighth grade. However, there is absolutely no evidence that either Student's Parents or the District were aware of this at the time of the June 15, 2005 IEP. There is no evidence that Parents raised any of these issues at the IEP meeting or otherwise brought them to the District's attention. Nor did any of Student's counselors or therapists testify at the hearing as to what indicators of social or emotional problems should have been apparent to the District at the time of the IEP meeting. Whatever mood disorders, anxiety, or emotional problems Student may have been having were therefore not apparent to the District at the time of the June 15, 2005 IEP. There was therefore no reason for the District to discuss Student's social or emotional levels, to develop any goals in those areas, or to provide any related services to address those alleged needs.

63. Student's June 15, 2005 IEP also contained an individualized transition plan (ITP). At the time of this IEP team meeting, both federal and state law required that beginning at age 14 and updated annually, a student's IEP contain a statement of the transition service needs of the child. The transition statement had to focus on the student's courses of study, such as participation in advanced-placement courses or in vocational education programs. Federal and state law also required that beginning when the student was age 16 (or younger, if determined appropriate by the IEP Team), the IEP contain a statement of needed transition services for the student, including, when appropriate, a statement of interagency responsibilities. Both Student and the District, in their closing briefs, reference the ITP requirements that became effective with the passage of the reauthorized IDEA, effective July 1, 2005. Those more comprehensive requirements were not in effect at the time Student's IEP team developed her June 15, 2005 IEP.

64. The ITP in the June 15, 2005 IEP states that Student had goals for attending college on a soccer scholarship. To address that goal, the ITP indicates that

Student would work with academic advisors about scholarship information and college requirements. Student also indicated that she wanted to obtain a driver's license. The ITP indicates that Student would investigate the requirements for taking driver's education at high school. Student indicated that she might want to pursue a career as a fitness trainer; her ITP indicated that Student would continue her own fitness training and would explore the criteria to become a fitness trainer. Student further stated that she wanted to move away from home, to either a dormitory or an apartment. Her ITP indicates that Student would work on chores at home so that she could learn independent living skills. To meet her goal of obtaining a high school diploma, the ITP indicated that Student would work with her high school academic advisors to develop a curriculum that would enable her to receive her diploma. The ITP, therefore, contained the required statement of Student's transition needs and the courses of study to obtain her goals, the only requirements in effect at the time the team developed the ITP.

65. Based upon Student's needs at the time, and given her goal to improve her accuracy in math, the IEP team determined that Student be enrolled in a resource specialist program (RSP) class in high school for one school period and in a collaboratively taught English class and collaboratively taught algebra class.¹⁷ Ms. Amon testified that a collaborative class is a combination of regular and special education students. A regular education and a special education teacher co-teach the class; therefore, there was one teacher for approximately 16 students, double the ratio in regular general education classes. Student's RSP class, taught by Ms. Amon, was called

¹⁷ According to Ms. Amon, Student's high school operated on a "block" schedule. Four days a week, the students attended three classes a day for approximately 92 minutes each class. On one day, students attended classes on a traditional schedule of six classes, each approximately 50 minutes long.

"Learning Strategies." The class had only 14 students. The strategies that Ms. Amon covered in class included doing homework promptly, turning it in, organization, and note-taking, all of which addressed Student's known deficits as they related to her ADHD.

66. Student presented no evidence that the placement and program offered in her June 15, 2005 IEP did not address her deficits or meet her needs at the time the District developed the IEP. The curriculum of the Learning Strategies class specifically addressed the Student's organizational deficits and problems with focus and need for structure and individualized attention. The collaboratively taught classes also gave Student an opportunity for more individualized teaching since there were two teachers in the class, as opposed to one, including a teacher specifically trained to teach students with special education needs. Student presented no evidence as to why these classes did not meet her needs at the time, or what other type of instruction Student required when the team developed the IEP.

67. Conversely, the District presented evidence, through credible testimony of Student's teachers, that when Student attended class and did turn in her assignments, Student did well in the classes. Deanna Petrucco, Student's career development teacher testified that Student's low grades was due to missed classes and missed assignments; when Student did complete assignments, she could earn an "A" or "B." Science teacher Craig Fransen testified that Student was brighter than many of his other freshman students, but that she was not handing in assignments and was missing classes. He testified that Ms. Amon was very aggressive about ensuring that Student made up missed work and that it was only through Ms. Amon's efforts that Student received a "C" in his class. Mr. Fransen indicated that Student was too sociable in class; she would rather talk than do her work. Thomas Airey, Student's geography teacher, also testified that Student appeared bright and that she participated in class, unlike many of the other

freshmen who were uncomfortable doing so. Mr. Airey also stated that Student was not turning in assignments and that Ms. Amon was working with him so that Student could make up missed work. RSP teacher Carol Weinell also testified that Student was bright and capable of doing the academics at school. English teacher Ron Miller testified that Student appeared happy, full of life, and appeared to be thriving.

68. The weight of the evidence therefore does not support Student's contention that her placement for the first semester of ninth grade was inappropriate or that the District failed to offer her a FAPE

THE JANUARY 26, 2006 AND APRIL 5, 2006 IEPS

69. In spite of the special education classes in which she was enrolled for her first semester of high school, Student's grades only improved slightly. Although she did not fail any classes, Student almost failed her English class, only receiving a "D-" on her first semester report card. Her other academic grades were one "C" and two grades of "C-."

70. On January 26, 2006, the District convened another IEP meeting for Student. The purpose of the meeting was for Student's annual IEP review and to consider Parents' request that the District refer Student to OCHCA for a mental health assessment.

71. By the time of this meeting, Student had met her math goal. Student was also half way to achieving her homework goal. All of Student's general education teachers continued to believe that Student was capable of doing the schoolwork but was faltering because of her failure to complete class work and homework.

72. Because of Student's continued problem forgetting or failing to do homework, Ms. Amon believed that Student would do better in a more restrictive environment. She suggested removing Student from her collaborative English and algebra classes and placing Student in RSP classes for English and algebra, along with

the Learning Strategies class in which Student was already enrolled, for three RSP classes. The English RSP class had a maximum of 14 students; the math RSP class had 10 students. Ms. Amon explained that the smaller class size meant that Student would receive individualized attention and that she would be able to spend more time working directly with Student on the concepts with which Student needed particular assistance. For example, if Student were missing assignments in other classes, Ms. Amon would be able to help Student with them during one of the RSP periods.

73. The IEP team also developed additional goals for Student. The team added two new math goals. Both goals were specifically designed to assist Student in preparing for and passing the high school exit exam. The first math goal stated "When given a teacher-made sample of numerical expressions with exponents, [Student] will multiply, divide, and simplify the expressions with 85% accuracy in 3 of 4 trials." The goal stated that Student's baseline would be derived from work samples, tests, quizzes, and teacher observation. Two benchmarks were delineated, each with measurable goals and objectives. The second math goal stated, "When given a set of rate-related word problems at [Student's] independent reading level, [Student] will write the algebraic equation correctly and solve problems with 80% accuracy." Two benchmarks were delineated, each with measurable goals and objectives. The goal also stated that Student's baseline would be derived from work samples, tests, quizzes, and teacher observation. Although Student contends that the baselines were inappropriate and that the goals were not measurable, Student failed to provide any testimony as to why they were not appropriate, or what they should have been. Student also failed to demonstrate that her ability to access her education or to achieve educational benefit from her IEP was hampered in any way by the alleged inadequacies either in the goal's baselines or in how the goals would be measured.

74. The IEP team also developed a study goal for Student. The goal indicates that Student's baseline would be derived from observation of her binders. The team designed the goal to assist Student in becoming more independent; the goal states that Student will independently file class work and homework in her binders for all six of her classes. Student's general education and learning strategies teacher, as well as Student's Parents, would have the responsibility of checking Student's binders to ensure that she was preparing them correctly. Student presented no evidence either that the baseline of the annual goal was inappropriate or what the baseline or goal should have included if they were inadequate as alleged.

75. The January 26, 2006 IEP also included an ITP for Student. However, it was not required to do so by the time the team convened this IEP meeting, federal and state law had changed, effective with the reauthorization of the IDEA on July 1, 2005. The new statutes required an ITP only if the IEP will be in effect when a student turns 16. The January 26, 2006 IEP indicates that it would only be in effect until January 25, 2007, two days before Student's 16th birthday. Since there was no requirement that this IEP contain an ITP, any inadequacies in the one the team developed are irrelevant.

76. Student also contends that the IEP was inadequate because it failed to state her present levels of performance with regard to her social, emotional, or mental health needs, and failed to offer a placement or services to address those needs. Student has sufficiently met her burden of proof in this regard.

77. Student's Parents requested that the District refer Student for a mental health assessment. As the ALJ explains in more detail below, a referral for mental health services is only appropriate where an IEP team has found that a student has emotional or behavioral characteristics that educational staff has observed in the educational setting and that impede the student from benefiting from her education. The characteristics must also be significant based upon their rate of occurrence and

intensity, and must be associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling.

78. Although Ms. Amon testified that she did not know why the IEP team agreed to Parent's request that it refer Student for a mental health assessment, the team did conclude that the referral was appropriate. Either Student did not have any needs in those areas, and therefore no referral was necessary, or she did, and those needs warranted a referral to OCHCA. Since the IEP team made the referral, the team had to have believed that Student had emotional problems that OCHCA needed to address. The IEP therefore should have contained Student's present levels of emotional and social functioning; there was no basis for the statement in the IEP that Student's social and emotional needs were "not an area of concern" at that time.

79. In spite of its determination that Student's social and/or emotional needs warranted a referral to OCHCA, the District appears to take the position that it was not required to provide any counseling services to Student while the referral was pending and that by making the referral, it met its obligation with regard to Student's mental health needs. While the District offered to refer Student to OCHCA, a referral was insufficient to meet the District's obligation to provide Student with the necessary related services that would provide her with a FAPE. The fact that a referral is pending does not relieve the District from providing psychological counseling services to a student with a disability who is suffering from a mental or emotional problem that inhibits her ability to access her education. Since the District had determined that Student required mental health intervention, for whatever reason, it should have offered her mental health services of some kind to address this need, at least until or if OCHCA accepted the referral and offered its own services. Therefore, the January 26, 2006 IEP

failed to offer Student a FAPE because it did not include any type of counseling services for Student.

80. The April 5, 2006 IEP meeting was convened solely to address the fact, as discussed more fully below, that the OCHCA had rejected the District's referral due to lack of information and the referral had to be re-submitted. Therefore, the discussion with regard to the January 26, 2006 IEP is equally applicable to the April 5, 2006 IEP.

81. The April 5, 2006 IEP notes, however, do state that Parents agreed that the Student was benefiting from the more restrictive RSP classes and that Student's grades were improving. Additionally, Parents expressed concerns to the team at that time that Student was having difficulty handling negative peer pressures and they wanted to explore alternative educational programs for Student. Parents agreed to visit other programs; the team scheduled another addendum IEP meeting for later that month. The fact that on March 20, 2006, Student was suspended from school for five days for being in possession of her prescription medication at school most likely fueled Parents' concerns that Student was being negatively influenced by her peers and needed a new environment. There is no evidence that Student had behavior problems prior to this time. There is also no evidence that the District had any reason to believe that Student had a substance abuse problem or that her low grades caused her to bring her medication to school. However, subsequent to her suspension, Parents did not return Student to school and, instead, had her home-schooled by a neighbor.

IEP ADDENDUM OF APRIL 24, 2006

82. The IEP team convened another addendum meeting on April 24, 2006, at the request of Student's Parents. Although the District team members believed that Student was responding well to the increase in her RSP classes, the District agreed to consider changing Student's placement. Father had visited a program proposed by school psychologist Wally Ernsdorf entitled Opportunities for Learning (OFL). Neither

Father nor Mother visited any other potential programs recommended by Dr. Ernsdorf. Dr. Ernsdorf and Ms. Amon did not believe that Student required a change in placement. However, since it was clear to Dr. Ernsdorf that Parents were not going to return Student to school, he suggested other placements for her. Dr. Ernsdorf testified that he believed that OFL would address Student's needs.

83. Jenny Wain, the OFL RSP teacher, explained that OFL was a charter school that was based upon an independent study model. At the time Student enrolled in the school, OFL had a program where students would attend class at the school four days a week for three hours a day. Students were given packets of materials for each subject and expected to work independently on the packets while at school and then for two to three hours a day at home. Because Student had an IEP, she also received one hour a week of individual RSP services by Ms. Wain. The RSP hour took place once a week in the late afternoon. Therefore, Student was required to leave the school at noon as she did every day and then required to return to school three or four hours later on the day she was scheduled to meet alone with Ms. Wain. During the three weeks Student attended OFL, she failed to turn in any of her work packets and there is no indication that she completed any of the assigned work. OFL did not provide any mental health or counseling services to Student.

84. The evidence supports Student's contention that OFL did not offer her a FAPE. The only justification for offering Student placement in the program was because Parents had removed Student from school, not because the program would meet Student's needs. Student's primary deficits throughout her school career stemmed from her ADHD. She had difficulty concentrating and focusing on schoolwork. She was inattentive in class, easily distracted, and failed to complete assignments, complete homework, or turn in homework. There was no basis for the District to believe that Student, who had documented attention and motivation problems, would be successful

in an independent study program that required her to turn in packets of work at her own pace and to spend hours of time alone at home. Ms. Amon's testimony emphasized the fact that the OFL program was not a good fit for Student; Ms. Amon stated that of her three RSP students who attempted the program, including Student, none was successful in it. The District believed that it was addressing Parents' concerns when it offered OFL to Student. However, its desire to placate Parents is not sufficient reason to offer a program that did not provide a FAPE to Student.

DELAY IN REFERRAL TO OCHCA

85. The District agreed at the January 26, 2005 IEP meeting to refer Student to OCHCA for a mental health referral. Dr. Ernsdorf completed the referral on or about that same date. It is unclear when OCHCA received the referral. However, on March 21, 2006, it returned the referral to the District because the District had failed to provide statutorily mandated information. Dr. Ernsdorf completed another referral packet and sent it to OCHCA, which received the packet on April 7, 2006, after which it began the assessment process.

86. The District's action therefore delayed the transmittal of the referral to OCHCA. However, once the ALJ has determined if a district committed a procedural violation of the IDEA, as happened here, the next step in the analysis is to determine if the student suffered any substantive harm. Here, Student's Father signed the assessment plan developed by OCHCA. However, Student's Parents subsequently interfered with the OCHCA's ability to complete the assessment within the 50 days required by statute. Parents did not initially respond to multiple telephone messages left for them by Dr. Julia Hermes, OCHCA's assessor, to schedule further appointments for the assessment. Dr. Hermes left messages on Parents' home phone as well as on the phone for Father's home office; Parents did not return the messages. Dr. Hermes was not able to contact Father until May 15, 2006. In order to meet the statutory timeline, Dr.

Hermes suggested to Father that she schedule two appointments for Student during the week of May 25, 2006. Father agreed to bring Student to see Dr. Hermes on May 16 and May 19. Although he brought her on May 16, he failed to do so on May 19, stating to Dr. Hermes that Student was not feeling well. Dr. Hermes suggested various appointment dates for the following week, which Father declined. He informed Dr. Hermes that he would be away on business and that Mother was not willing to participate in the mental health assessment process. Although Father later agreed to bring Student in to see Dr. Hermes on May 26, 2006, he later cancelled the appointment. On May 26, 2006, Linda Rappaport, the OCHCA licensed clinical social worker assigned to Student's case, wrote to Student's IEP team to inform it that there was no longer sufficient time to complete the assessment. Ms. Rappaport informed the team that OCHCA would need a new referral in order to recommence the assessment process.

87. The evidence therefore supports Student's contention that the District delayed transmitting its referral to OCHCA due to its negligence in complying with requirements mandated by recent changes in the law. As more fully discussed below, the District failed to meet required timelines for the submission of mental health referrals.

88. However, as discussed more fully below, in order to obtain relief for the procedural violation of the District's failure to timely send a referral packet to OCHCA, Student must demonstrate that the procedural violation impeded her right to a FAPE, impeded Parents' opportunity to participate in the IEP process, or caused a deprivation to Student of educational benefits. The evidence established that once OCHCA accepted the referral, Parents failed to produce Student for the assessment. The evidence further established that Mother did not want to participate in the mental health evaluation process. Student presented no evidence that had the District made the referral earlier, her parents would have participated in the assessment process, enabling OCHCA to

complete the assessment within the statutory timelines. It is Student's burden to prove that she suffered substantive harm based upon the District's procedural violation. Here, she has not met her burden.

REIMBURSEMENT FOR STUDENT'S RESIDENTIAL PLACEMENT

89. On or about May 31, 2006, Student accidentally overdosed on Klonopin pills, a prescription medication, during a break during the day while attending OFL. One of Student's friends had given her the pills because Student had appeared upset about something that morning. Student was admitted to the hospital that same day. On June 5, 2006, Parents sent an email to District staff, including Ms. Amon and Dr. Ernsdorf, informing them of Student's overdose. Parents also stated that they were going to send Student to a residential treatment center (RTC) in Utah to treat her mental illness of bipolar disorder, which Parents now claimed was putting Student "in harm's way regarding substance abuse." Parents also chastised Dr. Ernsdorf for suggesting Student attend OFL, pointing out how inappropriate the placement and Student's fellow students were for her. Parents did not indicate on what basis they had decided that Student required a residential placement, why they felt Student required a locked facility not available in California, if they had contacted or reviewed possible residential placements in California, or if they had contacted or reviewed possible day-treatment placements in California. There is no indication that Parents discussed the proposed RTC placement with any medical professionals, nor any evidence that medical professionals were the ones who advised them to send Student to a RTC out-of-state. At hearing, Father testified only that a senior pastor at the family's church had recommended the RTC placement.

90. The following day, June 6, 2006, Dr. Ernsdorf responded to Parents' email. Dr. Ernsdorf stated that in light of Parents' statement that Student was suffering from bipolar disorder, the District wished to assess Student. He informed Parents that Ms.

Amon would be sending them shortly an assessment packet and a copy of their parental rights, which he urged them to read. Dr. Ernsdorf also recommended that parents permit OCHCA to complete its assessments. He requested that Parents contact him to expedite the assessment process.

91. In an email dated June 6, 2006, Father declined to contact Dr. Ernsdorf because the family was concentrating on transporting Student to Utah. Father stated that he would contact the school and Dr. Ernsdorf the following week after Parents had handled the matter of Student's transport.

92. Dr. Ernsdorf responded to Father's email the same day, stating that neither the District nor OCHCA would be able to assess Student if Parents placed her out-of-state. Father responded immediately that Student would not be available for any type of assessment before she left for Utah. He further stated that while Parents would have preferred Student to remain in California, they felt she needed a locked facility, which was not available by law in California. Father further queried as to why the evaluations that the psychiatrist at the RTC in Utah would conduct could not be used in place of the assessments by the District and/or OCHCA. He further stated that Parents would proceed with another IEP for Student, as well as the OCHCA assessment, when Student returned from Utah.

93. Although Student attributes her need for an RTC placement to the District's failure to provide her a FAPE, the evidence does not support her contention. Although the evidence demonstrates that Student had difficulties with her schoolwork, there is no evidence that those difficulties led to Student's substance abuse or that the District even had any reason to be aware of that abuse. The record is replete with references to Student's normal adjustment at school. She exhibited no significant behavior or discipline problems, other than the five-day suspension for bringing a prescription medication to school, and was never referred to the office due to

misbehavior or discipline issues. At the time of the suspension, the District had no indication that Student was abusing prescription drugs, and had no indication that her problems were interfering with her access to her education. If Parents were aware of the abuse, they failed to inform the District of it. Student was polite and respectful to her teachers, and presented to the District a young woman who was social – perhaps too much so – and enjoyed being with peers and participating in sports. Furthermore, Parents never conveyed to the District the extent or nature of the private counseling Student was receiving and Student presented no evidence of it at hearing.

94. The evidence supports the District's contention that Student had developed a substance abuse problem and that conflicts between Student and Mother were an underlying reason for the abuse. The psychiatric evaluation completed by Dr. Mickelsen on June 16, 2006, shortly after Student was enrolled at the RTC in Utah, indicates that the reason for Student's placement at the RTC was her substance abuse and anger problems. Dr. Mickelson noted that Student's chief complaint was drugs and alcohol. Dr. Mickelson did not find that Student met the criteria for either depression or bipolar disorder; he therefore stated that she suffered from a mood disorder, not otherwise specified. However, he did diagnose Student with alcohol dependency, drug abuse, parent-child relationship problems and oppositional defiant disorder.

95. Dr. Michelsen testified that he believed that Student required placement in an RTC. However, his credibility was undermined by his position that even had Student not accidentally taken the drug overdose, she would still require a residential placement to treat Student's drug and alcohol abuse. Dr. Mickelsen did not give any testimony as to why he believed that a school district was required to provide a residential treatment for a Student abusing alcohol and/or drugs and the evidence does not support Student's contention that the District, in this case, had that obligation.

96. Dr. Fenstermacher conducted an evaluation of Student on June 29, 2006, after she had been at the RTC for about four weeks. He noted that Student had many conflicts with her Parents, particularly with Mother, whom she believed was too “hard” and strict. Dr. Fenstermacher noted that Student’s conflicts with her Parents had been both verbal and physical. He also noted that Student did not have any suicidal ideation or behavior. Dr. Fenstermacher recommended that Student continue treatment at a RTC. However, like Dr. Mickelsen, Dr. Fenstermacher’s testimony never addressed why the District should have known that Student suffered emotional problems that required residential placement at the time she accidentally took a drug overdose. For that reason, the ALJ does not find his recommendation, that Student required continuing RTC placement, relevant to the issue of whether the District was obligated to provide that type of placement as of May 31, 2006, when Student took the drug overdose.

97. In sum, the evidence demonstrates the District had no obligation to provide a residential placement to Student and that her Parents are not entitled to reimbursement for the funds they expended in placing Student at Youth Care and Pine Ridge in Utah. The deficiency the ALJ has found in Student’s January 2006 IEP (the District’s failure to offer outpatient counseling services to Student) does not support a finding that Parents are entitled to reimbursement for the cost of approximately seven months of tuition and expenses at a residential treatment center. Furthermore, the fact that the District’s offer of placement to Student at the OFL in the April 24, 2006 IEP failed to provide her with a FAPE, does not, *ipso facto*, mean that Student required a residential placement, or that reimbursement for her placement is an appropriate remedy. Student has failed to demonstrate that such a placement was either necessary or appropriate for her. In addition, the conduct of Student’s parents in failing to permit the District to assess her prior to transferring Student to Utah, in failing to review and consider residential and day school placements in California, and in their failure to

consult medical professionals before making the decision to residentially place Student, mitigate against finding that reimbursement is appropriate.

THE JANUARY 5, 2007 IEP

98. Student contends that the January 5, 2007 IEP did not offer Student a FAPE. However, in her closing brief, Student confuses this IEP with the previous year's IEP placing Student at the OFL campus. Student therefore offers no argument for her position that the January 5, 2007 IEP was inadequate. She also failed at hearing to present any testimony in support of her contentions in this regard. Student has therefore failed to meet her burden of persuasion as to this issue. However, the ALJ will address the adequacy of the IEP based upon its contents.

99. Student remained in Utah, first at an RTC called Youth Care, and then at a facility called Pine Ridge Academy, until approximately the end of 2006. Student returned to California on a home visit during the latter part of November and beginning of December 2006. Her parents permitted both the District and OCHCA to assess Student during the time she was on home visit. The District's current testing indicated that Student continued to have a discrepancy in math although she was making progress on her math goals. Her full scale IQ tested at 102. The District also administered the WJ-III to Student. Student's results ranged from a grade equivalent of 6.6 in quantitative concepts, to a grade equivalent of 18.0 in her writing samples. While all of Student's results on the language portion of the WJ-III were at least at grade level, all of her results on the math portions indicated that she was performing no higher than sixth grade in math. Dr. Ernsdorf also administered the Millon Adolescent Clinical Inventory (MACI) test to address Student's social/emotional/adaptive functioning. His results were similar to those obtained six months earlier by Dr. Fenstermacher: Student suffered from substance abuse, oppositional defiant disorder, and parental relationship problems, as well as anti-social and narcissistic traits. However, Dr. Ernsdorf's tests did

not indicate that Student suffered from any significant depression or bipolar disorder. His tests confirmed Student's ongoing diagnosis of ADHD.

100. OCHCA assessed Student on November 24 and 28, 2006. As part of the assessment process, OCHCA also conducted interviews with Parents. OCHCA also spoke with staff at Youth Care and Pine Ridge and District staff. The assessment also included a review of Student's educational records and testing since 1997. Significantly, OCHCA's report notes that while Student's grades at Youth Care were "Bs" and "B+'s," her grades at Pine Ridge, which she attended following Youth Care, had dropped to "Cs" and "Ds." Student's decline in grades at Pine Ridge was due to her lack of timeliness with assignments rather than due to the quality of her work. In other words, Student was repeating the same habits at Pine Ridge that had caused her grades to decline while enrolled at the District schools. The OCHCA report noted that the RTC schools believed Student was having difficulty with school projects because of her weaknesses as an independent worker and because of her lack of organization and self-monitoring of her workload. OCHCA also noted Student's substance abuse and parental conflicts.

101. Based upon its assessment, OCHCA found that Student qualified for outpatient mental health services. Assuming that Student continued to be eligible for special education, OCHCA offered Student a minimum of three 45-minute individual therapy sessions a month as well as one 30-minute family therapy session a month. It also offered Student consultation with Student's school at least once every three months for 30 minutes, and psychiatric consultation and medication a minimum of once every two months. OCHCA also developed corresponding treatment goals and objectives to address Student's mental health needs. The treatment plan and goals were presented as part of Student's January 5, 2007 IEP.

102. The IEP team met with Student's Parents on January 5, 2007. The team finalized the IEP on April 16, 2007, but Parents declined to attend the meeting. The team

developed two new math goals for Student, as well as new goals to address Student's needs in the areas of behavior, studying deficits, and organizational skills. Each area of need the IEP identified for Student had a present level of performance, either generally referencing the standardized tests that the District had administered to Student the previous November, or referencing schoolwork Student had recently completed. There is no evidence that the goals were not appropriate, that they were not measurable, or that they failed to address Student's areas of unique needs.

103. The District again offered Student an RSP placement for three of her academic classes. As in the prior year, the RSP classes offered Student small class size and individualized attention. Student presented no evidence that she required a more restrictive placement, such as a special day class, or a non-public school. The evidence demonstrates that placement in a private school setting did not guarantee that Student's grades would improve. As stated above, Student's grades at Pine Ridge were commensurate with some of her worst semesters at her District high school, based upon Student's failure to complete work and remain focused on her tasks. There is no evidence to support Student's contention that the RSP classes at Capistrano Valley High School would not offer her a FAPE.

104. The January 5, 2007 IEP also includes an ITP for Student. As Student would turn 16 during the pendency of this IEP had it been implemented, the ITP was required to be included. With regard to previous ITPs, Student contended that they were deficient because Student never received any career assessments. However, none were required at the time the District developed the previous IEPs. With regard to the January 5, 2007 IEP, the District correctly notes that it did not have an opportunity to assess Student since Parents had withdrawn Student from the District and she had not returned to school there. The ITP therefore indicates that the District would administer a vocational survey assessment once Student returned to a District school.

105. However, the ITP does not address any completed career preparation activities or describe any assistance the District will give to Student to achieve her goal of attending college or pursuing a career in law. Although Student is a student with average intelligence, on course to graduate high school and attend some type of post-secondary college, she still needs assistance in achieving those goals. The ITP does not describe any type of assistance the District would give to Student to research colleges or explore career choices and gives her no guidance as to where she could find the information necessary regarding either colleges or career choices. The deficiencies are significant given the nature of Student's disability. She has inattentive ADD. She has deficits in organizational skills, note taking, and focus. She specifically needs direction and assistance in achieving her educational and career goals. Student's disability, and past history of inability to focus and organize, should have been indicators to the District that Student needed specific guidance in how to locate information, how to determine what she would need in order to qualify for admission to specific schools, and how to complete the application processes. In particular, given Student's ADD, she needs techniques to help her overcome her organizational problems if she is going to be successful at college where the special education supports she has received through an IEP at high school may not be available. The weight of the evidence therefore supports Student's contention that the ITP contained in the January 5, 2007 IEP was inadequate and therefore failed to offer her a FAPE.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student, as the petitioning party, has the burden of proving the essential elements of her claims. (*Schaeffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

STATUTE OF LIMITATIONS (ISSUE 1)

2. Student first contends that the District waived its right to raise the statute of limitations as a defense because it failed to invoke the statute as an affirmative defense or by way of a motion to dismiss. Student then argues that the ALJ should waive the statute because she contends the District withheld information from Parents regarding their rights under the IDEA. Student further alleges that the District failed to advise Parents properly of their parental rights. Student also contends that the District misrepresented resolution of her Parents' ongoing disputes with the District over appropriate services for Student. Student therefore contends that her claims fall under one or both of the two exceptions to the statute of limitations. The District first addressed the statute of limitations in its closing brief. It contends that it did not fail to inform Parents of their rights, and did not make any specific misrepresentations to Parents, and thus no exception to the statute applies.

3. Due process complaints filed prior to October 9, 2006, were subject to a three-year statute of limitations, whereas due process complaints filed after October 9, 2006, are subject to a two-year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2); 34 C.F.R. 300.511(e); Ed. Code, § 56505, subds. (l) & (n).) In California and under federal law, a request for due process hearing is required to be filed within two years from the date the party filing the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. 300.511(f); Ed. Code, § 56505, subd. (l).) This statute does not apply to a parent who was prevented from requesting the due process hearing due to the local educational agency withholding information that was required "under this part" to be provided to the parent. (Ed. Code, § 56505, subds. (l)(l) & (2).) An administrative law judge is required to make determinations, on a case-by-case basis, of factors affecting

whether the parent “knew or should have known” about the action that is the basis of the complaint. (71 Fed.Reg. 46706 (Aug. 14, 2006).)

4. As an initial observation, the ALJ agrees with Student that a party must raise the statute of limitations or it waives the issue as an affirmative defense. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315, citing *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; Witkin, California Procedure (4th ed. 2003), Pleadings, section 1043.) However, Student does not argue that there is a limitation as to when a respondent in a special education hearing may raise this affirmative defense. Here, the District addresses the statute of limitations in depth in its closing brief. The ALJ thus finds that the District has not waived its right to invoke the statute of limitations as an affirmative defense in this case. Additionally, the ALJ notes that the issue of whether an exception to the statute of limitations applies to Student was specifically identified as Issue 1 for decision in the instant proceeding. The parties therefore discussed the issue at the prehearing conference and addressed it at the hearing. It is disingenuous to argue that the District did not invoke the statute of limitations when it is the first issue that the ALJ must address.

5. The evidence supports Student’s contention that Parents made numerous requests to have her assessed between 1997 and 2000 but that the District declined to do so. There is also no evidence that in declining to assess Student for special education eligibility during those years the District ever provided Parents with a copy of their parental rights or the IDEA’s procedural safeguards. Had this been the only evidence, Student’s assertion that the exception to the statute of limitations applied based upon the District’s withholding from Parents of what their rights were and how to appeal District decisions, might have merit. However, the facts of this case are that the District finally assessed Student on November 3, 2000, and held an initial IEP meeting, attended by Student’s Parents, on November 9, 2000. The IEP document indicates, and Mother

admitted at hearing, that the school principal reviewed parental rights with Parents and that Parents were given a copy of their rights and the IDEA procedural safeguards. Student contends that the District did not give her Parents specific instructions about the need to put requests in writing. She also alleges that the District did not advise Parents how to proceed to dispute resolution under the IDEA. However, it is unclear just how much instruction in their rights Student believes a district is required to give to parents. Here, there is no dispute that Parents are literate in English, and that they have at least average cognitive abilities. The District provided them with a copy of their rights and procedural safeguards and reviewed them orally with them. The law requires no more.

6. Nor has the Student demonstrated that the District made specific misrepresentations that it had solved Student's problems. The District determined that Student did not qualify for special education in November of 2000. It did not hide or misrepresent the results of its assessments or any other basis for its decision. Nor did the District misrepresent any of the progress Student made throughout her school career. The District merely believed that Student's deficits did not warrant special education intervention although it did decide in 2001 that Student met the criteria for a Section 504 plan. A difference in opinion as to the strategies necessary to address a student's deficits does not imply or prove that a district made specific misrepresentations to a parent, warranting a waiver of the statute of limitations.

7. Therefore, Student's Parents were aware of their rights no later than November 9, 2000. Since a three-year statute of limitations was in effect in California at the time for special education matters, Parents had until November 9, 2003, to file a due process request with regard to any claims they might have had against the District for the period 1997 to November 9, 2000. Parents chose not to file a due process request or otherwise exercise their rights at that time. Those claims are therefore now barred by

the statute of limitations. Furthermore, Parents were under notice as of November 9, 2000, as to their rights and the procedural safeguards available to them. Therefore, their failure to file any claims against the District for alleged violations of the IDEA arising before July 16, 2005, two years prior to the filing of the instant due process complaint on July 16, 2007, prevents them from now raising those claims since the claims are barred by the applicable two-year statute of limitations. Student's Issues 1, 2, and 3 are therefore barred by the two-year statute of limitations in effect when Student filed the instant complaint on July 16, 2007. (See *Grant Miller v. San Mateo-Foster City Unified School District* (N.D. Cal 2004) 318 F.Supp.2d 851, 860-862.) (Factual Findings 2 through 9, 23.)

FAILURE TO ASSESS STUDENT AND FIND HER ELIGIBLE FOR SPECIAL EDUCATION SERVICES FROM SEPTEMBER 1997 THROUGH JUNE 2005 (ISSUE 2)¹⁸

8. Assuming that the statute of limitations does not bar Student's claims, Student contends that the District improperly failed to assess her for eligibility for special education services until November 2000 and that after assessing her, the District improperly failed to find her eligible to receive services under the category specific learning disability. The District contends that it was not required to assess Student before November 2000, and that it properly found that Student was not eligible for special education prior to June 15, 2005.

¹⁸ The ALJ has already found that the applicable statute of limitations bars this issue from consideration; she addresses the substance of Student's contentions in the alternative.

Duty to Assess

9. California specifically obligates a district to actively and systematically to seek out “all individuals with exceptional needs.” (Ed. Code, § 56300 et seq.) 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.) 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.*) The District must respond within a reasonable time after obtaining notice of the potential disability and need for special education services. (*Dept. of Ed. v. Cari Rae S., supra*, 158 F.Supp. at pp. 1193-94.) However, failing grades alone do not necessarily establish that a district has failed in its child find obligation or that it failed to provide an educational benefit to a student. (See *Sherman v. Mamaroneck Union Free Sch. Dist.* (2d Cir. 2003) 340 F.3d 87, 93; *Mather v. Hartford Sch. Dist.* (D. Vt. 1996) 928 F.Supp. 437, 446; *Las Virgenes Unified School District v. Student* (2004) SEHO Case No. SN-01160.)

10. A child’s parents, the state educational agency, other state agency, or the LEA, may request an initial evaluation of a child for purposes of determining his or her eligibility for special education services. (20 U.S.C. § 1414(a)(1)(B).) If a child is referred for assessment, the school district is obligated to develop a proposed assessment plan within 15 calendar days of the referral for assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code, § 56043, subd. (b).) An IEP required as a result of an assessment of a student must be developed within a total time

not to exceed 60 calendar days from the date the school district received the parent's written consent to assessment, unless the parent agrees to extend these timeframes in writing. (Ed. Code, § 56043, subd. (f)(1).) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).)

11. In general, a pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) This section, however, is not intended to replace the assessment process discussed above. Rather, it refers to the type of educational methods to be used once a child has been determined to have exceptional needs.¹⁹

12. Here, the evidence supports the Student's contention that Parents made numerous requests to the District between 1997 and November 2000 that it assess Student. The District replied on several occasions that it did not believe that Student met the criteria for special education. However, as explained in Conclusion of Law 10

¹⁹ See, for example, the discussion regarding response to intervention strategies in the comments to the new federal regulations, which were effective on October 13, 2006: "An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required under §§ 300.304 and 300.305. As required in § 300.304(b), consistent with section 614(b)(2) of the Act, an evaluation must include a variety of assessment tools and strategies and cannot rely on any single procedure as the sole criterion for determining eligibility for special education and related services." (71 Fed.Reg. 46648 (Aug. 14, 2006).)

and 11, California law requires that a school district refer a student be for assessment if the parents make the request. The District does not have the option in California of making its own determination, absent an assessment, that a student does should not be assessed or does not otherwise qualify for special education. The District's failure to assess Student upon Parents' request therefore constituted a procedural violation of the IDEA.²⁰ (Factual Findings 2 through 9.)

13. However, this finding does not end the inquiry. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Nevertheless, in matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (hereafter *Target Range*)). Therefore, the District's failure to assess Student only constitutes a

²⁰ Student presented no evidence that Parents requested that the District assess her between November 2000 and approximately April 2005. Therefore, the District was under no duty to assess Student. Since she had already been assessed for eligibility, although not yet found eligible, the District did not have a further duty to "find" Student. Parents were under notice of their rights and could have filed a due process request had they believed between 2000 and 2005 that Student should have been found eligible for special education services.

substantive denial of FAPE if Student would have been found eligible for special education had the District assessed her.

Eligibility Under the Category of Specific Learning Disability (SLD)

14. Student asserts that the District denied her a FAPE by failing to find Student eligible for special education under the category of SLD from 1997 to 2005. Student maintains that she qualifies as SLD in math due to the severe discrepancy between her ability and achievement. Student argues that her severe discrepancy between intellectual functioning and ability is corroborated by her continuing struggles in school, the amount of time Mother had to spend assisting Student with homework, and her failure to perform at average levels in math on statewide performance tests. Student claims that her ADHD affects her basic psychological processes of attention. She argues that she requires special education services because the accommodations provided by the school for her ADHD in her general education classes during the years in question were not effective.

15. There are two factors to consider in determining whether a child has a SLD under the severe discrepancy method: 1) Does a severe discrepancy exist between the child's intellectual functioning and her academic achievement; and 2) Does a child have a disorder in one of the basic psychological processes such as attention. If the answer to both questions is "yes," the child is considered to have a SLD. A determination must then be made regarding whether the pupil's unique needs can be addressed in general education. If not, the District must provide the pupil special education.

16. In the instant case, Student contends that she has a SLD because the difference between her ability and achievement is over 22.5 points, or 1.5 multiplied by the standard deviation, when measured by standardized testing instruments. First, a severe discrepancy measured in this manner requires a comparison of "a systematic

assessment of intellectual functioning” and “standardized achievement tests” which demonstrates a difference in standard scores greater than 1.5 multiplied by the standard deviation. Second, once the required mathematical discrepancy between intellectual functioning and achievement is confirmed, the discrepancy must be corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples.

17. Student contends that she was eligible for special education services prior to June 2005 because she has a specific learning disability that the District would have discovered had it assessed her prior to November 2000. Student also contends that once Dr. Elliott and the District assessed her, the District should have found her eligible under SLD even if it had previously failed to do so. The District responds that neither Dr. Elliott’s assessments nor its own November 2000 assessment indicate that Student qualified for special education under the category of SLD because there was no significant discrepancy between Student’s abilities and her achievement.

18. A student is eligible for special education under the category of “specific learning disability” if: 1) based on a comparison of “a systematic assessment of intellectual functioning” and “standardized achievement tests” she has a severe discrepancy between intellectual ability and achievement; and 2) the student has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations; and (3) the discrepancy cannot be corrected through other regular or categorical services offered within the regular instructional program. (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j). The discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030, subds. (j)(4) & (5).) SLD does not include problems that are primarily the result of

visual, hearing, or motor disabilities, mental retardation, environmental, cultural, or economic disadvantage. (34 C.F.R. § 300.8(c) (10)(ii); Ed. Code, § 56377, subd. (a).) Further a pupil is not eligible for special education if the determining factor for such eligibility is lack of appropriate instruction in reading or math, or if the pupil has limited English-proficiency. (Ed. Code, § 56329, subd. (a)(2).)

19. A student “whose educational performance is adversely affected by a suspected or diagnosed attention deficit disorder or attention deficit hyperactivity disorder” and who meets the eligibility criteria for specific learning disability under Education Code section 56377 and California Code of Regulations, title 5, section 3030, subdivisions (f) and (j), is entitled to special education and related services. (Ed. Code, § 56339, subd. (a).)

20. “Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.” (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).) “Specific learning disability” does not include “learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” (34 C.F.R. § 300.8(c)(10)(ii); Ed. Code, § 56337, subd. (a).)

21. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*).) The courts apply the *Rowley* standard and consider whether the pupil is receiving some educational benefit from the general education classroom. (*Hood v. Encinitas Union Sch. Dist.* (9th

Cir. 2007) 486 F.3d 1099, 1107 (hereafter *Hood*.) In *Hood*, it was undisputed that the student was progressing in the general curriculum along with her peers by achieving nearly uniformly average or above average grades, and performing at or above grade level. (*Id.* at p. 1108.) In *Hood*, the school district offered 504 accommodations, but the student's parents removed her from public school shortly after the 504 accommodations were implemented. The court affirmed the ALJ's determination that the student was not eligible for special education under the category of SLD because she could not demonstrate that 504 accommodations would not be sufficient to correct her deficiencies in the regular education classroom. (*Id.* at pp. 1108-09.) The courts must defer to school districts' notions of sound educational policy. (*Id.* at p. 1108.)

22. In the instant case, Student's assertion that she qualified for special education under the category of SLD as between 1997 and 2005 is unpersuasive for two reasons. First, neither Dr. Elliott, Student's independent assessor, nor the District found that Student had a severe discrepancy between ability and achievement. To the contrary, Dr. Elliott specifically stated in his report that he was unable to make such a finding without further re-assessment of Student. Since Dr. Elliott did not testify at hearing to explain his report or otherwise reconcile his lack of specific finding of an SLD with Student's present contentions, his report must be taken at face value. Nor did Student offer any other psychologist to give an expert opinion concerning Student's assessment results and the implications of the results. Student thus has failed to meet her burden of proof that she qualified under SLD due to a severe discrepancy between her ability and achievement prior to the District's re-assessment of her in 2005.

23. Second, the weight of the evidence fails to support Student's assertion that even if she had the required discrepancy, her ADHD could not be addressed in the general education setting. The weight of the evidence supports the District's contention that Student was successful in her general education classes with modifications and

accommodations, and that she therefore did not require special education services in order to receive benefit from her education. The *Hood* case is instructive, for like the student in *Hood*, Student here received average, or above average grades, every year until she entered eighth grade. She was able to do so first without any modifications to her curriculum and later, through the modifications the District implemented through Student's Section 504 plan. Therefore, even if Student did have a learning disability, she has not demonstrated that she could not access her education even with modifications in the general education setting. (Factual Findings 2 through 33.)

FAILURE TO CONSIDER DR. ELLIOTT'S ASSESSMENT ²¹ (ISSUE 3)

24. Assuming that the applicable statute of limitations does not bar this issue from consideration in this Decision, Student contends that the District failed properly to consider the independent psychological assessment her Parents obtained for her in May 2000, from Dr. Michael Elliott, a licensed psychologist. The District maintains that it reviewed and considered Dr. Elliott's report at various times over the years when reviewing Student's educational needs but was not required to adopt all the recommendations he made.

25. The District correctly notes that a school district is only required to consider the results of an independent educational assessment that parents obtain at their own expense; there is no requirement that the district actually adopt or otherwise implement the recommendations. (Ed. Code, § 56329, subd. (c).)

²¹ The ALJ has already found that the applicable statute of limitations bars this issue from consideration; she addresses the substance of Student's contentions in the alternative.

26. As stated in Factual Finding 9 through 21 and 23 through 25, the evidence supports the District's assertion that it considered Dr. Elliott's assessment several times during the course of Student's enrollment in the District. Mother testified at the hearing to many such instances. Mother first provided the assessment report to the District at a Student Study Team meeting it convened for Student on June 22, 2000. The team considered Dr. Elliott's recommendations as well as reviewed Student's grades and determined that at the time Student did not require either a Section 504 plan or a referral for a special education assessment. Dr. Elliott found that Student exhibited classic symptoms of ADHD, and therefore made a specific diagnosis that she suffered from that disorder. However, in spite of the battery of tests he administered to her, Dr. Elliott was unable to diagnose Student has having a learning disorder. He therefore only recommended accommodations for her in the classroom and that Student have a re-assessment at an unspecified future date to see if it could be determined whether she suffered from a learning disorder.

27. In November 2000, the District determined that it was appropriate to assess Student for possible special education services. It convened an IEP meeting on November 9, 2000, to consider the results of its own assessments. The IEP document for that meeting notes that the District also considered Dr. Elliott's assessment in conjunction with its own assessments when it made the determination that Student was not eligible for special education services.

28. The District also considered Dr. Elliott's assessment when it determined in April 2001 that Student qualified for a Section 504 plan. Although it had not adopted his recommendations earlier, at this Section 504 meeting the District incorporated many of Dr. Elliott's recommendations into the modifications it decided were appropriate for Student under the plan. Inter alia, the Section 504 plan indicates that Student would be seated in front of her classroom, that she would be provided with study guides, and that

the teacher would move Student away from distractions when she took tests. Dr. Elliott previously recommended all three modifications in his assessment report. At subsequent Section 504 and IEP team meetings, the District continued to reference Dr. Elliott's report as a basis for decisions it made concerning Student's education. Student's contention that the District did not consider properly Dr. Elliott's report is therefore unsupported by the evidence. (Factual Findings 9 through 21, 23 through 25.)

FAILURE TO OFFER FAPE IN THE JUNE 15, 2005, APRIL 2006, AND JANUARY 15, 2007 IEPs

Present Levels of Performance (Issues 4(a), and 5(c))

29. Student contends that every IEP the District developed for her, beginning with her initial IEP dated June 15, 2005, in which the District first found Student eligible for special education services, failed to offer her a FAPE because they each failed to include a proper statement of her present levels of performance. Student asserts that this failure prevented the District from developing suitable goals and objectives for her, thereby denying her educational benefit. The District replies that it met all procedural requirements for developing Student's present levels of performance, which the District asserts it properly derived from Student's standardized test scores and classroom schoolwork and tests.

30. An IEP must include, among other things, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's progress toward the annual goals will be measured. (§ 1414(d)(1)(A)(i), (ii), (iii) & (vii)(I); 34 C.F.R. § 300.320; Ed. Code, § 56345, subds. (a)(1), (2), (3) & (9).) The measurable annual goals must be designed to meet the pupil's needs that result from the pupil's disability, in order to enable the child to be involved in and make progress in the general education curriculum, and that meet the pupil's other educational needs

that result from his or her disability. (§ 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) While the required elements of the IEP further important policies, “rigid ‘adherence to the laundry list of items [required in the IEP]’ is not paramount.” (W.G., *supra*, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.) Because “[a]n IEP is a snapshot, not a retrospective,” it is not to be evaluated in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Rather, an IEP must be evaluated in light of the information available, and what was objectively reasonable, at the time the IEP was developed. (*Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992.)

31 Student’s contention that the present levels of performance were inadequate in her IEPs is not supported by either the evidence or the law. Each IEP contained a brief statement of where Student’s abilities were for reading, writing, and most importantly, for math. The present levels were based upon Student’s results on assessments, state-mandated tests, and observations of her class work, for a variety of reasons. First, there was no other means of determining Student’s present levels. Since Student did not have previous goals and objectives, there was no point of reference other than testing and class work that the IEP team could use as a basis for her present levels of performance. Most important, however, as discussed by Ms. Amon, is that Student was on track to graduate high school with a diploma. One of the District’s goals for her was therefore to ensure that Student passed the high school exit exam. For that reason, the District specifically used Student’s standardized testing, which gave an indication of whether she would be able to pass the exit exam, as a basis for Student’s present levels. Moreover, the applicable statutes and regulations require only the IEP goals to be measurable, not the present levels of performance. The present levels of performance are only required to provide information about the pupil’s current level of functioning. For example, in *Nack v. Orange City Sch. Dist.* (6th Cir. 2006) 454 F.3d 604,

612, the parents challenged the proposed IEP based upon an alleged failure to provide a baseline to measure future progress. However, the court held that the technical failure to provide sufficient baseline information did not result in a substantive violation because objective test results demonstrated the pupil's progress and demonstrated that the pupil had not been harmed thereby. (See also *Derek B., by and through Lester B. and Lisa B. v. Donegal Sch. Dist.* (E.D.Pa. 2007) 2007 U.S. Dist. LEXIS 2983, pp. 31-37, 47 IDELR 34, 107 LRP 2742 [similar ruling on challenge to baseline information in IEPs].) Additionally, since Student failed to meet her burden of proof that the District should have been aware in June 2005 that Student had social or emotional needs, there was no requirement that the District state what Student's present levels of performance were in those areas. Student has therefore failed to demonstrate persuasively that the District denied her a FAPE by the way it defined her present levels of performance in the June 15, 2005 IEP. (Factual Findings 55, 56, and 61.)

32. Nor has Student met her burden of proof with regard to her allegation that the District ill defined her present levels in the January 2007 IEP. The District IEP team determined that Student now had unique needs that could only be addressed through special education and related services in the areas of behavior, studying deficits, organizational skills and math. For each area of need, the District made a statement of Student's general level of performance, referencing either Student's results on standardized tests or her class work. (Factual Findings 56, 57, 58, and 61.)

33. However, the weight of the evidence supports Student's contention that the District should have included the present levels of performance in the area of Student's social/emotional needs in the January 26, 2006 IEP. As discussed below, Student had demonstrated needs for counseling to address her social/emotional deficits in January 2006; the failure to include any present levels of performance resulted in the failure of the District to develop goals and objectives for Student in these areas, and the

resulting failure to offer any services to address Student's needs.²² (Factual Findings 76 through 81.)

Measurable Goals and Objectives (Issues 4(b) and 5(d))

34. With regard to all of Student's IEPs at issue in this case, Student generally contends that the District inadequately described Student's present levels of performance, and failed to develop proper baselines for Student's goals. Therefore, argues Student, it follows that there was no way to measure the goals the District developed for Student to address her math deficits. With regard to the January 26, 2006 IEP and its addenda, Student argues generally that the District failed to address her social/emotional needs. Since the District did not find that Student had unique needs in that area, it did not develop goals for her and, consequently, did not provide her with services to address her social/emotional needs. With regard to the January 2007 IEP, Student argues generally that it failed to address her needs. The District responds generally that as to all school years at issue Student's goals were appropriate and measurable.

35. As stated above, an IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed.

²² The IEPs that the District developed for Student in April 2006, were addendum IEPs to the January 26, 2006 IEP. Therefore, the ALJ's finding that the District failed to address Student's social/emotional needs through present levels of performance, goals, and the provision of services, applies equally to the April 2006 IEPs.

Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

36. Here, review of all of Student's goals from all IEP's at issue shows that all goals and present levels of performance were sufficiently understandable and measurable. Notably, Student never proposed alternative goals that she believed were better written, more understandable, or more easily measurable than the goals the District developed. For each year at issue, Student's IEPs contained various goals in each identified area of need. As stated in Factual Finding 59, the only area in which the District failed to develop measurable criteria was in the baseline for Student's math goal in the June 15, 2005 IEP. The District did not include a baseline against which Student's progress on her goal could be measured. However, as stated in Factual Finding 60, Student failed to meet her burden of proof that this procedural failure caused Student to suffer a loss of educational benefit. Without more, the District's failure to provide a measure baseline did not result in the denial of a FAPE to Student. Viewing the goals from the standpoint of what was reasonable at the time, rather than in hindsight, Student's goals in all IEPs at issue did not result in a failure to provide a FAPE to Student. However, as described more fully below, the District failed to determine in the January 26, 2006 IEP and addenda that Student required counseling services to address her unique needs in the social/emotional areas. Therefore, the District failed to develop any goals whatsoever to address those needs. The District's failure denied Student a FAPE. (Factual Findings 73, 76 through 81.)

Failure to Address All of Student's Unique Needs and Provide an Appropriate Placement, Accommodations, and Services (Issues 4(c) and (d), and 5(a) and (b))

37. For all IEPs at issue, Student contends generally that the classroom placement was inadequate. She alleges that the June 15, 2005 IEP and the January 26, 2006 IEP and addenda failed to address Student's social/emotional deficits. She argues that the District failed to provide her with a placement, accommodations, or services to meet those needs, and therefore substantively denied her a FAPE. Student alleges that the April 24, 2006 IEP addendum, in which the District changed her placement from Capistrano Valley High School, with RSP support, to the Opportunities For Learning independent study program, was not designed to address her unique needs and therefore also substantively denied her a FAPE. Finally, Student contends that the January 2007 IEP also failed to meet her unique needs. The District contends that at all times, it offered Student a FAPE and that the evidence demonstrated that she obtained educational benefit from all placements. The District further contends that it appropriately addressed Student's social/emotional needs once it determined the needs existed, by referring Student to OCHCA for a mental health assessment. The District contends generally that all IEP offers it made were proper in light of the information about Student known to the District at the time.

38. A student receives a FAPE when she obtains access to an education that is sufficient to confer "some educational benefit" upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program in light of what was reasonable at the time. (See *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Gregory K. v. Longview School District, supra*, 811 F.2d at p. 1314.) To provide a FAPE, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be

reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

39. With regard to the June 15, 2005 IEP, Student's primary objection is that it failed to include goals for social/emotional needs and provided no services, such as therapeutic counseling, to address those needs. However, as described in Factual Findings 61 and 62, the District had no reason to suspect that Student had social/emotional needs that should have been addressed through the IEP process. Although the District recognized that Student had been diagnosed with an undefined mood disorder and anxiety, there was no evidence that either were manifested at school. Several assessments had been administered to Student between 2000 and 2005. Dr. Elliott's May 2000 assessment did not find that Student had a mental health disorder that required intervention. The assessment Parents obtained from the Amen Clinic likewise failed to make any recommendation that Student receive counseling or any other intervention to address any alleged social/emotional needs. Additionally, the assessment administered to Student by the District psychologist also failed to indicate that Student had a current need for counseling or other psychological services. Finally, Student's teachers all noted that she was sociable with peers, got along well with teachers, and was never disruptive in class. Therefore, Student has failed to prove that the District had any reason to believe she had social/emotional issues at this time that required special education intervention. (Factual Findings 34 through 53, 55, 61, 62, and 66 through 68.)

40. Whether the District should have provided Student with social/emotional goals and with counseling services in its IEP offer of January 26, 2006, must be considered in light of the District's conclusion that Student's mental health at the time warranted a referral for assessment to OCHCA. Student contends that the District should

have addressed her social/emotional needs in the IEP. The District contends that it did address those needs by referring Student to OCHCA for an assessment.

41. The evidence in the record does not indicate the rationale for the District's decision to refer Student to OCHCA for a mental health referral, other than the fact that Parents requested the referral. However, the fact that the District believed the referral was warranted indicates that it had a basis to believe, as least as of January 2006, that Student was manifesting social or emotional issues that required intervention.

42. A student who is suspected of being an individual with exceptional needs and is suspected of needing mental health services may be referred to a community mental health service in accordance with Government Code section 7576. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. II, § 60040, subd. (a).) Referral packages are required to include certain documentation, and are required to be provided within five working days of a district's receipt of parental consent for the referral. (*Ibid.*)

43. Prior to referring a student to a county mental health agency for services, a district is required to conduct an assessment in all areas of suspected disability. (Ed. Code, § 56331, subd. (b).) A district is required to provide specially designed instruction required by the student's IEP, including related services, such as counseling services, parent counseling and training, and psychological services. (*Ibid.*) A district is required to provide related services by qualified personnel unless the IEP team designates a more appropriate agency for the provision of services. (*Ibid.*) Districts and community mental health services are required to work collaboratively to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of services needed. (*Ibid.*)

44. Therefore, a school district is authorized by California state law to refer a student to the county mental health department for evaluation if the district suspects

that the student is in need of mental health services. However, nothing in this law relieves a district of the requirement, under the IDEA and corresponding state law, of providing a FAPE to a student pending this referral to the county mental health department, even if the FAPE includes psychological counseling services. Regardless of whether a referral is made to OCHCA, Education Code section 56331 requires a district to provide any specially designed instruction required by an IEP, including related services such as psychological counseling services.

45. Because Student is a child with a disability and entitled to a FAPE, the District was required to offer psychological counseling to Student as a related service on January 26, 2006. By referring her to OCHCA, the District had determined that Student had a unique need for psychological counseling to assist her to benefit from special education and related services. The District's position that because the IEP team agreed on January 26, 2006, to refer Student to OCHCA for mental health services, the District met its obligation with respect to Student's mental health needs is unpersuasive in light of the evidence and the statutory requirements. Student either required counseling or she did not; if she did, the District was required to provide it to her even while the referral to OCHCA was pending. Student has therefore met her burden of proof that the District failed to offer her a FAPE in the January 26, 2006 IEP, and its addenda, by failing to offer her counseling or other psychological services to address her social/emotional needs. (Factual Findings 76 through 81.)

46. Student also contends that the District failed to offer her a FAPE in the April 24, 2006 IEP that placed her at OFL because that placement failed to meet her unique needs. The District replies that it offered Student this placement as a means of having her Parents return Student to school after they had begun home-schooling Student in response to her suspension for having brought a prescription drug to school.

The District further contends that the placement met Student's needs and was designed to provide her with at least some educational benefit.

47. Student's assertion that the placement at OFL denied her a FAPE is well taken. OFL was a charter school that operated on an independent study model. Students spent three hours a day in a classroom working on assignments at their own pace. Credit for a class was given when the student completed an entire assignment packet. The classes had no structure; they amounted to study halls where a proctoring teacher was available to answer questions. The only "special education" services offered to Student was one hour a week of RSP assistance which the OFL teacher provided on a one-to-one basis to her. The RSP class was scheduled in the late afternoon; Student was therefore required to return home, or otherwise occupy herself, for several hours between the time her class at OFL ended and the RSP hour began. The majority of Student's deficits were in the area of attention and focus, based on her diagnosis of ADHD. She had difficulty concentrating and focusing on schoolwork. She was inattentive in class, easily distracted, and failed to complete assignments, complete homework, or turn in homework. The District offered no basis for its belief that Student, with all her attenuating attention and task completion problems, could be successful in an independent study program. Student's RSP teacher Ms. Amon testified at hearing that Student was one of her three RSP students who had attempted to transfer to OFL, all without success. Ms. Amon did not believe that the OFL was a suitable placement for Student. The District believed that it was addressing Parents' concerns when it offered OFL to Student. However, in its zeal to try to address Parents' concerns, it failed to consider whether this program truly met the needs of a student with a learning disability who suffered from ADHD. The weight of the evidence thus supports Student's contention that the placement at OFL failed to provide her with a FAPE. (Factual Findings 82 through 84.)

48. Student also contends that the District's offer of placement to Student of three RSP classes at Capistrano Valley High School in the January 2007 IEP, which was similar to the placement offer the year before, failed to offer her a FAPE. The District asserts that the placement offer was reasonably designed to provide Student with educational benefit.

49. Student has failed to meet her burden of persuasion that the District's offer did not meet the *Rowley* standard. The RSP classes had a maximum of 14 students, ensuring that Student would receive much more individualized attention than she would in a general education class. The RSP teacher would also be able to ensure that Student completed assignments, turned them in, and paid attention in class. There is no evidence that the RSP classes were much different than the academic classes Student attended at her residential placement at the Pine Ridge Academy in UTAH. Student's grades at Pine Ridge had dropped to "Cs" and "Ds" indicating that a small school environment did not correlate automatically to success for Student. The January 2007 placement offer in the RSP classes at Capistrano Valley High School offered Student a legally adequate FAPE. (Factual Findings 98 through 103.)

INDIVIDUALIZED TRANSITION PLANS (ISSUES 4(E) AND 5(E))

50. Student contends that the ITPS contained in each of the IEPs at issue in this case did not meet legal standards. The District contends that the ITPS were "works in progress" that would evolve with Student as she grew older, and that the District could, and did, adjust them to meet Student's needs.

51. At the time the District offered Student her first IEP on June 15, 2005, federal and state law required that beginning at age 14 and updated annually, a student's IEP contain a statement of the transition service needs of the child. The transition statement had to focus on the student's courses of study, such as participation in advanced-placement courses or in vocational education programs.

Federal and state law also required that beginning when the student was age 16 (or younger, if determined appropriate by the IEP Team), the IEP contain a statement of needed transition services for the student, including, when appropriate, a statement of interagency responsibilities. (20 U.S.C. § 1414(d)(1)(A)(vii) (IDEA 1997); Ed. Code, § 56345.1, subd. (a) (2004).) Both Student and the District, in their closing briefs, reference the ITP requirements that became effective with the passage of the reauthorized IDEA, effective July 1, 2005. Those more comprehensive requirements were not in effect at the time Student's IEP team developed her June 15, 2005 IEP. Although the ITP the District developed for the June 15, 2005 IEP was brief, there was no requirement that it contain specific provisions. The ITP did address Student's goals for continuing post-secondary education, for obtaining a driver's license, and for post-education career goals. The ITP therefore met the legal requirements in effect at the time the District developed it. (Factual Findings 63 through 65.)

52. However, the statutory requirements for an ITP changed with the reauthorization of the IDEA and the corresponding amendments to the Education Code. The new statutes state that beginning not later than the IEP that will be in effect when a student receiving special education reaches 16 years of age (or younger, if the IEP team deems it appropriate), an IEP must contain a transition plan that contains appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills. The plan must also contain the transition services needed to assist the pupil in reaching those goals. (*Board of Education of Township High School District No. 211 v. Ross, et al.* (7th Cir. 2007) 47 IDELR 241, 107 LRP 26543; 20 U.S.C. § 1414(d)(1)(A)(i)(8); 34 C.F.R. § 300.320(b); Ed. Code, § 56345, subd. (a)(8)(A).) The new goal of an ITP is therefore that it be a results-oriented process focused on improving the academic and functional achievement of the student to facilitate the movement from school to post-

school activities. The ITP therefore should include instruction, related services, community experiences, the development of employment and post-secondary goals, and when appropriate, the acquisition of daily living skills.

53. Although Student's January 26, 2006 IEP contained an ITP, it was not required to do so because Student would not turn 16 at any time the IEP was in effect. Any deficiencies in the ITP therefore did not deprive Student of a FAPE. (Factual Findings 75.)

54. However, the District developed the January 5, 2007 IEP three weeks before Student's 16th birthday; this IEP therefore would be in effect when Student turned 16. It was obliged to meet the new requirements of the reauthorized IDEA and the amended Education Code. It failed to do so, for the reasons stated in Factual Finding 105. The District's failure to administer a vocational or career assessment to Student was due to Student's absence from the District. The ITP contemplates that Student would take such an assessment when and if she returned to a District school. The ITP therefore adequately addressed this requirement. However, the ITP failed to meet the other statutory requirements for an ITP. It is bereft of any reference to Student's post-secondary employment or educational goals, does not address whether Student needs assistance with daily living skills, and does not address whether it is necessary or appropriate for Student to engage in community activities. Nor does the plan describe any instruction or guidance that Student would receive as transition services in order for Student to meet transition goals. Student has therefore met her burden of proof that the January 5, 2007 IEP did not contain a legally adequate ITP. (Factual Findings 104 and 105.)

TIMELINESS OF REFERRAL TO OCHCA (ISSUE 6)

55. Student contends that the District failed to make a timely referral to OCHCA for her to receive a mental health assessment as part of the January 26, 2006

IEP. The District asserts that its referral was timely, that any delay was the result of administrative error, and that the error was harmless.

56. The IDEA allows state educational agencies the flexibility to provide related services required in IEPs through interagency agreements between the state educational agency and other public agencies. (See 20 U.S.C. § 1412(a)(12).) In California, in order to maximize the utilization of state and federal resources, mental health assessments for purposes of developing an offer of FAPE are the joint responsibility of the State Secretary of Public Instruction and the State Secretary of Health and Welfare. (Gov. Code, §§ 7570, 7572, subds. (a) & (c), 7576, subd. (a) [community mental health programs provide the mental health services required in order to provide a FAPE].) Because California has chosen the above method to provide mental health services that would otherwise be part of an individual student's IEP, it follows that local education agencies must comply with state statutes and regulations that apply to referrals for provision of mental health services. Thus, a failure to follow state procedures may be the basis for alleging a denial of FAPE under the IDEA.

57. "Mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals in conformity with Education Code sections 56320 through 56329 [detailing the numerous procedural safeguards associated with assessments]. (Cal. Code Regs., tit. 2, § 60020, subd. (g).) A local educational agency, an IEP team, or a parent, may initiate a referral to community mental health services for a special education student or a student who may be eligible for special education, who is suspected of needing mental health services. (Gov. Code, § 7576, subd. (b); Ed. Code, § 56320; Cal. Code Regs., tit. 2, § 60040, subd. (a); see also Cal. Code Regs., tit. 2, § 60030 [describing interagency agreements between local

educational agencies and local mental health director for provision of mental health assessments].)

58. A school district must initiate a referral for a mental health assessment within five working days of its receipt of parental consent to a referral. (Cal. Code Regs., tit. 2, § 60040, subd. (a).) The community mental health agency shall develop a mental health assessment plan and provide it to a parent within 15 days of receipt of the school district's referral. (Cal. Code Regs., tit. 2, § 60045, subd. (b).) If mental health services are recommended following a mental health assessment, then an IEP team meeting must be convened at which time the provision of services must be added to the IEP. (Gov. Code, § 7572, subd. (d).) The school district must schedule an IEP team meeting pursuant to Education Code section 56344 within 50 days from the mental health agency's receipt of the parent's written consent to the mental health assessment (Cal. Code Regs., tit. 2, § 60045, subd. (d).) The 50-day time period for convening an IEP meeting does not include school vacations in excess of five school days. (Ed. Code, § 56344(a).) If the referral for an assessment has been made 20 days or less prior to the end of the regular school year, the IEP developed as a result of that assessment shall be developed within 30 days after the commencement of the subsequent regular school year. (*Ibid.*)

59. As stated in Factual Findings 85 through 88, the District determined that Student's social and/or emotional needs warranted a referral to OCHCA for a mental health assessment. Dr. Ernsdorf sent a referral to OCHCA on or about the date on which the IEP team developed the January 26, 2006 IEP. However, the referral did not contain all statutorily mandated information and OCHCA returned the referral to the District on March 21, 2006. Dr. Ernsdorf did not complete another referral and return it to OCHCA until April 7, 2006. Therefore, the District missed two deadlines: the first when it failed to send a correct referral to OCHCA and the second when Dr. Ernsdorf failed to return a

revised referral to OCHCA within five days of notice that OCHCA had rejected the original referral.

60. Student has failed, however, to demonstrate that she has suffered a substantive loss based upon the District's procedural violation of her rights. The District properly completed the revised referral, which OCHCA accepted. OCHCA then timely processed the referral and attempted to complete its assessment of Student within statutory timelines. Student's Parents hindered the process and OCHCA was therefore unable to complete the assessment within the mandated timeline. Student was never assessed in the spring of 2006 through no fault of either the District or OCHCA. The actions of Student's Parents demonstrate that they had no real desire to have OCHCA assess Student, and thus no desire to receive services from OCHCA. Student has failed to put any evidence into the record to demonstrate that had the District completed the referral process six weeks earlier than it did, Student's Parents would have produced Student for assessment and accepted OCHCA services. The only conclusion that the ALJ can draw from these facts and the lack of evidence to the contrary is that Student has suffered no loss of educational benefit from the District's failure to submit a timely referral to OCHCA. Student has therefore failed to meet her burden of proof that the District's failure to submit a timely referral denied her a FAPE. (Factual Findings 85 through 88.)

REMEDY FOR FAPE VIOLATIONS – REIMBURSEMENT FOR RESIDENTIAL PLACEMENT AND COMPENSATORY EDUCATION

61. Student alleges that due to the District's failure to provide her with a FAPE, her Parents are entitled to reimbursement from the District for all of their out-of-pocket expenses for Student's residential placement in Utah. Student also asserts that she is entitled to compensatory education. Finally, Student contends that her Parents are entitled to reimbursement for the costs of her non-residential private school placement,

in which she is presently enrolled, because the January 5, 2007 IEP did not offer her a FAPE. The District responds that there is no evidence to support either that Student required a residential placement or that her Parents are entitled to reimbursement for the cost of the placement, and no evidence that Student is entitled to compensatory education. The District additionally contends that it is not obligated to pay for Student's present private school placement.

62. In general, when a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96, 85 L.Ed.2d 385] (hereafter *Burlington*).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Factors to bear in mind when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*Target Range, supra*, 960 F.2d at p. 1487; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.)

63. A district may be required to reimburse a student's parents for the costs of a private school if the district failed to make a FAPE available to the child. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); Ed. Code, § 56175.) Under the Court's finding in *Burlington*, a parent may receive reimbursement for his or her unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the Ninth Circuit has held that when a student's unilateral placement is

necessitated by "medical, social, or emotional problems . . . apart from the learning process," the responsible local educational agency is not obligated to pay for that placement. (*Clovis Unified Sch. Dist. v. Office of Admin. Hearings* (9th Cir. 1990) 903 F.2d 635, 643.)

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

65. A student's parent must permit the district to conduct necessary and appropriate assessments if the parent intends to seek the benefits of the IDEA. (See 20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(a)(3); *Gregory K. v. Longview* (9th Cir. 1987) 811 F.2d 1307, 1315; *Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178; *S.F. v. Camdenton R.-III School District* (8th Cir. 2006) 439 F.3d 773.)

66. Reimbursement for the costs of a private school shall not be reduced or denied for failing to provide notice of intent to remove the child from the public school in any of the following circumstances: (1) the school prevented the parent from providing notice; (2) the parents were not informed of the notice requirement; or (3)

complying with the notice requirement would likely result in physical harm to the child. (20 U.S.C. § 1412(a)(10)(C) (iv)(I); 34 C.F.R. § 300.148(e)(1); Ed. Code, § 56177, subd. (a).)

67. The ALJ has found that Student prevailed on three issues raised in her due process complaint. She has met her burden of proof that the District failed in the January 5, 2006 IEP, and its addenda, to provide her with counseling or other psychological services to address her social and/or emotional needs. Student has also met her burden of proof that placement at OFL in the April 24, 2006 IEP denied her a FAPE. Finally, Student met her burden of proof that the District failed to develop a legally adequate ITP for Student in the January 5, 2007 IEP. However, as stated in Factual Findings 89 through 97, Student has failed to meet her burden of proof that she required a residential placement in May 2006 or that reimbursement for Student's residential placement is a proper remedy for the District's violations of Student's rights. As also stated in Factual Findings 89 through 97, Student has also failed to meet her burden of proof that her Parents are entitled to reimbursement for their funding of Student's present private placement as a remedy for the District's failure to develop a proper ITP in the January 5, 2007 IEP.

68. Student's Parents decided to place her at a RTC in Utah after Student took an accidental overdose of a prescription medication. The evidence supports the District's contention that the placement was specifically due to their discovery of Student's substance abuse and their belief that a residential treatment placement would address Student's issues with regard to her abuse. The evidence also demonstrates that Student's primary problems were manifested at home. She had significant conflicts at home, particularly with her Mother. Student's substance abuse was not manifested at school. Her behavior at school was appropriate. There is nothing in the record to suggest that the District should have been aware that Student had problems that interfered with her ability to access to her education. There is also nothing in the record

to indicate that Student required a residential placement to address her problems or that a placement in a day treatment program would not have provided some benefit to her. Dr. Mickelsen's opinion was that Student required a residential placement even if she had not taken the overdose; his opinion is that all children who are substance abusers require such a placement. However, as stated in Conclusion of Law 63, a school district is not responsible for the cost of a student's unilateral residential placement where the placement was prompted by medical, social, or emotional problems apart from the learning process.

69. Here, the only evidence in the record is that Parents decided to place Student at an RTC based on advice from their clergyman. There is no evidence that a medical professional made the determination that Student required such a restrictive placement or that another type of placement or outpatient counseling could not have addressed her needs. Nor is there any evidence that Student was an immediate danger to herself, or a danger to others.

70. Additionally, reimbursement is also not available to Parents because they did not give the District 10 business day's notice of their intent to place Student out-of-state. Parents made their decision prior to sending notification to the District on June 5, 2006, five days after Student's overdose. Although Mother and Father were understandably concerned for Student's welfare given her drug use, there is no evidence that compliance with the notice requirement would likely have resulted in physical harm or serious emotional harm to Student. As stated above, there is no evidence that a medical professional determined that Student required a residential placement, let alone any evidence that Student required an immediate placement to avoid further harm to herself.

71. As stated above, an ALJ may also deny reimbursement based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R.

§ 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.” In *Patricia P.*, the court denied reimbursement where the parents had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. Here, reimbursement is also unavailable because the District was not given an opportunity to assess Student. Like the facts of *Patricia P.*, *supra*, Student’s Parents removed her from California, and refused to permit the District to assess her despite all its efforts to do so. As soon as Parents informed the District that they were sending Student to Utah, the District informed them that it needed to assess Student. Parents adamantly refused to permit the assessment, suggesting that the District accept the results of any assessments conducted by the Utah professionals. Parents did not provide Student for assessment until late November 2006, six months after they placed Student at the RTC in Utah. Although Student’s accidental overdose was naturally of considerable concern to Parents, reimbursement cannot be awarded where the District was not given a chance to assess Student and make an offer of FAPE in light of assessment results. Accordingly, the ALJ also denies reimbursement because Student was not made available for assessment by the District and/or OCHCA prior to her placement in Utah.

72. Finally, the ALJ also denies reimbursement because there is no evidence that Parents investigated any placements or options in California. There is no evidence that alternatives to a residential placement in Utah would not have met Student’s needs.

73. In sum, Student has failed to meet her burden of proof that Parents are entitled to reimbursement for expenses incurred in privately placing Student at the RTCS in Utah. (Factual Findings 89 through 97.)

74. Student's argument that Parents are entitled to reimbursement for costs of her tuition at the New Vista School is also unpersuasive. The only FAPE violation that the ALJ has found with regard to the January 5, 2007 IEP is that it failed to contain a legally adequate ITP. Student has failed to provide any evidence, or to even make an argument, that placement at a private school is a proper remedy for a district's failure to develop an adequate ITP. Neither is the ALJ aware of any case where a court or other tribunal ordered such a remedy solely based on inadequacies in an ITP. As stated above, remedies for the violation of a student's rights under the IDEA are equitable in nature. Ordering the District to fund a private school placement merely because its ITP was insufficient would not be equitable.

75. The ALJ notes that Student failed to put on any testimony or present any other evidence of what compensatory remedies would be appropriate and what the basis is for any compensatory remedies. Therefore, in light of the equitable nature of compensatory remedies, the ALJ will make the following orders.

- a. The ALJ has found that the District improperly failed to provide Student with counseling services in the January 2006 IEP. OCHCA subsequently determined that Student required three 45-minute sessions of counseling a month to meet her social and/or emotional needs. The District should have provided counseling to Student from January 26, 2006, when it developed the IEP, until early June 2006, when Parents sent Student to Utah. The ALJ shall order the District to provide Student with 12 45-minute counseling session to compensate Student for the loss of services. Student shall have up to six months to use the services. Student will forfeit any services not used within six months from the date of this decision. The District may either provide the services through a school psychologist or through an appropriate outside provider. The District shall provide the services to Student after her regular

school hours. Student shall be responsible for her own transportation to the location of the services.

- b. The ALJ also found that the District denied Student a FAPE when it placed her at OFL. However, Student has failed to provide any evidence of what, if any, compensatory education she requires based upon this denial of FAPE. The ALJ has already determined that reimbursement for Student's residential placement is not an appropriate remedy for the reasons described above. Student has not provided any evidence of an appropriate alternative remedy and has not argued in her closing brief that the ALJ should consider and award any alternative remedy. Since there is no evidence of an alternative remedy upon which the ALJ could base an award of compensatory education for this denial of FAPE, the ALJ is unable to award one.
- c. The ALJ further has found that the ITP in the January 2007 IEP does not meet legal requirements. She has also found that reimbursement for Student's private school costs is not an appropriate remedy to address this violation. However, Student is entitled to the benefits of an appropriate ITP. In addition to ordering the District to convene another IEP meeting to develop a legally adequate ITP, the ALJ shall order the District to provide Student with five hours of career guidance counseling to address Student's transition needs. The District shall provide the career counseling within the next six months. Student will forfeit any hours that she does not use within that time. The District may provide the hours either through a school career guidance counselor or through an appropriate private provider. The District shall provide the hours to Student after her regular class hours. Student shall be responsible for providing her own transportation to the counseling sessions.

ORDER

1. Within 45 days of the date of this Order, the District shall begin providing Student with counseling sessions pursuant to paragraph 75 (a) of the Conclusions of Law.
2. Within 45 days of the date of this Order, the District shall begin providing Student with career counseling or career guidance sessions pursuant to paragraph 75(b) of the Conclusions of Law.
3. Within 45 days of this Order, the parties shall hold another IEP meeting for Student and shall develop a legally adequate ITP.
4. All of Student's and Parent's other requests for relief are denied.

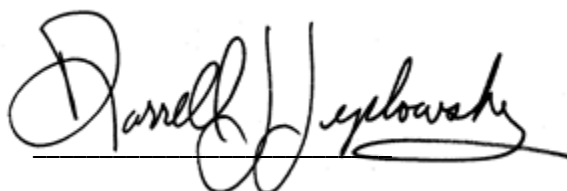
PREVAILING PARTY

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 partially prevailed on issues 5 (a), (b), (c), (d) and (e). The District prevailed on all other issues heard and decided in this decision.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: June 6, 2008

A handwritten signature in black ink, reading "Darrell L. Lepkowsky". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings