

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

WILLIAM S. HART UNION HIGH
SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007060605

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Santa Clarita, California, on October 9 and 10, 2007.

Joel S. Aaronson, Attorney at Law, represented Student. Student's stepmother (Mother) attended the hearing on all days.

Barret K. Green and Ian T. Wade, Attorneys at Law, represented William S. Hart Unified School District (District). District Director of Special Education Marty Lieberman attended the hearing on all days.

Student filed a Request for Due Process Hearing on June 19, 2007. A stipulated continuance was granted on July 23, 2007. At the hearing, the parties were granted permission to file written closing arguments. Upon receipt of written closing arguments on October 22, 2007, the matter was submitted and the record was closed.

ISSUE

Is Student entitled to reimbursement for expenses related to Student's placement at Cross Creek Manor in Laverkin, Utah (Cross Creek), from January of 2006 through June of 2007 because the District denied her a free and appropriate public education (FAPE)?

CONTENTIONS OF THE PARTIES

Student contends that the District failed to provide her with a FAPE prior to her enrollment at Cross Creek because despite her seemingly good grades, she was not performing up to her potential and Student's behavior in a District high school should have signaled a need for increased counseling services or a referral to the county Department of Mental Health. Student contends that the District's failure to provide a FAPE resulted in Student's behavior declining to the point where Student's parents were justified in placing her at Cross Creek on January 14, 2006. Finally, Student contends that after her parents placed her at Cross Creek, the District still had a responsibility to provide FAPE and should have held IEP team meetings for Student. Based on the above, Student contends that the cost of her attendance at Cross Creek should be reimbursed by the District.

The District contends that: Student's success in a District high school showed that Student was receiving FAPE and that a residential placement such as Cross Creek was not necessary, Student did not meet her burden of demonstrating that Cross Creek was an appropriate placement, Student was unilaterally placed at Cross Creek without having given the District the required ten day notice, the District's efforts to make a mental health referral for Student after she was at Cross Creek were rebuffed, and that placement at a for-profit school like Cross Creek is not reimbursable.

REQUESTED REMEDY

Student seeks reimbursement of \$80,546, calculated as 18 months tuition at Cross Creek, plus hotel and car rental expenses for three family visits, minus charitable contributions the family received.

FACTUAL FINDINGS

1. Student is an 18-year-old female, who, while enrolled in the District was eligible for special education under the category of emotional disturbance (ED) due to anxiety and depression.

2. Student had a history of depression, anxiety attacks and psychosomatic symptoms like feeling faint. Student was hospitalized in an adolescent psychiatric unit in March of 2003. A psychoeducational report prepared in April of 2003, prior to Student's transition from junior high school to a District high school, showed that Student had average intelligence and academic achievement scores, with the exception of writing, in which she achieved high average scores on a standardized test. Prior to her hospitalization, Student's school behavior included tardies, truancies, and defiance. After her hospitalization, Student reported that she was maintaining good grades and attending school regularly. Student was under psychiatric care for medication management and saw a private therapist two times per week. The report recommended "ongoing counseling to help [Student] work on her feelings of sadness and depression," which District personnel interpreted as a continuation of Student's private therapy.

3. Student's Individualized Education Programs (IEP's) dated May 13, 2003 and Jun 1, 2004 provided that Student would attend school in special day classes (SDC's) designed for Students with ED. The SDC's were intended to provide Student with smaller class sizes and a more emotionally supportive environment.

4. Normita Meza (Meza) taught Student Biology and Algebra in ED SDC's at a District high school during the 2004-2005 school year (10th grade). Meza was a credentialed special education teacher with a bachelor's degree in psychology. Student would leave class daily to go to the restroom and asked to visit the nurse's office approximately two times per week. Student fainted one time in class.

5. Michael Pepo (Pepo) taught Student in her ED SDC History classes during the 2004-2005 school year and in the fall semester of 2005. Pepo also served as Student's IEP coordinator. Pepo had a bachelor's degree in psychology, a master's degree in education and was a credentialed special education teacher. In class, Pepo saw that Student was moody and sometimes appeared depressed, however, Student was not a behavior problem. Pepo thought that Student was doing well in school but that Student had problems at home.

6. In February of 2005, an ambulance was called for Student because of a panic attack at school. Student was subsequently hospitalized for treatment of her panic and anxiety symptoms. The psychiatric admission notes show that Student was not suicidal and made no reference to oppositional or defiant behavior. Following the hospitalization, Student continued in private therapy and was prescribed psychiatric medication. Pepo spoke to Mother after the hospitalization about Student returning to her high school.

7. Student returned to high school and passed the California High School Exit Exam (CAHSEE) on the first try on March 15, 2005. Student passed easily and had a strong score in English Language Arts.

8. An IEP team meeting was held on April 27, 2005, while Student was in the tenth grade. The IEP specified special day classes for most academic classes in order to provide small class sizes and curriculum modifications. Accommodations for state-wide and

District assessment tests included shorter test segments, additional time, small group settings, and the option of having some test portions read aloud. The IEP team was aware that Student had been hospitalized for psychiatric reasons prior to the meeting and that Student was receiving private therapy.

9. The April 27, 2005 IEP contained a behavior/transition goal that Student would “complete one semester of Career Visions [a career transition program] and maintained [sic] ‘panic’ episodes.” The objectives/benchmarks for this goal were: 1) that Student would follow all school rules and attendance policies; 2) that Student would enroll in Career Visions class by August of 2005; 3) that by December of 2005, Student would reduce her visits to the counselor and/or nurses office to one time per week; and 4) that Student would be mainstreamed to an additional general education class. The IEP included a behavior plan that emphasized the expected classroom behavior, the rewards for positive behavior and the progressive discipline consequences of not following classroom standards.

10. At the April 27, 2005 IEP team meeting, Mother was provided with the District’s handout regarding parental rights and procedural safeguards that included notice that a claim for private school tuition reimbursement might be reduced if the parents failed to provide ten days notice to the District prior to the placement and failed to make the child available for assessment by District personnel.

11. No IEP team meetings were held regarding Student between April 27, 2005 and June 20, 2007.

12. During the spring semester of the 2004-2005 school year, Student achieved the following grades: English B-; Algebra C; Biology A; Modern Civilization B-; Physical Education D-; and Art A-. Student met the California Algebra requirement by June of 2005.

13. David La Bat was the school psychologist for the high school between 2003 and August of 2006, at which time he left District employment for private practice. At the time of his testimony, La Bat did not have any contracts with the District. La Bat had a master’s degree in family therapy and had been a licensed psychologist in Minnesota. La Bat held a California pupil and personnel service credential in school psychology. La Bat first met Student during the 2004-2005 school year in Pepo’s ED SDC. La Bat did not know what Student’s underlying diagnosis was, but had discussed with Student that she went to privately paid therapy and that she liked her therapist. La Bat had not been aware that Student had a panic attack at school in February of 2005, resulting in psychiatric hospitalization. Pepo and Meza reported to La Bat that they never saw Student have a panic attack in class.

14. According to Mother, Pepo was informed that Student had stopped attending private therapy in the summer of 2005. However, Pepo did not recall any discussion with Mother during 2005 regarding a need for Student to obtain a mental health referral or a placement other than a District high school. Mother’s testimony on this point was not

persuasive given that the evidence at hearing showed that Mother frequently e-mailed District staff or otherwise documented her interactions with District personnel.

15. During the fall semester of 2005 (11th grade), Student was in Pepo's SDC history class. The daily lessons consisted of a class agenda, vocabulary notes, review of class materials, and worksheets. Student was given homework approximately once a week. Student participated in the class and did well. Student told Pepo that she felt anxious approximately two times per week. Pepo or the instructional assistants in the class would speak to Student about her anxiety. Sometimes Student was permitted to leave class to speak to LaBat or Fricke, but Pepo could not verify that Student actually went there. Student's requests to leave class did not increase during that semester.

16. David Hefner taught Student's general education digital photography class during the fall semester of 2005 and recalled that Student enjoyed the class and sometimes came in during the lunch period to work. Student was not a behavior problem or excessively absent.

17. During the fall semester of 2005 Student visited health assistant Suzi Warne (Warne) at 10:00 a.m. daily to take her medication. Student visited Warne three or four other times during the semester.

18. On November 3 and 7, 2005, Mother contacted Marty Fricke, the high school guidance counselor, with concerns about Student's behavior. Specifically, Mother expressed concern that Student had shown a sudden change of behavior at home, resulting in restrictions on telephone and internet use. Mother was concerned that Student's school attendance and grades would suffer and wanted the high school to discipline Student for any trancies.

19. On November 8, 2005, the high school vice principal, Martha Spansel, disciplined Student for forging a note from home. Student was assigned one day of Saturday school, consistent with the high school's "progressive discipline" policy of increasing the consequences for unacceptable behavior.

20. On November 15, 2005, Fricke e-mailed Mother to tell her that Student had missed 11 days of her first period health class and that 15 absences, whether excused or not, would result in a grade of "F." Student ultimately did not exceed the absence limit and completed the health class with a grade of "B."

21. On November 17, 2005, Mother e-mailed Fricke to express that she was concerned for Student's welfare and did not feel that the school was consistently and appropriately disciplining Student for school misconduct. Mother wrote, "If you don't want to, or are unable to discipline [Student] when she breaks school rules, we need to send her to a school that will."

22. On November 22, 2005, Student was given an in-class suspension in English class by teacher Orval Garrison (Garrison) for failure to use her class time to work on assignments. Garrison did not recall Student as being a behavior problem other than this one time. It can be inferred that this incident was not significant because Garrison, who otherwise displayed a good memory at hearing, had to have his recollection refreshed with documents to even recall it. Garrison's English class had between 18 and 22 pupils and was a "lab" class with an emphasis on improving writing skills. Garrison tailored his instruction and the assignments to each student's skill level.

23. On December 2, 2005, at the request of Vice Principal Spansel, Student was issued a truancy citation from the Los Angeles County Sheriff's Department for two full-day truanancies on November 1 and 29, 2005, and for missing eight class periods at various times.

24. By the end of the fall semester of 2005, Student had an academic grade point average of 2.84 and was a half a year ahead of schedule in obtaining the credits needed to graduate. Student obtained the following grades in her fall semester classes: English B-; SDC US History C-; Photography A-; Career Visions C; and Health B. Student's grade in her SDC history class was based on her daily work completion. Two-thirds of Student's grade in her general education English class was based on completion of class work and one-third of the grade was based on test scores.

25. Student achieved most of the benchmarks from the April 27, 2005 IEP. Comparison of nurse's office visit logs from the spring of 2005 and the fall of 2005, showed that Student succeeded in reducing her visits to the nurse's office. Student completed one semester of Career Visions and succeeded in increasing her participation in general education by successfully taking general education photography, health and English classes. Although Student did not succeed in following all school rules, the progressive discipline plan in the IEP, as well as the progressive discipline policies of the high school were implemented and Student was able to maintain her grades.

26. Student testified at hearing. According to Student, a typical school day for her in the fall semester of 2005 consisted of cutting class in order to hang out with her friends or get food. Student avoided the hall monitors by pretending to be going somewhere. In class, Student would listen to her headphones and copy other student's work. Student did not have homework. Student admitted at hearing that she had forged a note to obtain a pass that permitted her to leave school early during the fall semester.

27. Student's account of her school day is not persuasive evidence that she was not receiving educational benefit during the fall semester of 2005. In particular, because Garrison's English class provided more individualized instruction and emphasized individual writing assignments, copying from other students would not have lead to success. As to Pepo's SDC History class, Pepo specifically testified that Student participated in class. Finally, Hefner saw Student working on photography projects outside of class time, indicating that Student was actively participating in the learning process.

28. Student described that outside of school during the fall semester of 2005, she was running away, stealing, lying, getting body piercings and riding in cars with people who were under the influence. At home, she did not have a good relationship with her parents and was always arguing with them or crying in her room.

29. Student did not talk about her problems with Pepo, La Bat or any of her teachers.

30. Around December of 2005 and January of 2006, Student was planning to run away from home with a boyfriend and a female friend. Student planned to live in Elyssian Park in Los Angeles and both Student and her female friend intended to get pregnant by the boyfriend.

31. Student attended high school between January 9, 2006, the Monday that all students returned from the holiday break, and Friday, January 13, 2006. During this week, Student was absent from six periods of school.

32. On January 13, 2006, Student was driven from California to Cross Creek, where she was enrolled the next day, January 14, 2006. Student had not gone voluntarily, but did not resist because she knew that she needed help. Mother testified that she and Student's father (Father) believed that Student had been in an "extreme crisis" over the holiday break and was in danger of killing herself. However, Mother testified that it was after Student enrolled at Cross Creek that she found a letter by Student that Mother interpreted as a suicide threat. Mother and Father understood at the time that they could have taken Student to a local hospital to be stabilized but they wanted a longer term solution to Student's behavior problems. Mother found Cross Creek by filling out an internet survey on a website that gave referrals for troubled teens. Cross Creek called Mother to explain their program and told Mother that it was more restrictive than would be permitted in California.

33. Prior to January 14, 2006 (the date Student enrolled at Cross Creek), Student had not received counseling as a designated instruction and service (DIS), nor had she ever been referred to the Los Angeles County Department of Mental Health (CMH) for assessment or services.

34. Upon admission to Cross Creek in January of 2006, Student was seen by Norman Thibeault (Thibeault). Thibeault was licensed in Utah as a marriage and family therapist at the time. Later in 2006, Thibeault obtained a Ph.D. from California Coastal University, a school accredited only by the Distance Education Training Council. Thibeault's "intake summary," developed in approximately three to five hours, identified Student's "primary problem" as "oppositional defiant" with "secondary problems" of "depression, sexual abuse survivor and R/O [rule out] chemical dependence." Thibeault did not administer any standardized assessments to Student. Thibeault's treatment plan for Student made reference to "suicidal thoughts and/or gestures" as a symptom of Student's secondary problem of depression, but made no reference to Student being an immediate danger to herself.

35. Thibeault explained at hearing that Cross Creek used a six level system of increasing privileges and responsibilities based on compliance with the Cross Creek rules. Student participated in daily group therapy sessions, and one session per week of either individual or family therapy. Cross Creek was a “for profit” institution that was not accredited by the California Department of Education.

36. At hearing, Thibeault offered the opinion that Student required residential treatment at Cross Creek. Thibeault’s opinion was not persuasive evidence that Student required residential treatment for purposes of a FAPE or that the Cross Creek program was appropriate for Student. Although Thibeault had some recollection of reviewing school records, at no time did Thibeault speak with District personnel about Student’s school performance. In addition, Thibeault had no knowledge of the educational portion of Student’s program at Cross Creek and had no knowledge of whether Student graduated.

37. On January 17, 2007, the District received notice that Mother had withdrawn Student from the District high school and that Student would be attending Cross Creek. Around the same time, Mother stopped by Warne’s office to say that Student had been taken out of school because Student had wanted to get pregnant. Warne’s testimony that this was the reason Mother gave for withdrawing Student from school is persuasive because it was corroborated by Student’s testimony regarding her plans at the time.

38. In late January of 2006, La Bat saw Student’s name on a list of students who had withdrawn. La Bat was surprised because it had appeared to him that Student was doing well. On January 31, 2006, La Bat called Mother to find out what happened and learned that Student had been taken to Utah and enrolled at Cross Creek. La Bat asked Mother to provide a treatment summary from Cross Creek so that he could initiate a referral to the CMH. La Bat correctly explained to Mother that the District did not have “money of our own to give” toward residential mental health services because under California law such services were provided by county mental health departments, whereas educational services were the responsibility of school districts. La Bat also explained to Mother that Student would have to be physically present in California for CMH to assess her.

39. Mother believed that it would not have been safe to take Student out of Cross Creek after she was enrolled. Cross Creek had reported that Student was defiant and a high flight risk. Cross Creek did not provide an escort service out of its facility. Mother believed that if Student was returned to California at the time her life was at risk.

40. La Bat made a follow-up call to Mother approximately two weeks after January 31, 2006, to again request Student’s current treatment plan. Mother never provided a treatment plan to La Bat and did not call him again. Cross Creek had generated a treatment plan for Student dated January 30, 2006, from which it can be inferred that Mother could have provided the treatment plan to La Bat at or around the time of his original January 31, 2006 telephone call.

41. Mother contacted Pepo in January of 2006 to tell him that Student had been placed at Cross Creek. Pepo accurately told Mother that in general, a residential placement was a last resort after all other options had been exhausted and a referral to CMH had been made. Pepo also told Mother that the District generally did not pay for unilateral placements when the District options had not been exhausted. Pepo told Mother to contact District Director of Special Education Marty Lieberman (Lieberman).

42. Mother called the District offices two times in February of 2006 and one time in March of 2006 to ask about Student's transfer to Cross Creek and to ask about reimbursement.

43. Mother contacted Pepo and Meza in June of 2006 to request documents related to Student.

44. On June 19, 2006, Lieberman received a facsimile letter from Mother stating, "This is a pre mediation meeting requests for [Student]." The letter stated that the District's program "was not helping [Student] and she needed emergency intervention in January 2006 due to a crisis that unfolded over Christmas break." Mother related that Student had been sent to Cross Creek and that Student "will finish high school" there. Mother requested "the Hart School District to pay for [Student's] education at Cross Creek Manor."¹ The letter also stated Mother wanted an "IEP advocate" named Karen Crockett to participate in the meeting. Lieberman did not respond to the letter.

45. On March 29, 2007, Lieberman received a letter from "Educational Advocate / Child Right's [sic] Advocate" Karen Crockett stating that Student's parents had hired her "to assist them in seeking financial assistance in their daughter's placement in a residential therapeutic treatment center." The letter stated "it is our hope that we can come to an amiable agreement, prior to filing a due process [request]" and also referred to attending a mediation.

46. The June 19, 2006 and March 29, 2007 letters were not requests for IEP meetings because they referred to resolving Mother's claim through mediation or a due process hearing and did not address the issue of having Student assessed by the District for purposes of conducting an IEP.

47. Student graduated from high school at Cross Creek in June of 2007. No evidence was presented regarding Student's classes, her grades, or the graduation requirements.

¹At hearing, Student elicited evidence that Mother was thwarted from contacting Lieberman by e-mail on June 19, 2006, because the District's web site contained an incorrect e-mail address for Lieberman. However, because Lieberman received the same information from Mother via facsimile the same day, no negative inference will be drawn from the failed e-mailed communication.

48. Mother and Father paid Cross Creek \$80,820 (18 months tuition at a rate of \$4,490 per month). Mother and Father visited Student three times and incurred a total of \$750 in rental car expenses and \$600 in hotel expenses. Mother and Father received \$2,274 in charitable contributions that were applied to Student's tuition at Cross Creek.

CONCLUSIONS OF LAW

1. Student contends that she is entitled to reimbursement for tuition her parents paid to Cross Creek because the District failed to provide her with a FAPE both before and after her enrollment there. The District disagrees, contending that Student was provided a FAPE prior to enrollment at Cross Creek, that Student should have provided notice to the District prior to the placement, and that the District was unable to perform a mental health assessment after Student was placed at Cross Creek. As discussed below, Student failed to meet her burden of proving that she is entitled to reimbursement.

2. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

3. A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private school placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c);² see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

4. FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20

² Prior to October 14, 2006, this regulation was numbered as 34 U.S.C. § 300.403. Because no substantive changes were made to the regulation, the latest version has been cited.

U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* 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. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, 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.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

6. The IDEA allows states the flexibility to provide related services required in IEP’s 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 services provide the mental health services required in order to provide a FAPE].) “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].) The following conditions must be met in order to make a referral for a mental health assessment:

- (1) The pupil has been assessed by school personnel in accordance with [Education Code section 56320, et seq.]. Local educational agencies and community mental health services shall 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.

- (2) The local educational agency has obtained written parental consent for the referral of the pupil to the community mental health service, for the release and exchange of all relevant information between the local educational agency and the community mental health service, and for the observation of the pupil by mental health professionals in an educational setting.

- (3) The pupil has emotional or behavioral characteristics that are all of the following:
 - (A) Are observed by qualified educational staff in educational and other settings, as appropriate.
 - (B) Impede the pupil from benefiting from educational services.
 - (C) Are significant as indicated by their rate of occurrence and intensity.
 - (D) Are 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.

- (4) As determined using educational assessments, the pupil's functioning, including cognitive functioning, is at a level sufficient to enable the pupil to benefit from mental health services.

- (5) The local educational agency . . . has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to the pupil pursuant to Section 56363 of the Education Code,^[3] or behavioral intervention as specified in Section 56520 ^[4] of the

³ Education Code section 56363, subdivision (b), provides, in relevant part, that designated instruction and services may include: Counseling and guidance services; psychological services other than assessment and development of the individualized education program; parent counseling and training; and social worker services. (Ed. Code, § 563563, subds. (b)(9), (b)(10), (b)(11), and (b)(13).)

⁴ Education Code section 56520, subdivision (b)(1), provides, “That when behavioral interventions are used, they be used in consideration of the pupil's physical freedom and social interaction, be administered in a manner that respects human dignity and personal privacy, and that ensure a pupil's right to placement in the least restrictive educational environment.” California regulations provide that a functional analysis assessment (FAA) and a behavior intervention plan (BIP) which is derived from the FAA, occur after the IEP team finds that

Education Code, as specified in the individualized education program and the individualized education program team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the individualized education program team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

(Gov. Code, § 7576, subd. (a); see also Cal. Code Regs., tit. 2, § 60040, subd. (a).) The process of obtaining special education mental health services is not designed for an emergency situation. (Gov. Code § 7576, subd. (f); Cal. Code Regs., tit. 2, § 60040, subd. (e).) If a student requires emergency services, a parent must seek other resources. (Gov. Code § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040 (e).)

7. Reimbursement is not available to Student because she failed to meet her burden of demonstrating that she was denied a FAPE prior to her enrollment at Cross Creek and that Cross Creek was an appropriate placement. First, the District provided Student with a FAPE prior to Student's enrollment at Cross Creek. At the time of Student's April 27, 2005 IEP, Student had unique needs related to her anxiety and depression. However, Student was also making progress in the general curriculum and meeting her graduation requirements. The IEP addressed Student's needs by providing for SDC placements for academic classes and modifications to testing procedures. Reduction of Student's visits to the nurse's office related to panic attacks was made a goal. To the extent that Student's school behavior was a concern, the IEP made compliance with school rules a goal and outlined a progressive discipline strategy. Academically, the IEP addressed that Student was capable of taking part in more general education classes and set a goal that Student do so. The IEP also included the Career Visions class to facilitate Student's transition out of school. Because Student was receiving private therapy for her anxiety and depression at the time of the IEP, and was making progress in the general curriculum, the District would not have had a reason to suspect that Student needed additional counseling at school. During the Fall semester of 2005, Student was receiving educational benefit in her District high school placement. Student was ahead of schedule in meeting her graduation requirements, maintained good grades and had succeeded in reducing her visits to the nurse's office for her anxiety. To the extent that Student had some truancy problems, they were being addressed and did not impact her educational progress. In sum, Student was receiving educational benefit in the District placement prior to her enrollment at Cross Creek. (Legal Conclusions 2, 3, 4, 5, and 6; Factual Findings 2 through 9; 11 through 27.)

instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment pursuant to Education Code section 56320 et seq. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) The BIP is a written document that becomes part of an IEP and is developed when the student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (a)(3).)

8. Student's behavior during the fall semester of 2005 would not have caused the District to suspect that Student needed additional mental health services such that a referral to CMH would have been warranted. Student's needs had been identified as anxiety and depression and during the fall of 2005, Student succeeded in reducing her visits to the nurse's office related to panic attacks. Student had some problems with truancy, but the truancy issues were being addressed through the progressive discipline strategies at the high school. Although Student was experiencing difficulty at home, as she admitted, she would not have discussed these problems with District personnel. During the entire semester, there was only one incident of defiant behavior by Student in school, in Garrison's class, and the incident was immediately dealt with. Accordingly, oppositional or defiant behavior was not observed by educational staff in a school setting with any significant frequency or intensity. Similarly, Student's grades demonstrated that she was not impeded from benefiting from educational services. Moreover, to the extent Student had a mental health crisis over the winter break, the District could not have been aware of it, and referrals to CMH do not apply to emergency situations. Accordingly, a CMH referral during the fall semester of 2005 would not have been warranted. (Legal Conclusion 2, 4, 5 and 6; Factual Findings 5, 9, 14 through 33.)

9. Cross Creek was not shown to be an appropriate placement. Thibeault, the only witness from Cross Creek, had no knowledge of Student's academic program at Cross Creek and other than the fact that Student graduated, no other evidence of Student's education at Cross Creek was produced. While the restrictive atmosphere at Cross Creek may have been appropriate to address Student's out of school oppositional behaviors or fantasies about running away and getting pregnant, the record at hearing does not support a finding that Cross Creek was educationally appropriate. (Legal Conclusion 2 and 3; Factual Findings 34 through 37, and 47.)

10. Reimbursement may also be reduced if at least ten days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district's placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).) Reimbursement must not be denied on this basis if the parents had not been provided notice of the notice requirement or compliance with the notice requirement "would likely result in physical harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iv)(I)(bb) & (cc); 34 C.F.R. § 300.148(e)(1)(ii) & (iii).) The cost of reimbursement, may, in the discretion of the ALJ, not be reduced for failure to provide the required notice if compliance with the notice requirement "would likely result in serious emotional harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 C.F.R. § 300.148(e)(1).)

11. Reimbursement is also not available to Student because the District was not given ten business days notice of Mother and Father's intent to enroll Student at Cross Creek. Mother was informed of the ten day notice requirement in the District procedural safeguards that were given to her at the April 27, 2005 IEP team meeting. Although Mother and Father were understandably concerned for Student's welfare given her behaviors at home and her plans to run away and get pregnant, the evidence at hearing did not show that compliance with the notice requirement would likely have resulted in physical harm or serious emotional

harm to Student. It cannot be concluded that Student was at risk of harming herself when her intake at Cross Creek described Student's primary problem as being oppositional and defiant. At most suicidal ideation was considered a symptom of Student's depression and not an immediate threat to Student. Although disturbing, Student's plan to run away to a life of homeless pregnancy in Los Angeles had not been implemented, and presented only a possible danger to Student. Further, it was only after Student was enrolled at Cross Creek that Mother discovered a letter that she interpreted as including suicidal thoughts. As candidly testified to by Mother, Student could have been stabilized in local mental health facilities, however, the family chose another option which they perceived to be a longer term solution. Finally, Mother had indicated to Fricke as early as November of 2005 that she was considering sending Student to a school that imposed greater discipline. Accordingly, reimbursement must also be denied based on the failure to provide the District with the required ten day notice prior to enrolling Student at Cross Creek. (Legal Conclusions 2 and 10; Factual Findings 21, 30, 31, 32, 34 and 37.)

12. Reimbursement may also be denied 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.* reimbursement was denied 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. (*Ibid.*)

13. Here, reimbursement is also unavailable because the District was not given an opportunity to assess Student. Like the facts of *Patricia P.*, *supra*, Student was removed from California and not returned until she graduated from Cross Creek 18 months later. As soon as Mother informed the District that Student had been enrolled at Cross Creek, Mother was told that the District would need information regarding Student's treatment plan at Cross Creek and would need to assess Student in California. Mother did not provide any Cross Creek reports to the District, nor communicate any willingness to make Student available for assessment. As early as June of 2006, the end of Student's eleventh grade year, Mother made it clear that she intended for Student to finish high school at Cross Creek. Cross Creek's only concern with allowing Student to leave was that she was a flight risk, not that Student's life was in immediate danger. Although Student's behaviors at home and her intention to run away prior to enrolling at Cross Creek were a life-or-death issue to Mother and Father, reimbursement cannot be awarded where the District was not given a chance to assess Student and make an offer of FAPE. This is particularly true where the crisis at home leading to the family's decision to enroll Student at Cross Creek occurred while school was not in session. Accordingly, reimbursement is also denied because Student was not made available for assessment in California by the District and/or CMH. (Legal Conclusions 2 and 12; Factual Findings 30, 33, 34, and 37 through 46.)

14. In sum, Student is not entitled to reimbursement because she did not meet her burden of demonstrating that she was denied a FAPE prior to her enrollment at Cross Creek or that Cross Creek was an appropriate placement. Further, Student is not entitled to reimbursement because she failed to provide the District with the required notice prior to her enrollment and Student was not made available to the District for assessment after her enrollment.⁵

ORDER

All of Student's requests for relief are denied.

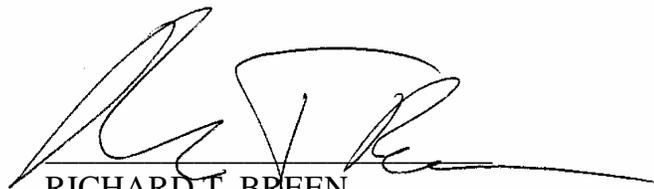
PREVAILING PARTY

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, the District was the prevailing party on all issues presented.

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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: November 27, 2007



RICHARD T. BREEN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division

⁵ In light of the conclusion that Student is not entitled to reimbursement, this Decision does not address the issue of whether reimbursement is improper because Cross Creek was a for-profit business. (See *Yucaipa-Calimesa Joint Unified School Dist. & San Bernardino Department of Behavioral Health* (CA OAH 2005) 106 LRP 8480.)