

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-05898 RGK (SHx) Date May 3, 2013

Title *T.C. et al v. VENTURA UNIFIED SCHOOL DISTRICT*

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams, Not Present

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order re: Motions for Summary Judgment (DE 36 and 44) and Order and Judgment re Court Trial

I. INTRODUCTION

T.C. and C.M. (inclusively, “Parents”), on behalf of themselves and their son, F.C. (“Student”), (collectively, “Plaintiffs”) filed a due process hearing complaint before the California Office of Administrative Hearings on August 15, 2011. The complaint alleged that Ventura Unified School District (“Ventura”) violated the Individuals with Disabilities Education Act (“IDEA”) by failing to provide Student with a free appropriate public education.

Administrative Law Judge Clifford Woosley (“ALJ”) presided over the proceedings, and identified the following four issues:

- (1) As of October 17, 2009, did Ventura violate its Child Find obligation by failing to assess Student in all areas of suspected disability?
- (2) Was Ventura’s March 28, 2011, psychoeducational assessment of Student, which determined that Student was not eligible for special education, appropriate?
- (3) Should Student have been found eligible for special education as of the time of Ventura’s psychoeducational assessment in 2011?
- (4) Are Parents entitled to reimbursement for the January 2011 placement of Student at Logan River Academy residential treatment center?

The administrative due process hearing took place over the course of eight days, from February 6 through February 17, 2012. The ALJ issued a decision that found in favor of Ventura on all issues (“Decision”).

On July 9, 2012, Plaintiffs filed the current action seeking (1) declaration that the ALJ erred by failing to admit certain records of proffered evidence; (2) review and reversal of the ALJ’s decision; (3) reimbursement of Parents’ costs for Student’s assessment and placement at Logan River Academy; (4)

Ventura's offer of placement for Student that is reasonably calculated to render Student full educational benefit; and (5) compensatory education in the form of a monetary trust fund.

II. INDIVIDUALS WITH DISABILITIES ACT

IDEA, 20 U.S.C. §1400 et seq., provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures. 20 U.S.C. §1412. IDEA's primary purpose is to assure that all children with disabilities have available to them a "free appropriate public education," which emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. §1400. An appropriate public education does not mean the absolutely best or potential-maximizing education for the individual child. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993). Rather, states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child. *Id.*

III. STANDARD OF REVIEW

In any action seeking review of a hearing officer's decision, "[t]he court ... shall receive the records of the administrative proceedings; ... hear additional evidence at the request of a party; and ... basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. 20 U.S.C. § 1415(i)(2)(C).

The District Court's standard of review is considered de novo. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467 (9th Cir. 1993). However, in recognition of the administrative agency's expertise, the court must consider the findings carefully, attempting to respond to the hearing officer's resolution of each material issue. *San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1993). After such consideration, the court is free to accept or reject the findings in part or in whole. *Id.* Despite their discretion to reject the administrative findings, however, courts are not permitted simply to ignore the administrative findings. *Id.* The court should determine independently how much weight to give the administrative findings. *Id.* The amount of deference afforded the hearing officer's findings increases where the findings are thorough and careful. *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). The Court gives deference to an ALJ's decision when it evinces careful, impartial consideration of all the evidence and demonstrates sensitivity to the complexity of the issues presented. *County of San Diego v. California Special Educ. Hrg. Off.*, 93 F.3d 1458, 1466 (9th Cir. 1996). A court treats a hearing officer's findings as thorough and careful when the officer participates in the questioning of witnesses and writes a decision containing a complete factual background as well as a discrete analysis supporting the ultimate conclusions. *Napa Valley*, 496 F.3d at 942-43. Although the District Court independently reviews the evidence and issues a decision supported by a preponderance of the evidence, the court must give due weight to the hearing officer's decision. *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1100 (C.D. Cal. 2000).

The burden of proof lies with the party challenging the due process hearing decision. *See Board of Educ. of Community Consol. School Dist. No. 21 v. Illinois State Board of Education*, 938 F.2d 712, 716 (7th Cir. 1991); *see also Clyde K. v. Puyallup School Dist., No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994), *superseded by statute on other grounds*.

IV. FINDINGS OF FACT

The ALJ's Decision is sixty-two pages long, with forty-five of those pages devoted to a detailed factual findings. The Court has reviewed the Decision, the evidence contained in the Administrative Record and Transcript, and any additionally submitted evidence. The Court finds the ALJ's Factual

Findings accurate and thorough. With the applicable standard of review in mind, the Court hereby adopts the Factual Findings as written in the ALJ's Decision.

To place the Court's Conclusions of Law in context, however, the Court will summarize below the relevant portions of the Factual Findings it has adopted.

At the time of the Decision, Student was an 18-year-old, general education senior at Pacific Continuation High School. From kindergarten to 10th grade, Student attended schools within the Ventura Unified School District. In the 2010-2011 school year, Student started 11th grade at a charter school, but returned to the school district in October 2010. In January 2011, Parents unilaterally placed Student in a residential treatment center, Logan River Academy, where he remained until June 2011, two months before the administrative complaint was filed.

Prior to High School

Parents described Student as having tics and quirks, mood swings, and unusual reactions to common stimuli since childhood. This behavior increased in frequency or intensity as Student aged, and would appear intermittently for certain periods. According to Parents, getting Student to do his schoolwork became increasingly difficult as Student aged into middle school.

In 6th grade, Ventura conducted a screening of Student, which revealed indication of attention deficit disorder ("ADD") or attention deficit hyperactivity disorder ("ADHD"). In 2006, Dr. Joshua Scott formally diagnosed Student with ADD and prescribed medication to treat the disorder.

In 7th grade (2006-2007 academic year), Student's grades were Bs and a C. Student's 8th grade marks for the 2007-2008 school year were As, Bs and one C. In 2008, Parents believed that Student's grades were suffering, possibly because of side effects from the ADD medication.

High School - 9th Grade

Student started 9th grade at Buena High School for the 2008-2009 academic year. On March 12, 2009, Student turned 15 years old. Around this time, Student started to abuse marijuana. Parents stated that Student had become increasingly oppositional and angry at home. They also described Student as depressed, refusing to follow rules, not doing his homework, and overreacting to common situations.

At school, Student did not exhibit any inappropriate behaviors. The school has no records of any oppositional, disrespectful conduct during Student's 9th grade.

Mr. Shaun Strople, who has substantial experience in teaching children with individualized education programs and other learning challenges, was Student's Algebra 1A teacher. According to Mr. Strople's testimony, Student quickly demonstrated an understanding of all the material. Therefore, he suggested that Student immediately move onto Algebra 1B. Though Student performed well in Algebra 1A, Mr. Strople testified that Student did not perform well after he transferred to Algebra 1B.

Student's 9th grade marks for the 2008-2009 school year were an A- (Art), two B+'s (Spanish and Geography), a C+ (English), a D (Biology), and a D- (Algebra 1B). Student's school attendance was consistent.

In Summer 2009, Student's mother ("Mother") spoke with Ms. Mateos-Bendinelli, a high school counselor at Buena. Mother expressed concern that Student was not meeting the academic eligibility requirements for admission to the University of California. Mother also shared that Parents were having

difficulty with Student at home, and that Student was not doing what Parents asked. Mother did not say that Student was depressed.

High School - 10th Grade

In September 30, 2009, Mother informed Ms. Mateos-Bandinelli that she was very concerned about the direction Student's year was taking. Mother mentioned that Parents had enrolled Student during 9th grade in Buena's Advisory for Relationship and Knowledge ("BARK") program, which provided students with academic support and encouragement. BARK did not produce any positive results. Mother inquired about Advancement Via Individual Determination ("AVID"), which was a program that prepared students to qualify for four-year university study. She also asked for suggestions of programs, tutors, or strategies that might help.

Ms. Mateos-Bandinelli responded and provided information regarding tutors. She suggested that Student get help from his individual teachers during non-class hours, and for Mother to check with Student's teachers. Ms. Mateos-Bandinelli also met with Student. She discussed his performance and raised the possibility of AVID.¹ Student said he was not interested in AVID. There is no evidence that Student or Parents ever followed through on Ms. Mateos-Bandinelli's suggestions.

On February 21, 2010, Mother told Ms. Mateos-Bandinelli that Parents were very worried about Student's grades and overall performance. Ms. Mateos-Bandinelli met with Parents on February 26, 2010 regarding their concerns. At the meeting, Mother told Ms. Mateos-Bandinelli that she thought Student was depressed.

Ms. Mateos-Bandinelli then met with Student to discuss his grades and how he could improve. Ms. Mateos-Bandinelli concluded that Student knew what he had to do to improve his grades, but was not motivated to do so. In her interaction with Student, Ms. Mateos-Bandinelli did not perceive any learning disability and saw no signs of depression. Though she was not qualified to diagnose depression, she had previously taught at-risk youth at Vista del Mar Hospital, which provided her with unique insight regarding emotionally disturbed adolescents.

Following the February 2010 meeting with Parents, Ms. Mateos-Bandinelli started the process of referring Student to a student assistance program (SAP) team.²

On March 2, 2010, Mr. Mateos-Bandinelli brought Student's case to the SAP team. They discussed Student's performance and what teachers had reported in questionnaires regarding Student. None of the teachers reported any inappropriate or suspicious behavior on the part of Student. The SAP team set three goals: (1) administer a reading assessment test to provide data on Student's reading level and growth; (2) encourage Student to join one of the SAP support groups on campus; and (3) provide Student with a mentor.

As to the first goal, Student was tested, and scored as an "advanced reader." Student's score was equivalent to first year college. As to the second goal, Student declined the SAP support group. As to the third goal, the SAP team decided that Mr. Cromie, Student's 10th grade History teacher, would

¹ Ms. Mateos-Bandinelli also considered the Buena Vista High School Program, which was a program designed to offer students an alternative high school setting. Pupils who participated usually had attendance or performance problems. However, the program was not college preparatory curriculum, and would not have enabled Student to meet the academic eligibility requirements for admission to the University of California, which was one of Parents' primary concerns.

² SAP is a program for students who need some academic support, but do not require more serious intervention.

check in with Student on a daily basis and affirmatively mentor him.

Mr. Cromie testified that Student appeared like many other adolescent boys who would often “goof around” with a female student in a joking manner, and banter back and forth. Student was always respectful. Student was never defiant and never exhibited inappropriate behavior. While in class, Student did his work. Mr. Cromie stated that Student’s work quality was usually in the 60th to 70th percentile. Sometimes Student would surprise Mr. Cromie by getting a higher score of 90 to 100. For the Fall semester, Student received a grade of F, with a “satisfactory” mark for citizenship, no tardies, and two absences.

The SAP team strategy appeared to work. By the next SAP meeting, Student was performing better, and doing his homework. Additionally, Student’s performance was more consistent, and his grade in History had improved. Student’s progress report and quarterly grade raised to a D-. On March 5, 2010, Mother reported that Student was making an effort to improve his grades, mostly because he did not want to lose his friends by having a different schedule at school. Moreover, on March 16, 2010, Student took and passed both sections of the California High School Exit Examination (CAHSEE) in English-Language Arts and Mathematics. Student maintained the higher grade for the remainder of the semester until the last project of the year, when Student did not perform. As a result, Student received a grade of F for the Spring semester.

Mr. Cromie believed that Student was capable of performing in his class. However, Student lacked the effort required. Though he usually did work in class, he did not do the required work outside of class. Mr. Cromie testified that progress and grade reports were sent home. Parents could also track their child’s progress and grades via the internet. Parents never contacted Mr. Cromie.

Mr. Strople was Student’s 10th grade Algebra 1 teacher. Mr. Strople described Student as a typical teen in class. He observed Student joking with friends before and after class. Student was willing to answer questions if called upon, and seemed to enjoy class. Mr. Strople did not see any appearance of depression.

Mr. Strople believed that Student was capable of doing the material based on his class experience with Student. However, Student lacked motivation. After discussions with Student and observations of his work, Mr. Strople concluded that Student simply did not practice his algebra by doing his homework. Therefore, the material never got into Student’s long-term memory, which resulted in poor examination performance. Based on Student’s responsiveness to Mr. Strople’s help, however, Mr. Strople believed that one-on-one support helped. Other than back-to-school night early in the academic year, Parents had no contact with Mr. Strople about Student’s performance in Algebra 1.

Parents testified that, during this time, Student’s conduct was becoming increasingly unmanageable at home. Student refused to follow simple rules, would disappear from home, would be verbally abusive to his family, isolate himself in his room, and steal money. They testified that Student was depressed and would not get out of bed to go to school. By Spring 2010, Parents were aware that Student was smoking marijuana. Parents did not share any of this information with Ms. Mateos-Bendinelli. The SAP team and other teachers who attempted to help Student did not know about Student’s marijuana use.

In April 2010, Ms. Mateos-Bendinelli met with Student for academic counseling. Student did not seem sad or depressed. There was nothing about Student’s presentation that gave cause for concern. She spoke with Student about how to improve his grades, possible strategies, doing homework, and studying for tests. She concluded that Student knew what he needed to do to improve his grades but decided not to make the effort.

On May 10, 2010, Mother contacted Ms. Mateos-Bendinelli. Mother noted that while Student showed some improvement during the Spring semester, it was brief and that he was again not doing the course work necessary to pass his classes. Ms. Mateos-Beninelli met with Student the same day. Again, she saw no evidence of depression.

Later in May 2010, Mother met with Ms. Mateos-Bendinelli. During this meeting, Mother informed Ms. Mateos-Bendinelli that Parents would likely send Student to ACE Charter High School (ACE) for 11th grade. She stated that Student had been experimenting with drugs, and Student needed a change in environment, as his friends were a negative influence. Mother also shared details about Parents' struggles with Student. Ms. Mateos-Bendinelli suggested that Parents seek out therapy.

Student's 10th grade final marks for the 2009-2010 school year were a B (Physical Education), two D's (English and Art), a D- (Spanish 2), and two F's (History and Alegebra). For the second semester, Student's attendance was consistent. Student was never tardy, and missed two days of school.

High School - Summer 2010

Barbara Harvey was Student's 10th grade summer school teacher for History, which Student had failed during the regular academic year. Mrs. Harvey taught special education of students with various disabilities for almost 19 years before moving to general education.

Mrs. Harvey taught Student for three weeks during the summer, for four hours a day. Student earned a grade of D, which was based upon class participation, homework, and test performance. Mrs. Harvey stated that Student received a poor passing grade because he did not do all of his homework and did poorly on tests. He did, however, attend regularly. She recalled that Student was timely, remaining for class throughout the day.

Having taught special education students for 19 years, Ms. Harvey identified distractibility, anger, and extreme frustration as traits common amongst students with emotional disabilities. She had no recollection of Student exhibiting any such behavior in the 2010 summer school class.

In June 2010, Parents hired Dr. James Keener, a family therapist. Dr. Keener saw Student and Parents every two weeks through October 2010. Father testified that Parents sought treatment for Student's marijuana abuse. Dr. Keener referred Parents to Dr. Michael Vivian, a psychiatrist, for psychological evaluation and medication. According to Father, Dr. Keener also suggested placing Student in a residential treatment center. Parents did not inform Ventura.

High School - 11th Grade

On August 25, 2011, Parents enrolled Student for 11th grade at ACE Charter High School. At ACE, Student was caught once with drug paraphenalia and had problems with truancy. ACE did not refer Student for an assessment of any kind.

On October 14, 2010, Mother re-registered Student at Buena because Parents had seen no positive results from Student's transfer to ACE. At this time, Dr. Vivian started to treat Student. Sometime before December 23, 2010, he prescribed medication for Student.

David Ingersoll was Student's Geometry teacher after Student returned to Buena. Mr. Ingersoll reported that Student was often absent and did not return to take his final exam. When present, Student was on task and not distracted. Although Student was not doing well in geometry, Mr. Ingersoll has no recollection of being contacted by, or receiving correspondence from, Parents.

Heather Arrambide was Student's English teacher after Student returned to Buena. Ms. Arrambide had also been one of Student's 10th grade English teachers. She stated that Student was well-behaved, did not appear sad, but would be off task and unengaged. He enjoyed talking to friends, but was not disruptive. Ms. Arrambide further stated that Student did not violate rules, and did not have behavioral problems.

Ms. Arrambide testified that Student was capable of doing the work but did not want to perform. He did not show that he was confused or stumped, like other students who struggled with the subject matter. She had taught students with IEPs, and identified students who were chronically sad, by affect and demeanor, or by the student's writing. Ms. Arrambide had no such concerns regarding Student. She stated that Student's lack of attendance and motivation were the cause of his poor grades. According to Ms. Arrambide, Parents never contacted her.

Vista del Mar Hospital, ACTION, & Center for Discovery - November and December 2010

Student's father testified that Student's behavior continued to worsen, even though Student returned to Buena. On November 7, 2010, Student had a "meltdown" that resulted in the police being called to the home.³ When the police spoke with Student, Student said he wanted to commit suicide by shooting himself, and did not know if he could stop himself from going in his father's room at night and killing him. Parents decided to place Student in a 5150 hold.⁴ Student was taken to Vista del Mar Hospital.

The Vista del Mar admission file contains a Chemical Dependency Assessment, completed by personnel with Student's assistance. The file shows that Student smoked three to four bowls of marijuana a day since he was 15 years old. His urine test showed positive for cannabinoid. He took Xanax about four times, the last time being approximately two weeks before admission to the hospital. In August 2010, Student tried ecstasy. Student tried abstaining from marijuana, but it last for only one week.

By the time Student was discharged on November 12, 2010, Student had been placed on two antidepressants and the general consensus by Parents and treating clinicians and doctors was that Student's placement in an residential treatment center was an appropriate next step.

Prior to placement in a residential treatment center, Parents first enrolled Student in ACTION Family Counseling, a drug and alcohol treatment and rehabilitation program, to satisfy the insurance company's requirement that Student first try an intensive outpatient program. Student participated with ACTION from November 15 to 27, 2010. After four sessions, Student refused to continue.

On December 10, 2010, Parents admitted Student to Center for Discovery, a residential treatment facility for adolescents.

On December 13, 2010, Mother emailed the Buena school counselor to inform her that Student would be absent because of health issues related to Student's pre-existing condition of high blood pressure. Mother did not let Buena know that Student had been admitted to Center for Discovery. Other

³ According to the testimony, the police had been called to the home on previous occasions as well. Each time they came to Student's house, the situation with Student was worse.

⁴ Section 5150 is a section of the California Welfare and Institutions Code. The provision allows a qualified officer or clinician to place an involuntarily hold on a person deemed to have a mental disorder making him dangerous to himself, dangerous to others, or gravely disabled.

than this email, Parents provided no information to Ventura regarding Student's health or mental state. Parents did not report any hospitalizations. Parents did not tell Buena that Student used marijuana or was angry, depressed, suicidal, or homicidal. Mother testified that she had difficulty sharing such personal family information.

Student remained at Center for Discovery for only six days, because Parents' insurance company declined coverage. The discharge summary stated that Student had been admitted with major depressive disorder, cannabis dependence, and family discord. The summary strongly recommended that Student re-enroll at ACTION and participate in a 12-step program with a sponsor. The Center for Discovery also recommended that Student undergo a "90/90" regime, which was 90 meetings in 90 days, and family therapy. The summary also noted that Parents had been encouraged to seek long-term placement if Student's behaviors continued.

Parents testified that they did not re-enroll Student in ACTION because he refused to participate. Parents also did not enroll Student in a 12-step program, obtain a sponsor, or try the 90/90 regimen.

Father said that he first heard of an individualize education program (IEP) from counselors at Center for Discovery. He was unaware of a possible IEP for placement at a residential treatment center.

Demand for Emotional Disturbance Assessment and Placement in Residential Treatment Center

On December 18, 2010, Parents retained Lynn Hamilton, an educational consultant, to locate and recommend an appropriate residential treatment center for Student. Based on the information she received from Parents, Ms. Hamilton recommended Logan River Academy (LRA) in Utah.

With guidance from their parent advocate, Elissa Henkin, Parents drafted a December 22, 2010 letter to Linda Dubois, Director of Ventura's Specialized Academic Instruction Services. The letter demanded an assessment of Student to determine that he was qualified for special education under emotional disturbance eligibility and should be placed in a residential treatment center. Parents also demanded a concurrent Chapter 26.5 evaluation referral to Ventura County Behavioral Health.

Ventura provided parents with an assessment plan, which Father signed on January 9, 2011, and returned on January 11, 2011. Ventura also confirmed that it had referred Student to Ventura County Behavioral Health for a a Chapter 26.5 evaluation.

Student started LRA on January 12, 2011. LRA therapist, Shannon Kegerries provided monthly reports to Parents and to Ms. Hamilton, the educational consultant. Ms. Hamilton visited LRA in March 2011. While there, she talked with Student and observed him in a classroom. She believed that Student was compliant at LRA. In her opinion, calling the Student emotionally disturbed was too severe a description; she described Student as behaviorally disturbed.

March 2011 Psychoeducational Assessments and Report

School Psychologist, Deborah Erickson, prepared a March 28, 2011, Psychoeducational Case Study report and testified at the due process hearing. She is a credentialed school psychologist, in pupil personnel services. Ms. Erickson has been a school psychologist since 1985 and has worked for Ventura since 1987. At Ventura, her duties include conducting psychoeducational evaluations and developing individual education and behavior plans. She has conducted more than 500 psychoeducational evaluations.

Ms. Erickson testified that a special education assessment determines eligibility at the time of the testing and evaluation. To prepare for Student's assessment, Ms. Erickson reviewed Student's cumulative education file; spoke with Mother; consulted with Jason Lee of Ventura County Behavioral Health; spoke with LRA therapist Ms. Kegerries; consulted with Sheri Schoenwald, a program specialist at Ventura; conferred with Buena's school psychologist, Cheri Patino; and spoke to Dr. Vivian's nurse.

Both Dr. Vivian and LRA's intake report diagnosed Student with Major Depressive Disorder (Axis I), with marijuana dependency and ADD and/or ADHD.⁵

Student's school records indicated that Student had been achieving a satisfactory level at Buena, and was passing most of his classes. Records also indicated that Student had passed the CAHSEE. In May 2010, Student took the California Standards Test (CST). He scored in the "basic" range in English-Language Arts and World History, "below basic" in Algebra 1, and "far below basic" in Science. Ms. Erickson notes that Student had a history of scoring in the "proficient" or "advanced" range in English-Language Arts, and "basic" or "below basic" in Math. Student's grades declined during the first semester of his junior year, when he had spent a few weeks at Buena. At the time he left for LRA, Student was failing his classes, primarily because he was not present for tests and final exams.

Dr. Erickson reviewed Student's school records for any signs of inappropriate behavior. She found no record of disciplinary challenges. Student had never been referred for misbehavior, given a detention, or expelled. Student had a history of regular school attendance until 2010-2011. He was found truant on several occasions while attending ACE, as well as after he returned to Buena in October 2010.

Ms. Erickson interviewed, assessed, and evaluated Student at LRA over two consecutive days. She stated that Student easily engaged in conversation throughout the evaluation. He expressed himself clearly, using age-appropriate vocabulary. He was alert, focused, and appeared willing to give effort to all the presented tasks. He was able to respond to questions and talk about current time and place. He did not appear agitated, nervous, or depressed. At times, Ms. Erickson had to encourage Student to persevere when assessment tasks became difficult. He would become somewhat fidgety as the test sessions progressed, although this did not affect his ability to focus on the task at hand. Based on the observed behaviors, Ms. Erickson believed that the test results are valid and a reliable measure of Student's then-current functioning.

Ms. Erickson administered tests to assess Student's cognitive functioning, academic skills, and visual-motor integration. Specifically, Ms. Erickson administered the Wechsler Intelligence Scale for Children, the Woodcock-Johnson Psychoeducational Battery, and the Developmental Test of Visual-Motor Integration (VMI). These tests generally indicated that Student (1) could learn at a rate similar to that of his peers; (2) had average academic skills across all basic subject areas; and (3) had adequate visual-motor skills, but did not always focus on detail.

To obtain information regarding Student's social-emotional development, Ms. Erickson gathered input from a variety of sources. Using the Behavior Assessment System for Children ("BASC"), Ms. Erickson obtained input from Parents, one teacher from Buena, and four teachers from LRA. Ms. Erickson administered BASC to Student, as well as the Reynolds Adolescent Depression Scale ("RADS"). Ms. Erickson also interviewed Student and Student's LRA therapist, Ms. Kegerries.

In the social-emotional and behavioral domains, Student was still learning to develop insight

⁵ Ms. Erickson was unaware whether LRA's intake diagnosis was made by the LRA staff, or from Student's history and records.

regarding his actions and motivations. He demonstrated significant problems with conduct, including drug use, truancy, and defiance. Although he had been diagnosed with depression, Ms. Erickson concluded from the tests that he was not clinically depressed, and treatment had been conducted while Student was actively using marijuana. Student himself denied clinical depression, but admitted to an apathetic attitude toward school and a strong desire for independence, and an interest in continuing his use of marijuana.

In considering the factors used to determine emotional disturbance (ED) eligibility, Ms. Erickson concluded that Student exhibited many behaviors of a student who is socially maladjusted, rather than one with an emotional disturbance.⁶

March 2011 Chapter 26.5 Eligibility Assessment and Report

Pursuant to Ventura's referral, Ventura County Behavioral Health ("VCBH") commenced its assessment for mental health services for Student. The VCBH assessment included information provided by Parents, interviews of Parents and Ms. Kegerries, and interview/testing of Student at LRA. In generating its report, the VCBH team considered the assessment results, as well as information in Student's school record and data gathered by Ms. Erickson.

VCBH identified the symptoms that impacted Student's ability to profit from his educational plan as lack of motivation for school, willful and deliberate defiance in attending school, and a long history of drug abuse. VCBH concluded that there did not appear to be an emotional reason for Student's leaving school, other than his not liking school. His behaviors, based on its assessment, were of his choosing and not a result a qualifying mental health disorder.

VCBH found that Student did not qualify for mental health services pursuant to Chapter 26.5, and that he did not require mental health services to benefit from his education.

Shannon Kegerries, Therapist at Logan River Academy

Shannon Kegerries, who testified at the due process hearing, was Student's therapist at LRA for the six months he was there. She provided Student with individual therapy once a week, and conducted family therapy once a week, with Parents appearing telephonically. Student also participated in two to three group therapies per week. Each session lasted about one hour.

Within two to three months of treatment, Ms. Kegerries formed the opinion that Student used marijuana to cope with internal anxiety and conflict, and to escape. She arrived at this conclusion because Student still exhibited depression and lack of motivation even though he was cut off from marijuana.

In the school setting, Student completed his assignments. Ms. Kegerries stated that Student was never disrespectful to teachers. She also stated that she did not know if Student showed depression while at school.

Ms. Kegerries' treatment of Student primarily focused on Student's lack of motivation and

⁶ Students who are socially maladjusted typically exhibit a voluntary pattern of actions that conflict with established value systems, and do not value educational achievement. They demonstrate the ability to function in the school and community, although not according to generally accepted standards. In addition to considering the factors of emotional disturbance, Ms. Erickson also considered four categories of social maladjustment, and found that the Student's behaviors fit within those categories.

family group dynamics. She minimally worked with Student's marijuana dependence. In a March 31, 2011 email containing her clinical impressions of Student, Ms. Kegerries noted that Student displayed anxiety and depressive symptoms, even though he was medicated. The email also describes Student's pattern of losing motivation when he encounters difficulty.

Initial IEP Meeting - April 1, 2011

On April 11, 2011, Ventura convened Student's initial IEP team meeting, wherein Ms. Erickson presented Ventura's finding that Student did not meet the criteria for ED eligibility.

Parents expressed concern that Ventura's report did not adequately include review of diagnoses and information from Student's prior doctors and specialists. Parents and Ms. Henkins requested that Ms. Erickson and the IEP team look further at information that was not made available at the time of the assessment.

The IEP team adjourned and agreed to reconvene after further information was reviewed.

May 6, 2011 Psychoeducational Case Study - Revised

Ventura agreed to consider the additional information to which the Parents referred in the April 11, 2011 IEP meeting. Ms. Erickson obtained the following additional documents: (1) November 7, 2011 Vista del Mar Hospital records regarding the 5150 hold; (2) November 12, 2011 Vista del Mar Hospital discharge summary; (3) December 16, 2011 discharge plan; (4) Student's VCBH client assessment and client assessment update; (5) December 23, 2010 letter from Dr. Vivian; (6) April 21, 2011 letter from Dr. Keener; and (7) additional teacher reports from LRA. Ms. Erickson also personally interviewed Drs. Vivian and Keener, Ms. Goforth, and Ms. Mateos-Bandinelli.

Ms. Erickson incorporated the additional information into her May 6, 2011 revised case study report. She also expanded the ED analysis and included additional details from her interview of Student. Her conclusion and recommendations remained unchanged.

Continued IEP Meeting - May 6, 2011

On May 6, 2011, the IEP team reconvened for the continued initial IEP. Via telephone, Ms. Kegerries gave an update on Student, which was similar to her March 31, 2011 email. Ms. Erickson reviewed her revised report. The assessment team did not recommend eligibility for special education. Parents and Ms. Henkin disagreed.

After LRA

In June 2011, Student came home for a visit from LRA and refused to return. In August 2011, Student started continuance school at Pacific.

Dr. Randy Wood, who testified at the due process hearing, provided Student and Parents with individual and family therapy from June 27, 2011 to December 7, 2011. Dr. Wood stated that Student would not behave at school the way he did at home because he was socially conscious and knew he would suffer a consequence in school. Dr. Wood thought Student was self-medicating for his depressive disorder and ADD, and did not think his drug abuse was the cause for Student's anger and explosive displays at home. Dr. Wood also testified that he was unsuccessful in helping Student to accomplish the goal of doing the work required by Pacific to catch up on lost credits. Dr. Wood reported that Student

was inconsistent in school attendance, did not come to the last two sessions, was still having blow-ups with family members, and was heavily relying on marijuana. Dr. Wood testified that Student participated in sessions, but they only “lasted to the parking lot.”

Dr. Jordan Witt gave Student a neuropsychological examination on June 29 and 30, 2011. He administered various tests to measure Student’s intellectual, cognitive, academic, emotional and behavioral functioning. He also conducted a classroom observation of student at Pacific on August 2, 2011. Dr. Witt reviewed school records and other documentation provided by Parents, as well as Ventura’s psychoeducational case studies and VCBH’s Chapter 26.5 eligibility report. He interviewed Parents twice for about an hour each session.

Dr. Witt reported that Student’s overall intellectual functioning fell in the lower end of average. Student showed some behavioral patterns associated with inattention during testing, but his scores generally indicated adequate to good attention and executive functioning. For academic functioning, tests showed Student with adequate reading and writing fluency, reaching the upper end of average. Student had greater difficulty in math fluency, where he scored in the low average range.

As to behavioral and emotional functioning, Dr. Witt concluded that Student showed patterns of unspecified mood disorder, which included difficulty regulating his anger, as well as symptoms associated with clinical depression. Such patterns predated and likely caused his behavioral and substance difficulties, with substance abuse serving a self-medicating function.

Dr. Witt also found that Student no longer showed several signs of ADD. Instead, Dr. Witt concluded that Student’s issues with task completion and overall attention “related to his emotional disturbance” and was “likely to adversely impact on [Student’s] education attendance and progress, as well as his timely completion of tasks in and out of school.”

Dr. Witt did not review and apply the criteria and characteristics required by state and federal law in determining if a student is entitled to special education services due to ED eligibility. Moreover, Dr. Witt’s conclusion of long-standing mood disorder was primarily based on Parents and their review of the information from doctors Student had seen since childhood. Dr. Witt did not review any medical records or reports regarding Student that predated Drs. Vivian and Keener in 2010.

Unlike LRA, Dr. Witt did not diagnose Student with major depressive disorder. Unlike LRA, Dr. Keener, Dr. Vivian, Center for Discovery, and Vista del Mar, he did not diagnose Student with marijuana dependence. Dr. Witt said he did not see the Vista del Mar Chemical Dependency assessment. Dr. Witt agreed that use of marijuana could affect mood and depressive symptoms, and that Student’s marijuana abuse coincided with Student’s increased difficult behaviors at home. He also acknowledged that none of Student’s oppositional and angry behaviors occurred at school or LRA.

Dr. Witt said that if an assessor was unqualified to consider the impact of medications, the conclusions would be less valid. He noted that marijuana could impact an ED evaluation, but that Student did not have access to marijuana while at LRA, during the evaluation. Student did have access to marijuana when Dr. Witt assessed Student. Dr. Witt acknowledged that his standardized testing of Student was generally consistent with the testing conducted while Student was at LRA.

Parents provided Dr. Witt’s report to Ventura, but refused to attend an IEP meeting to review the report. Dr. Witt’s report did not alter Ventura’s conclusion that Student was not ED eligible.

V. CONCLUSIONS OF LAW

Plaintiffs argue that the ALJ made erroneous findings regarding (1) Ventura's violation of California's "child find" statute; (2) the validity of Ventura's assessment of Student, upon which the ALJ heavily relied; and (3) the criteria in under which Student was measured to determine ED eligibility. The Court addresses each argument in turn.

A. California's "Child Find" Statute

IDEA imposes on a school district an affirmative duty to identify, locate, and evaluate all children with disabilities who are in need of special education and related services. 20 U.S.C. § 1412(a)(3)(A). This duty, known as "child find," 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 Educ., State of Hawaii v. Cari Rae S.*, 158 F.Supp.2d 1190, 1194 (D. Hawaii 2001). The child find duty extends to all children suspected of disability, including those advancing from grade to grade, regardless of the severity of the disability. *Id.*

A school district is deemed to have knowledge of a child with a disability if, among other things, the behavior or performance of that child demonstrates the need for special education services. *Id.* The contours of this standard are not clearly defined, and determination of whether a district is deemed to have knowledge is a fact-specific inquiry. Courts have stated, however, that 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 School Dist.*, 340 F.3d 87,93 (2d Cir. 2003).

When the child find duty is triggered, the school district's appropriate inquiry is whether the child should be referred for an assessment, not whether the child actually qualifies for services. *Rae*, 158 F.Supp. 2d at 1195.

According to Plaintiffs, evidence shows that, after October 17, 2009,⁷ Ventura's child find obligations had been triggered. Specifically, Plaintiffs state that notations in Student's record regarding his poor attention and work-completion, Parents' concerns regarding Student's functioning at school, and Student's academic decline were all well-documented. However, because of the statute of limitations, the ALJ erroneously refused evidence of Student's pre- October 2009 history of social and emotional functioning problems, which would have made the case in favor of Plaintiffs even clearer. The Court disagrees.

As to Plaintiffs' argument regarding the exclusion of evidence, the Court finds no error on the part of the ALJ. First, it is apparent from the Factual Findings that the ALJ considered evidence dating back to Student's early childhood. (Administrative Record ("AR"), 159-161.) Second, the record clearly shows that the ALJ allowed pre-October 2009 evidence for purposes of context, but refused to hear testimony or argument regarding that evidence. (AR, 3038:2-3040:9.) As the ALJ pointed out, such testimony is not pertinent to whether Ventura violated Child Find during the relevant period, as the salient question is whether Ventura had reason to suspect a disability starting from October 2009. Therefore, the ALJ was correct in allowing admission of this evidence, and according the proper weight to such evidence.

As to the substantive issue, the Court also agrees with the ALJ's finding. The records shows that Student's grades in 10th and 11th grade deteriorated. The primary reason for Student's low grades was his failure to complete assignments and his poor performance on tests. As he advanced from grade to

⁷ It is undisputed that the statute of limitations for IDEA claims bars any claims Plaintiffs may have prior to October 17, 2009.

grade, Student's grades continued to deteriorate. On state standardized tests taken his 9th and 10th grade years, Student's performance fell from "proficient" to "basic" in Language Arts, and remained "below basic" in Math.

However, testimony from his teachers and counselor, Ms. Mateos-Bandinelli, indicated that Student was capable of performing in class, and was willing to answer questions when called upon. Outside of class, Student failed to do the work required. He knew what he needed to do, but lacked motivation to put forth the effort. Student declined to participate in AVID or SAP support groups, programs that are designed to provide academic support. The evidence also indicates that Student and Parents never utilized the list of tutors provided to them by Ms. Mateos-Bandinelli, or seek assistance from teachers during non-class hours. The record shows, however, that Student was able to respond positively to academic support. When mentored through SAP by Student's History teacher, Student's performance, effort, and grades in that class improved. Student's Algebra 1 teacher also reported that one-on-one support seemed to make a difference.

When Ms. Mateos-Bandinelli administered a reading assessment test to Student, the results revealed Student to be an "advanced reader." While in the SAP program, Student passed both the English-Language Arts and Math sections of the California High School Exit Examination.

As to Student's behavior, Mother shared with Ms. Mateos-Bandinelli that she thought Student was depressed, and shared details regarding Parents' struggles with Student at home. At school however, Student did not exhibit any inappropriate behavior or other behavior that caused the teachers or counselor to be concerned. Student had good attendance. Mr. Cromie and Mr. Strople, two of Student's 10th grade teachers, both testified that Student appeared like many other teenage boys, joking with friends and female students.

By Spring 2010, Parents became aware that Student was smoking marijuana. However, they did not share this information with Ms. Mateos-Bandinelli or any of Student's teachers. At the start of 11th grade, Parents pulled Student out of Ventura and enrolled Student in ACE Chapter High School. The reason Parents provided to Ventura was that Parents wanted to remove Student from his friends, who they perceived to be a bad influence. ACE did not provide the results Parents expected, so Parents re-enrolled Student in Ventura. In November 2010, Student had a "meltdown" at home, which resulted in a 5150 hold at Vista del Mar Hospital, followed by admission to Center for Discovery, a residential treatment center. Again, Parents did not inform Ventura of any of these events. Rather, Parents told Ventura that Student's absence was due to health issues related to Student's high blood pressure.

Based on the facts stated above, the Court finds that there was no reason for Ventura to suspect that Student had a disability or that special education services may be needed. The record shows that Student exhibited no behavioral issues at school, and demonstrated the ability to do the course work. Except for his grades, there was no clear indication that Student was struggling at school. As other courts have found, 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*, 340 F.3d at 93. Moreover, the record indicates that Student knew what he needed to do to improve his grades, but did not want to put forth the effort.

In light of the foregoing, the Court finds that Plaintiffs have failed to satisfy their burden, and Ventura was not statutorily obligated to refer Student for an assessment as of October 2009. The Court affirms the ALJ's finding as to this issue.

B. Validity of Assessment

IDEA and the California Education Code state that assessments must be conducted by qualified persons who are knowledgeable of the student's disability, and competent to perform the assessments, as determined by the local educational agency. 20 U.S.C. § 1414(b)(3); Cal. Educ. Code § § 56320 and 56322. The assessor must give special attention to the student's unique educational needs, including, but not limited to, the need for specialized services, materials, and equipment. *Id.* Individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. Cal. Educ. Code § 56424(a). Tests and other assessment materials must be used for purposes for which the assessments or measures are valid and reliable. Cal. Educ. Code § 56320(b)(2) and (3).

In assessing the child, all areas of suspected disability shall be assessed, and no single measure should be used as the sole criterion for determining whether the child is an individual with special needs. Cal. Educ. Code § 56320(e) and (f). Where the validity of the assessment is questioned, the plaintiff bears the burden of proof in showing invalidity. *See Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994).

In December 2010, Parents formally demanded an assessment of Student to determine that he was qualified for special education under emotional disturbance (ED) eligibility. Ms. Erickson, the school psychologist, conducted the assessment on behalf of Ventura, and determined that Student was not ED eligible.

Plaintiffs challenge the validity of Ms Erickson's assessment. Specifically, Plaintiffs contend that (1) Student's scores were miscalculated and misreported, and (2) Student was not given a proper assessment by qualified individuals to support Ms. Erickson's conclusions. The Court disagrees.

1. *Errors in Student Scores*

As to their first argument, Plaintiffs have failed to provide any evidence supporting this contention, or any argument as to whether Ms. Erickson's purported errors were material to her conclusion.⁸

2. *Assessors' Qualifications and Quality of Assessment*

As to their second argument, Plaintiffs state that special education assessment must be performed by someone who is familiar with the areas of suspected disability; qualified to give the measures used; and provide a vision/hearing assessment. Further, qualified assessors must use more than a single measure to determine eligibility and take into account the remediating factors of the setting in which the student is assessed. Plaintiff contends that Ventura did not comply with these standards.

a. *Assessors' Qualifications*

As to qualifications, Plaintiffs argue that the assessments were not given by those qualified to do

⁸ On February 27, 2013, after the motion cut-off date had passed, Plaintiffs filed their Motion for Summary Judgment. On the same date, Plaintiffs filed an Ex Parte Application Regarding Leave to File Untimely Filing. In the interest of justice, the Court granted Plaintiffs leave to file a Corrected Motion for Summary Judgment, which corrected errors contained in the unedited version of the originally filed motion. Attached to Plaintiffs' application, however, was a request by Plaintiffs to file additional evidence. Plaintiffs provided no information regarding this evidence, nor any reason why this evidence had not been included in the first place. As such, the Court denied Plaintiffs' request.

so. Plaintiffs also argue that the assessor was not qualified to determine causation of educational impact in a dual-diagnosed child, or interpret the extent to which Student's two-months of medical management impacted his presentation during his interview at LRA.

In his thorough analysis of the issue, the ALJ found that Ms. Erickson, a licensed school psychologist with 25 years of experience, was qualified to make the assessment, as required by California Education Code § 56324(a). The evidence supports this determination.⁹ In addition to her years of experience as a credentialed school psychologist, she has conducted more than 500 psychoeducational evaluations, screening students for behavioral and educational issues. As to Ms. Erickson's qualifications regarding Student's dual-diagnosis and interpretation of results in light of medical management, Plaintiffs have failed to set forth any law requiring specialized qualifications under these circumstances. In the absence of such law, the Court finds Plaintiffs' challenge to Ms. Erickson's qualifications unpersuasive.

b. *Quality of Assessment*

The ALJ also found that Ms. Erickson's assessment met all other statutory standards. In doing so, he pointed to a number of factors, including (1) the variety of assessment tools and instruments used to gather information regarding Student's mental state and educational challenges;¹⁰ (2) the appropriateness of Student's assessment as he presented himself at the time of assessment; (3) Plaintiffs' failure to demonstrate that Student's medication rendered the tests and interviews invalid; (4) the similarity of Ms. Erickson's assessment results to those of Dr. Witt's, who assessed Student when he was not on medication; and (5) the consideration of additional information after the first IEP meeting. Upon review of the record, the Court finds that the evidence strongly supports the ALJ's finding that Ventura's assessment met the statutory standards.

One of Plaintiffs' arguments here, which was not specifically addressed by the ALJ, is whether Ms. Erickson assessed Student in all areas of suspected disability. Plaintiffs assert that Ms. Erickson failed to assess Student in the area of adaptive skills impairment. Upon review of the record, the Court disagrees. Adaptive skills are not an area of disability. Rather, it is a criteria for diagnosing and classifying intellectual disability. Ms. Erickson's report clearly demonstrates that she assessed Student in the area of intellectual ability. For example, Ms. Erickson administered the WISC, which is specifically tailored to measure intellectual ability. As a second measure, Ms. Erickson also administered the BASC, which provides questionnaires to determine, among other things, the child's level of adaptive functioning. In her report, Ms. Erickson discusses the fact that one of his Buena teachers scored Student's adaptive skills in the "at-risk" range, while four of his LRA teachers scored his adaptive skills within the normal limits. As to Student's self-report, Ms. Erickson states that, in the area of personal adjustment, Student scored in the "clinically significant" range, but the score was

⁹ To the extent Plaintiffs argue the assessment is invalid because Mr. Lee of VCBH was not a credentialed school psychologist, the Court finds this argument is unavailing. Even if Mr. Lee was not a credentialed school psychologist, there is no evidence showing that Ms. Erickson relied on any tests individually administered by him to reach her conclusion. While Ms. Erickson's report lists the Roberts Apperception Test (administered by J. Lee, VCBH) as a newly administered assessment, she does not discuss the results of that test. Nor does she mention the test in her Overall Summary and Recommendations. She refers only generally to VCBH's Chapter 26.5 Eligibility Report, which found that Student did not qualify for mental health services under Chapter 26.5. Plaintiffs have failed to introduce any evidence that Mr. Lee's administration of the Roberts test for purposes of determining Chapter 26.5 eligibility was improper. Nor is there any valid argument that VCBH's conclusion was an improper piece of information for Ms. Erickson to consider in her assessment.

¹⁰ Plaintiffs specifically point out that Ventura had not administered vision and hearing assessments, as required by California statute. The record, however, indicates otherwise. (AR 868-869.) Plaintiffs have not introduced any evidence refuting this.

mainly due to the “relations with parents index.” In the “interpersonal relations index,” Student scored in the “average” range. As a third measure, Ms. Erickson interviewed Student, and noted that he “presented as an alert, friendly and well-groomed adolescent with a normal affect.” These facts clearly indicate that Ms. Erickson measured Student’s adaptive skills in assessing whether Student had an intellectual disability.

In light of the foregoing, the Court finds that Plaintiffs failed to met their burden, and affirms the ALJ’s finding that Ventura’s assessment of Student was valid and appropriate.

C. Criteria for Finding ED Eligibility

In his Decision, the ALJ ruled that Ventura correctly found that Student did not have a serious emotional disturbance, and did not qualify for special education on that basis. Plaintiffs argue that the ALJ erred in his determination because he adopted a standard for determining emotional disturbance eligibility that is too stringent and unfounded in law. The Court disagrees.

Under federal and California regulations, a “serious emotional disturbance” requires at least one of the following characteristics:

- (1) An inability to learn which cannot be explained by intellectual sensory or health factors.
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (3) Inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations.
- (4) A general pervasive mood of unhappiness or depression.
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(c)(4); Cal. Code Regs. tit. 5, §3030(i). The child must exhibit the characteristic(s) “[1] over a long period of time and [2] to a marked degree [3] that adversely affects a child’s educational performance.” 34 C.F.R. §300.7(c)(7).

Congress left to the states the responsibility for defining these terms. *R.B., ex rel. F.B. v. napa Valley Unified School Dist.*, 496 F.3d 932, 944 (9th Cir. 2007) (citing *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000); *Mr. I v. Me. Sch. Admin. Dist.*, 55, 416 F.Supp.2d 147, 157 (D.Me. 2006)). Rather than promulgate additional regulations, California relies on case-by-case administrative adjudication of IDEA eligibility. *Id.* In 1986, the California Department of Education (CDE) issued a manual for ED identification and assessment, which is relied upon in California State Educational Agency decisions. Consistent with both the ALJ’s decision and Ms. Erickson’s report, the CDE suggests that the term “to a marked degree” comprises two separate components: (1) ‘pervasiveness,’ which means that the behavior should be present across most environments (school, home, and community), and (2) ‘intensity,’ which means that the behavior should be demonstrated in an overt, acute, and observable manner. *See California State Depart. of Ed., Identification and Assessment of the Seriously Emotionally Disturbed Child: A Manual for Educational and Mental Health Professionals* (1986)(CDE ED Manual, p. 9).

The ALJ found that Plaintiffs failed to satisfy their burden of showing the existence of the first, second, and fifth ED characteristics. The evidence supports this finding. As to the inability to learn, standardized and individualized testing showed that Student’s ability to learn fell in the “average” range. Student’s teachers at Buena and LRA stated that motivation, rather than ability, was the cause of

Student's poor performance. These statements were confirmed by results of the BASC, RADS, and Roberts testing, which indicated that Student simply did not like school. As to the inability to build interpersonal relationships, the evidence clearly shows that Student developed friends in his peer group, both at Buena and LRA. Moreover, his teachers reported Student as polite, and courteous, with social behavior typical of a teenager. As to the fifth characteristic, there is no evidence showing that Student displayed physical symptoms or fears connected with personal or school problems. In admissions questionnaires, Mother answered that, other than high blood pressure from a preexisting kidney condition, Student was in good health with no restrictions. To the extent Plaintiffs argue that Student's depression was a physical symptom satisfying the fifth ED characteristic, the evidence fails to show a conclusive diagnosis of clinical depression. Nor does the evidence conclusively show how Student's depression may have been impacted by Student's marijuana use. Moreover, even if Student's depression satisfies the "physical symptom" criteria, there is insufficient evidence showing that Student exhibited this characteristic "to a marked degree," as discussed below.

Although evidence shows that Student exhibited the third and fourth ED characteristics, the ALJ found that neither was exhibited "to a marked degree." Again, the evidence supports this finding. As stated above, the term "to a marked degree" means that the behavior should be present across most environments (school, home, and community), and the behavior should be demonstrated in an overt, acute, and observable manner. This definition of the term, "to a marked degree," comports with the Court's reasonable interpretation of the statute.¹¹ The evidence indicates that Student exhibited inappropriate behavior, but this behavior appeared exclusively in the home environment. The same is true with reports of Student's pervasive depression. Ms. Erickson, Mr. Lee, Ms. Mateos-Bendinelli, Buena teachers, and LRA teachers, all of whom the ALJ appropriately found credible, reported differently in the school setting. Specifically, Student cooperated with teachers and had no record of disciplinary issues at school from year to year. Additionally, teachers reported that Student was social, and joked around with his peers in typical teenage fashion. Ms. Mateos-Bendinelli, who met with Student a number of times, stated that Student did not exhibit any signs of depression or sadness. Teachers who reported to Ms. Mateos-Bendinelli, as well as teachers who participated in Ventura's assessment of Student, reported the same. Therefore, the evidence shows that Student's inappropriate behavior and/or pervasive depression do not satisfy the criteria required to render Student ED eligible.¹²

Plaintiffs have failed to meet their burden. The Court affirms the ALJ's findings on the issue of whether Student was eligible for special education under ED eligibility.

VI. CONCLUSION

¹¹ The Court notes that this interpretation is consistent with opinions of the United States Department of Education, Office of Special Education Programs (OSEP). Specifically, the OSEP has stated that "marked degree" of the emotionally disturbed characteristics should generally include the school setting. *See In Letter to Anonymous* (August 11, 1989), 213 IDELR 247.

¹² In their brief, Plaintiffs also argue that Student was eligible for special education based on other health impairment (OHI) or specific learning disabled (SLD). However, Plaintiffs did not assert this claim at the due process hearing. (*See AR 1525:1-8.*) Therefore, the Court will not address this argument, as Plaintiffs have failed to show why the claim is not barred by the exhaustion requirements of 20 U.S.C. §1415(1).

Based on the foregoing, the Court hereby finds in favor of Ventura on all issues brought on appeal, and affirms the ALJ's Decision as to those matters. Plaintiffs are not entitled to any of the relief requested.

IT IS SO ORDERED.

Initials of Preparer _____ : _____
