

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PITTSBURG UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012070894

NOTICE: This Decision has been Reversed by the U.S. Court of Appeals Ninth Circuit on September 1, 2016. Click [here](#) to view the Appellate decision.

DECISION

Margaret Broussard, Administrative Law Judge (ALJ), from the Office of Administrative Hearings (OAH), State of California, heard this matter on April 9, 10, and 11, 2013, in Pittsburg, California.

Jean Murrell Adams, Attorney at Law, represented Student. Gail Hodes, Attorney at Law, was present for part of the day on April 10, 2013. Student's mother (Mother) was present on the first two days of hearing and Student's stepfather (Stepfather) was present on the first day of hearing.¹ Student was not present.

Jan E. Tomsy, Attorney at Law, represented the Pittsburg Unified School District (District). Deborah Daly, director of special education, was present throughout the hearing on behalf of District.

Student filed his initial request for a due process hearing (complaint) on July 27, 2012. On October 15, 2012, pursuant to an order from OAH, Student was allowed to file an amended complaint. On December 4, 2012, at the request of the parties, the matter was continued.

At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to May 6, 2013, for the submission of closing briefs.² On

¹ Mother and Stepfather shall be referred to collectively as "Parents."

² Student's Closing Brief has been marked for identification as Student's Exhibit 30, and the District's Closing Brief has been marked for identification as District's Exhibit 19.

May 6, 2013, both parties submitted their closing briefs, the record was closed and the matter was submitted for decision.

ISSUES³

- I. Did the District deny Student a free appropriate public education (FAPE) by failing to make him eligible for special education and related services at the May 30, 2012, and October 9, 2012 individualized educational program (IEP) team meetings, specifically under the eligibility categories of specific learning disability (SLD), other health impairment (OHI), or emotional disturbance (ED)?
- II. Did the District deny Student a FAPE by failing to include Parent in the decision making process regarding FAPE from March 20, 2012 to present by:
 - A. Failing to provide the following Student records:
 1. Nurse report;
 2. Complete Lincoln Center report from May 2012;
 3. Test protocols;
 4. Emails;
 5. Service log for 1:1 aide?
 - B. Failing to provide prior written notice:
 1. When the District failed to conduct assessments in all areas of disability; and
 2. By making error(s) in the invitation to the May 30, 2012 IEP team meeting?
- III. Did the District deny Student a FAPE by failing to provide comprehensive assessments from March 20, 2012 to present in the following areas:
 - A. Educationally related mental health services (ERMHS) assessment;

³ The issues are listed here as set forth in the Order Following Prehearing Conference, however, they are reordered to align them with the statutory scheme and to provide clarity.

- B. Nurse assessment⁴;
 - C. Occupational Therapy (OT) assessment including a test of visual motor integration (VMI); and
 - D. Neuropsychological assessment?
- IV. Did the District deny Student a FAPE by failing to tailor an appropriate educational program to meet his unique needs from March 20, 2012, to the present?

CONTENTIONS

Student contends that the District denied him a FAPE from March 20, 2012, to the commencement of the hearing by failing to make Student eligible for special education at IEP team meetings held in May 2012 and October 2012, failing to provide records, failing to assess Student several areas, and failing to provide Student with an appropriate educational program.

Student has asked for remedies that include an independent educational evaluation (IEE) in the areas of an ERMHS assessment, a nurse's assessment, an occupational therapy assessment, an assistive technology assessment, and a neuropsychological assessment. Student also requests that compensatory education be awarded in all areas of need as identified in the IEE's, including, but not limited to intensive 1:1 educational therapy, counseling services, and behavior intervention services. Student has requested that the ALJ order the District to produce the student records identified in Issue II above. Student also requests that the ALJ find that Student has been eligible for special education and related services and that the District find a therapeutic non-public school (NPS) placement at the Marchus School or other appropriate school of Parent's choice.

The District contends that it correctly determined that Student was not eligible for special education at the May 2012 and October 2012 IEP team meetings. The District also contends it has provided all Student records to Parent multiple times, that it has assessed Student in all areas of suspected disability and that since Student was not eligible for special education, it was not under any obligation to provide student with a FAPE.

PROCEDURAL MATTER

On May 1, 2013, Student filed a motion titled "Petitioner's Request to Admit Supplemental Evidence for Limited Purposes Only." Student attached a declaration from Parent to emails dated April 17, 25, 26, 29, and 30, 2013, which were proffered as the

⁴ This is typically referred to as a health assessment, but the parties in this case used the terminology of Nurse assessment.

supplemental evidence. Student contends that the emails show that Student's behaviors are escalating and that the Parent is being "kept in the dark" regarding Student's behaviors. Student further contends that the Parent must be informed about Student's behaviors in school to effectively address Student's behaviors with his therapist and psychiatrist. Student asks to have these emails admitted to support a new request of Parent to assign Student a 1:1 behavioral aide for at least the rest of the 2012-2013 school year (SY), including extended school year (ESY). Student also asks that the aide provide daily updates to Parent regarding Student's behavior.

This is the first time that Student has claimed that he needs a 1:1 aide in order to receive a FAPE. Student did not raise this issue prior to or even at the hearing. Therefore, this motion raises a new issue for determination and can be construed as a motion to amend the complaint.⁵ The District opposes this motion on several grounds, and objects on the basis of multiple hearsay, irrelevance and the existence of a factual dispute regarding the evidence offered.

A party may amend a due process hearing request notice only if the other party consents in writing to the amendment and is given the opportunity to resolve the hearing issue through a meeting held pursuant to Section 1415(f)(1)(B) of title 20 of the United States Code, or the ALJ grants permission, except that the ALJ may only grant permission at any time not later than five days before a due process hearing occurs. (Educ. Code § 56502(e).)

As the hearing has concluded and the time for an amendment is long past, the motion to amend must be denied as to the addition of a 1:1 aide for student. In addition, the ALJ finds that the evidence submitted by Student is not relevant to the determination of whether Student was eligible for special education at the time of the May 30, 2012 and October 9, 2012 IEP team meetings. The emails student seeks to admit were regarding Student's in school behavior more than six months after the date of the eligibility determination made at the October 9, 2012 IEP team meeting. An IEP team decision is analyzed in light of the information available to the IEP team at the time of the meeting. Therefore, this evidence is not relevant to the issue of eligibility, as pled in this case.

This evidence might be relevant if it were necessary to craft a remedy for Student, if he were found eligible for special education. However, Student did not meet his burden to show that Student was eligible for special education, as discussed below, and the proffered supplemental evidence is not relevant for any purpose. Accordingly, the motion to admit the

⁵ Student cites two OAH cases in support of his request to admit the evidence, *Student v. Cupertino Union School District*, OAH Case Number 2012020850 (2012), and *Student v. Los Angeles Unified School District*, OAH Case Number 2010050500 (2010). However, these cases are not applicable because in both cases the party seeking to supplement the record after the hearing had ended, was not seeking to do so in an attempt to place a new claim at issue.

emails is denied and neither the emails nor Mother's declaration have been considered for the purposes of this Decision.⁶

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is nine year-old boy who is currently residing with Parents, within the geographical boundaries of the District. Student is in fourth grade at Willow Cove Elementary School (Willow Cove) in the District and, at the time of the hearing, was a general education student who had not been identified as a student eligible for special education.

Second Grade

2. Student has had a history of behavioral problems in both the home and the school environments. During the 2010-2011 SY, Student was in second grade at Marina Vista Elementary School (Marina Vista) in the District. During that SY, Student's behaviors at school escalated as the year progressed. His discipline records for the 2010-2011 SY include 14 to 15 instances of discipline. The descriptions of the incidents include disrupting class, defiant behavior, physical altercations with other students, and bullying. The dispositions of the incidents included conferences, administrative detention, referrals, administrative loss of privileges and a total of three days of suspension. By March 2011, there was an indication that a behavior support plan (BSP) was discussed for Student.⁷ The BSP for Student from that time period was not offered as evidence at hearing and no school staff who worked with Student during the 2010-2011 SY testified.

3. By the end of the 2010-2011 SY, Student had been referred to the Lincoln Child Center (LCC) by the District for counseling services to address anger and lack of self-control.⁸ During one behavior incident in March 2011, Student indicated that he wanted to

⁶ A party to the hearing held pursuant to this section shall be afforded the right, consistent with state and federal statutes and regulations, to receive from other parties to the hearing, at least five business days prior to the hearing, a copy of all documents to be used at the hearing. (Educ. Code §56505(e)(7).) This is yet another reason for denying Student's request to admit the supplemental evidence.

⁷ In the case of a child whose behavior impedes his or her learning or that of others, a school district may develop a BSP which includes positive behavioral interventions, strategies, and supports to address that behavior. BSP's are used in the District for both general education and special education students.

⁸ LCC contracts with the elementary schools in the District to provide counseling services to general education Students at each school site and also contracts with the District

die and LCC completed a suicide evaluation. With the exception of the note on the discipline record noting the above facts, there was no other evidence regarding this incident at the hearing. Mother recalled that during this time period, she was getting phone calls from the school daily because Student was not sitting still, not focusing, yelling and hurting other kids. Student was diagnosed with ADHD at the end of the 2010-2011 SY. Student's behaviors in the home from the time he was in second grade until May 2012 included wild tantrums, throwing and breaking things, saying he hated people and wishing he would die.

4. Student's report card from the end of the 2010-2011 SY shows that Student had mastered all the end-of-year standards for all academic subjects. Student's overall grades for academic subjects showed Student received one "excellent," mostly "good," a few "satisfactory" grades, and nothing lower. In the citizenship area, it was noted that Student needed improvement in the areas of "listens attentively and follows directions," "respects authority," "observes school rules," and "observes classroom rules." Student received a satisfactory in the areas of "stays on task and uses time effectively," "completes work with care," "works well with peers," "respects rights and property of others," and "takes care of books and materials." Student received a good in the area of completes and returns homework on time. The teacher commented at the end of the 2010-2011 SY that Student "is doing fine in all academic areas."

Third Grade until March 27, 2012

5. At the beginning of his third grade year, Student was assigned to Mrs. Gonzalez in a general education class at Marina Vista.⁹ He was enrolled in this class from the beginning of the 2011-2012 SY until March 2012. Prior to the beginning of the SY, Mrs. Gonzalez had heard that Student had some behavioral problems the previous year and had volunteered to have Student in her class.

6. The District uses a behavioral system for all students, general and special education, which is based on a response to intervention (RTI) model. For general education students, the District uses a variety of tools, including intervention by behavioral staff and the use of BSPs. Dr. Tracy Catalde is the District-wide lead for school-wide positive behavior supports and intervention and RTI, as well as the coordinator for special education and psychological services.¹⁰ Dr. Catalde explained that the District is working to have a

to provide special education related services. All of the LCC services referenced in this report were provided as part of the general education program at the various school sites Student attended.

⁹ Ms. Lisa Gonzalez has a bachelor's degree in liberal studies and a multiple subject teaching credential.

¹⁰ Dr. Tracy Catalde has a master of arts in clinical psychology and a doctorate in education; majoring in special education and applied behavior analysis. He has credentials in administrative services and school psychology and holds a behavior intervention

universal behavioral support system for both general education and special education students. Dr. Catalde coaches administrators, teachers, paraprofessionals, and parents to effectively raise their skill sets to address the behavior needs of students.

7. Dr. Catalde started working with Student in December 2012 or January 2013. Dr. Catalde met with Mrs. Gonzalez a number of times to coach her and to look at supports for Student, look at the effectiveness of the BSP, and to help her tailor her skill set to Student's needs. Dr. Catalde wanted to get Mrs. Gonzalez to work in an evidenced-based manner. Dr. Catalde explained that before a BSP is changed, it should first be implemented with fidelity. Dr. Catalde observed Student many times in the school environment.

8. At the time Dr. Catalde started working with Student, he evaluated the BSP in place to ensure that it was evidenced-based and to evaluate its implementation. At that time, the plan appeared to be consequence-based and he changed this over time. Dr. Catalde testified that in order to develop a BSP that would work for Student, he needed to understand what was working and what was not working and then reformulate the plan. Dr. Catalde felt that Student showed indications that he could develop the skills to manage his behavior at school. However, Mrs. Gonzalez was not implementing the BSP with fidelity. While Student had some good days where he was quick to correct his own behavior, he was having a good deal of trouble overall.

9. Student needed a consistent environment and Mrs. Gonzalez was unable to provide this in her classroom. She used a color coded card system for discipline in her classroom and modified the system for Student to add a point system for extra chances. This behavioral system was not effective for Student. Mrs. Gonzalez described some of Student's behaviors in her class as extreme. Sometimes, when Student's behaviors were challenging, Mrs. Gonzalez would call LCC and a staff member would come to the classroom to assist with Student's behavior. However, Mrs. Gonzalez did not consider the LLC intervention successful. She felt that Student wanted her constant attention and she was unable to provide this level of attention in the classroom to only one student. The BSP's were only partially implemented and Student's behavior continued to escalate. There were limited references in testimony and in the records to Student having a one-to-one aide while he was in Mrs. Gonzalez' class.

10. The District developed another BSP for Student dated March 9, 2012. The behaviors targeted in the BSP were acting impulsively, and refusing to following directions. The impulsive behaviors included calling out, tipping over his desk, throwing the contents of desk on the floor, getting out of his seat, making noises, leaving the classroom without permission, and pushing and grabbing other students. The impulsive behavior was noted to occur daily, was moderate to severe in intensity, and lasted two to 10 minutes. The refusal to

certification. He has worked for the District since 2002 in a variety of positions and is currently the coordinator for special education and psychological services. Until July 2012, he was the District behavior analyst.

follow rules and directions was noted to occur daily, be moderate in intensity and last two to 10 minutes, as well.

11. The BSP for March 9, 2012 had goals for Student to increase self-regulation and following rules by 50 percent. There were a variety of teaching strategies listed in the BSP to teach Student appropriate replacement behaviors for problematic behaviors. The BSP listed the environmental structure and supports necessary to prevent the problematic behavior from occurring and to facilitate the use of the replacement behavior. These supports included reminders and pre-correction, avoiding reinforcing negative behaviors, allowing Student to take a break and if necessary, verbally prompting Student to leave the classroom until he can demonstrate control. The BSP included specific reinforcement procedures for Student and a section that explained how to respond to the problematic behavior when it occurs.

12. By the end of March 2012, Student's discipline record shows 16 discipline incidents from the beginning of the 2011-2012 SY until the end of March 2012. Student's records indicated that most of the incidents involved referrals, but there were also four suspensions. His behaviors had escalated this year to include disrupting the class, falling out of his chair onto the floor, kicking backpacks, defiance, screaming, pounding on his desk, mocking other students, work refusal, and culminated in an incident where Student hit the teacher.

Third Grade after March 27, 2012

13. In March 2012, the District proposed moving student to Heights School (Heights) to what was described as a general education behavior class. Student was not moved to this school after the District and Parent entered into a settlement agreement. Pursuant to this agreement, Dr. Sherry Burke was retained to perform a psychoeducational assessment and a functional analysis assessment (FAA) of Student. He was assigned a one-to-one aide as a behavior coach and Student was moved to Mr. Ramos' class at Los Medanos (Los Medanos) Elementary School on March 27, 2012.¹¹

14. At Los Medanos, Mr. Brian Anonio was assigned to Student to work with him as a behavioral coach in the classroom. Student's BSP was revised on March 26, 2012, by Dr. Catalde and this BSP had more specific and intensive behavioral strategies. Mr. Aronio spent six hours being trained by Dr. Catalde on Student's BSP and how to implement the BSP, prior to Student starting in Mr. Ramos' class. Dr. Catalde instructed Mr. Aronio to use a scientific approach with data collection. He trained Mr. Aronio in the implementation of a structured reward system and the use of a teaching view instead of a disciplinary view. Mr. Ramos also met with the principal to receive training regarding the effective implementation of Student's BSP.

¹¹ Mr. Ramos holds a bachelor's degree in sociology and a multiple subject teaching credential.

15. Mr. Ramos' classroom was very structured. Mr. Ramos credibly testified that his expectation for students is that they will behave respectfully and as good citizens. He described his style as strict but fair and very stern. Mr. Ramos explained that it was important to him that students behave well. Both Mr. Aronio and Mr. Ramos implemented Student's BSP with fidelity, and he exhibited very few problematic behaviors in Mr. Ramos class.

16. Data charts were kept by Mr. Aronio, keeping track of the behaviors Student exhibited. Mr. Aronio was instructed to document *all* of Student's behaviors on data charts. The data charts show that during the time period Student was enrolled in Mr. Ramos' classroom, there were only eight entries on a total of six days on the data charts. The data charts show that student had a few incidents of minor defiant behavior and a few times where Student was not focused, mostly due to frustration regarding finishing his math facts. Student also had one incident where he cried a bit because he was not able to earn an ice cream party because he was not able to master the total number of math facts necessary for him to be allowed to attend the party. None of the incidents required removal from class, a referral to the office, or suspension. Student's behavior had improved markedly and almost immediately upon his arrival in Mr. Ramos classroom.

17. Shortly after Student arrived in Mr. Ramos' class, and as his behavior began to improve, the behavior coach was able to fade back and did not need to intervene with Student as often. Mr. Ramos testified credibly about Student's time in his classroom. He described Student as quiet at first. He described Mr. Aronio's interventions as very effective and highly motivating for Student. He felt that Mr. Aronio kept Student on task in his class. As time went on, Student became more comfortable in class, and Student often played sports with other students at recess and also "hung out" and socialized with other students. Mr. Ramos did not recall any out of the ordinary behavior on the part of Student while in his class. Student was never sent out of class or asked to remove himself from class while in Mr. Ramos' classroom. Mr. Ramos had seen Student's previous discipline log and felt that Student was completely different than the student described in the logs. Mr. Ramos did not recall Student breaking any rules in his classroom. Mr. Ramos felt Student was successful in his class academically and behaviorally.

18. Dr. Catalde testified credibly regarding the difference in Student's inappropriate behaviors in Mrs. Gonzalez' class and his typical behavior in Mr. Ramos' class. Dr. Catalde has observed Student both in Mrs. Gonzalez's and Mr. Ramos's classrooms. Dr. Catalde opined that Mrs. Gonzalez's failed to implement strategies that would work for Student. Mrs. Gonzalez gave Student lots of attention and proximity when Student misbehaved. This reinforced Student's problematic behaviors. Dr. Catalde felt that Mrs. Gonzalez wanted to nurture Student, but that in doing so she inadvertently increased and strengthened his disruptive behaviors.

19. Dr. Catalde observed Mr. Aronio and Mr. Ramos on more than 10 occasions implementing Student's BSP with fidelity. At some point, Dr. Catalde instructed Mr. Aronio to fade back and Mr. Ramos took over the implementation of the BSP on his own. Dr.

Catalde observed Student in both structured and unstructured settings at Los Medanos doing well behaviorally during this period of time. In Mr. Ramos's class, Student looked like every other student in the class: he transitioned well, looked ready to learn, and he responded to teacher direction and correction. Dr. Catalde described the difference in Student from Mrs. Gonzalez to Mr. Ramos class as "night and day." Student wanted to please Mr. Ramos from the first day and Student did what he was supposed to do in class.

20. Student's report card from the end of the year showed that he achieved end of year mastery, or was approaching end of year mastery, in all academic areas with the exception of two of the ten number sense standards, and one of the algebra and functions standards. Student received a satisfactory in all areas of citizenship and social growth. The overall pattern of grades from trimester to trimester on his report card shows great improvement from the second trimester grades at Marina Vista, to the third trimester grades at Los Medanos at the end of the 2011-2012 SY.

Assessments from May 2012

21. Dr. Burke completed her psychoeducational assessment of Student in early May 2012 and presented her report at the IEP team meeting on May 30, 2012.¹² Dr. Burke met with Student twice at her office and made one school observation as part of her assessment. She interviewed Student, Mother, Mr. Ramos and Mr. Aronio and had access to and read Student's educational file, including the disciplinary reports for student located in his record. Dr. Burke's testimony was generally credible.

22. As part of her report, Dr. Burke interviewed Mother and she told Dr. Burke that Student had been diagnosed with ADHD and oppositional defiant disorder (ODD) in November 2011. At the time of the assessment was taking Adderall. Student had tried other medications in the past, but Mother felt that Adderall was more successfully controlling Student's symptoms. Notably, the assessment indicates that Mother was pleased with Student's placement in Mr. Ramos' class and felt that the structure of the class and support from his paraeducator had helped Student function better in school. Mr. Ramos told Dr. Burke that Student was working as hard, behaving as well and was learning as much as his peers in the class. Student told Dr. Burke that the paraeducator had taught him how to stay calm and keep out of trouble. He told Dr. Burke he had made a lot of new friends at school and he had friends in his neighborhood.

23. Dr. Burke administered the NEPSY.¹³ This is a developmental neuropsychological assessment Dr. Burke used to explore and differentiate auditory

¹² Dr. Sherry Burke holds a master's degree in counseling with options in clinical child psychology and marriage, family and child counseling and a doctorate in education in child and youth studies. She holds credentials in school psychology and school counseling and is a California licensed educational psychologist.

¹³ NEPSY is not an acronym

processing versus inattention in Student. Dr. Burke found that Student's scores on this test fluctuated from slightly below average to above average when compared with peers. Student did struggle mildly with planning, which Dr. Burke attributes to his impulsivity. Dr. Burke noticed that throughout the testing, Student responded immediately and that he needs to be systematically taught to take time to process information and analyze before answering.

24. Student's auditory pressing skills were tested using the Test of Auditory Perception Skills – 3rd Edition (TAPS III). Student scores were all in the average range. Student's visual perception skills were tested using the Developmental Test of Visual-Motor Integration- Fifth Edition (VMI-V). Student received a standard score of 94 and his overall performance on this test suggests average visual motor integrations skills.

25. Student's emotional and behavioral status was also assessed. Dr. Burke used several projective tests to reveal themes and pattern in Student's life experiences. Dr. Burke used a clinical interview, Three Wishes, Kinetic Family Drawing, and the Sentence Completion Form. Dr. Burke determined that several themes emerged including security and attachment. She found that Student struggles to accept responsibility for his actions and has a tendency to blame others. Socially, he has presented himself as having some friends but does not feel that he is always well-liked.

26. Dr. Burke gave the Achenbach Behavior Checklist which measures several behavioral domains and gives information about how a child expresses himself. Scores between 60 and 69 are considered to be at risk and scores of 70 and above are considered to be clinically significant. The checklists were given to Mother and Mr. Ramos. At the time Mr. Ramos was given the checklist to complete, he had known Student for about six weeks. Dr. Burke testified that it was proper to give Mr. Ramos this checklist and Student did not produce evidence to the contrary. Mother rated Student as at risk in somatic complaints, anxious/depressed, social problems, thought problems, attention problems, and rule breaking behavior. Mother rated Student as clinically significant in aggressive behavior. Mr. Ramos rated Student as at risk in anxious/depressed. All other scores were in the average range. Dr. Burke noticed that Student's behaviors as reported by both raters were seen both at home and school, but the behaviors in school were noted to a lesser degree.

27. Dr. Burke also administered the Weschler Individual Achievement Tests – 3rd Edition (WIAT-III). This is described as a comprehensive individually administered battery for assessing the achievement of students on a variety of academic skills. Student received standard scores ranging from 95 in pseudoword decoding to a high of 129 in multiplication fluency. All of his scores are at least in the average range.

28. Dr. Burke summarized that Student presents as a bright and happy child who is verbally expressive. He stated that Student is clearly experiencing impulsivity in the school environment and anger management issues in the home. She feels that Student is highly impulsive which has resulted in a negative impact on peer relationship development. She stated that it has also negatively affected his academic progress in that he is missing direct instruction and access to core curriculum when misbehaving, although his academic

achievement has not been impacted. Dr. Burke clarified in her testimony that her comments about his misbehavior and missing instruction did not refer to Student at the time the assessment was completed but from reports of earlier behavioral incidents prior to Student's placement in Mr. Ramos' classroom and the behavior coaching from the paraeducator.

29. Dr. Burke determined that Student did not meet the eligibility criteria for specific learning disability, other health impaired or emotional disturbance at the time of her assessment. Student did not present expert testimony and was otherwise unable to refute Dr. Burke's conclusions.

30. Dr. Burke also completed a functional analysis assessment (FAA) in May 2012 and her FAA was presented at the May 30, 2012 IEP team meeting.¹⁴ Data for the FAA was taken through systematic observation using formal and informal methods as well as reviewing school records and data collected by Mr. Anonio. Anecdotal information was obtained and Student was observed at school during classroom lecture, group work, individual work, lunchtime recess, and standardized testing. None of the historically reported attention seeking behaviors were observed in the classroom by Dr. Burke at any time during her assessments. No further BSP or BIP was developed as a result of the FAA because Student was not having any behaviors at school that were interfering with his education. Dr. Burke did make several recommendations, many of which were already in the BSP being used at the time. Dr. Burke also recommended fading back the behavior coach (paraeducator) and having Mr. Ramos cue/prompt and reinforce the positive behaviors Student had learned.

31. Parent testified that her agreement to let Dr. Burke assess Student was predicated upon Dr. Burke agreeing to get information from Mrs. Gonzalez. However, Student failed to produce a signed copy of the assessment plan with the this request. Student did produce an assessment plan with a notation that parent wanted Mrs. Gonzalez consulted, but it was not signed. Student did not establish that the assessment plan with the note to gather input from Mrs. Gonzalez was, in fact, the signed assessment plan the District received. Also, the appropriateness of Dr. Burke's assessments were not challenged as part of the due process complaint for this hearing.

32. Dr. Burke credibly explained that she did not need to contact Mrs. Gonzalez because there was a clear record of Student's behaviors while in Mrs. Gonzalez' class that she had read. Further, Student was no longer exhibiting any of the extreme behaviors Mrs. Gonzalez had reported. Dr. Burke credibly testified that had Student been exhibiting behaviors in Mr. Ramos' class, she would have contacted Mrs. Gonzalez as part of the assessment because her input would have helped her determine whether the behaviors were present for a long time or to a marked degree.

¹⁴ For a student with more serious behavior problems that impede a child's learning or that of others, a school district is required to conduct an FAA, and if warranted, develop a behavior intervention plan (BIP.) California regulations provide detailed criteria that govern the contents of an FAA and a BIP.

33. The District also completed an initial speech and language evaluation for Student. With the exception of Deborah Daly, the special education director for the District who testified about a single subtest of the Test of Language Development- Primary 4, no one testified regarding that assessment and no weight is given to this assessment.

May 30, 2012 IEP Team Meeting

34. An initial IEP team meeting was held for Student on May 30, 2012. Dr. Burke came to the IEP team meeting and discussed the results of her assessment and the FAA with the team, which also included Parents, Deborah Daly, and Dr. Catalde, among others.

35. LCC also provided the IEP team with a short paragraph outlining the services Student had been receiving, which included five sessions of individual therapy at Los Medanos since April 20, 2012. No one from LCC testified at the hearing. The report indicated that Student was being seen once a week for 30 minutes and described Student as personable, bright, eager to come to therapy and actively engaged. Student identified positive experiences since attending Los Medanos and school staff reported minimal angry outbursts or disruptive behavior at school. The report mentions Mother's concerns about anger in the home. LCC indicated that the focus of the therapy they were providing was on identifying sources of Student's anger, building a positive self-image, and developing strategies to help Student manage his feelings and resolve conflicts, especially at home.

36. Dr. Catalde credibly testified that he did not believe that Student was a child with a disability and eligible for special education. Dr. Catalde's testimony is given great weight. He testified openly and thoughtfully and he had observed Student in both classrooms. He explained that Student had the capacity to acquire and use the skills necessary to display appropriate school behavior. In his experience, Student could turn his behavior around when given structure in the general education environment. He explained that Student's behavioral issues were environmental and that when structures were put in place to teach new behaviors and correct behaviors, Student's behaviors came under control.

37. Dr. Catalde testified credibly that Student needs a general education teacher who runs a highly structured class that is routine-bound, a teacher who is willing to take the time and form a relationship with Student, and one who is willing to be coached and follow Student's behavior plan. Dr. Catalde explained that one of the factors he considers when looking at whether a student with difficult behaviors might have a disability is whether a student, when given the motivation of a reward to improve behavior, is able to improve behavior with only the addition of a reward. He explained that a student with a disability cannot change their behavior with only the addition of a reward. Students who have behavioral issues and not a disability can change their behaviors with the right training and instruction. In this case, Student was able to change his behavior with the addition of a reward system and BSP that was implemented with fidelity.

38. The IEP team determined that Student did not meet the eligibility criteria for special education under specific learning disability, other health impaired or emotional disturbance.

Eligibility

Specific Learning Disability

39. A pupil qualifies for special education services under the category of SLD if the student has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations, and has a severe discrepancy between intellectual ability and academic achievement.

40. Dr. Burke administered the Differential Ability Scales – Second Edition (DAS-II) to Student. She describes this test as a battery of cognitive and achievement tests. Dr. Burke notes in her report that Student is African-American. Student’s IEP document identifies Student as African-American as well. However, in her report, Dr. Burke does not discuss the limitations on intelligence testing for African-American students in California, pursuant to the *Larry P.* decision and its progeny.¹⁵ Nowhere in her report or in her testimony did Dr. Burke address whether administration of the DAS-II in order to assist in the determination of special education eligibility for an African-American Student was permissible.

41. Because there was no evidence that the DAS test meets the requirements of the *Larry P.* injunction, the results of the DAS-II will not be given any weight and any conclusion that Dr. Burke reached that references results from the DAS-II, including any conclusion as to Student’s cognitive abilities, will not be given any weight. In any case, however, as discussed below, Student did not meet his burden to show that he met the SLD criteria at the time of the May 30, 2012 IEP team meeting.

42. Student claims that his scores on STAR [standardized testing and reporting] testing establishes that he may have a specific learning disability.¹⁶ In second grade,

¹⁵ In California, school districts may not administer tests that measure a student’s intellectual quotient (IQ) if a student is African American. Other measures must be used to measure the cognitive abilities of an African American student. (*Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp.926, *affd. in pt., revd. in pt., Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969.)

¹⁶ The ALJ is aware that in the spring of each year students in grades two through 11 are administered standardized tests in several academic areas. The areas tested always include English, language arts and math. There are five ranges for students’ scores: far below basic, below basic, basic, proficient and advanced.

Student received scores in the basic range in both English-language arts and mathematics. Not only were these scores from more than one year prior to the IEP team meeting in May 2012, Student did not provide any testimony relating Student's STAR test results to any of the SLD eligibility criteria.

43. Student's teachers testified that Student may be able to achieve proficient or maybe advanced scores on STAR testing. However, a teacher's opinion that a student may be able to achieve higher scores on the STAR testing is also not a showing that the Student meets the criteria for specific learning disability. There was no evidence that Student had a severe discrepancy between his intellectual ability and academic achievement.

44. As discussed below, the only new information available to the IEP team at the time of the October 9, 2012 IEP team meeting was regarding Student's emotional functioning. Student presented no evidence that there was any new testing or new information available to the IEP team in October 2012 with respect to the criteria for SLD. Accordingly, Student did not meet his burden to show that as of either the May 30, 2012 or October 9, 2012 IEP team meeting, there was a significant discrepancy between cognitive ability and achievement. Accordingly, Student did not meet his burden of proving that he has an SLD.

Other Health Impairment

45. For a student to meet the eligibility criteria under OHI, there must be a showing that the student has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness as to the educational environment, due to chronic or acute health problems such as attention deficit disorder (ADD) or ADHD that adversely affects the child's educational performance.

46. The District does not dispute Student's ADHD diagnosis. Student did not present evidence that ADHD or any other condition caused Student to limited strength or vitality. Student's mother testified that among the side effects of Student's medication are dizziness, headaches, drowsiness and stomachaches. However, the uncontroverted testimony of Mr. Ramos, Mr. Aronio and Student's fourth grade teacher, Aaron Hatfield, who all had observed Student in the classroom environment, established that Student was no more distractible than his classmates.¹⁷ He could easily be redirected back to attention with general education supports that his teachers used with all students, and none of these individuals, or others who had observed Student saw him to be drowsy or otherwise exhibiting the side effects of medication that Parent described. Student did not present any evidence from anyone who observed Student in class that his ADHD or medication side effects adversely affected his educational performance. As discussed below, the only new information available to the IEP team at the time of the October 9, 2012 IEP team meeting

¹⁷ Aaron Hatfield's testimony concerned Student's fourth grade year which was after the May 30, 2012 IEP team meeting, however, his testimony confirmed the testimony of the other witnesses.

was regarding Student's emotional functioning. Student presented no evidence that there was any new testing or new information available to the IEP team in October 2012 with respect to the criteria for OHI. Therefore, Student did not establish that he qualified for special education services under the category of OHI at the time of the May 30, 2012 or October 9, 2012 IEP team meetings.

Emotional Disturbance

47. To be eligible for special education and related services under the category of ED, a child must exhibit one or more of five characteristics over a long period of time, and to a marked degree, and the child's educational performance must be adversely affected as a result. The characteristics are: (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; and (5) a tendency to develop physical symptoms or fears associated with personal or school problems.

May 30, 2012 IEP Team Meeting

48. Student contends that he was eligible under the category of ED at the May 30, 2012 IEP team meeting. The District asserted that at the time of the assessment, Student was not exhibiting any characteristics consistent with ED eligibility.

49. As to the first characteristic of ED, as noted above, Student had the ability to learn and made academic progress in his academic classes. Student showed academic progress over time as reported in report cards and by teacher report. Student did not meet his burden to show that he met this characteristic.

50. For the second characteristic, Student was able to develop friendships with his classmates, as reported by District staff. While Student's parents indicated that Student did not have friendships, Student reported friendships in and out of school. Student also changed schools prior to the IEP team meeting and was demonstrating the ability to make friends in the new environment. As to Student's relationships with teachers, Student had a difficult time with Mrs. Gonzalez. However, by the time of the IEP team meeting, Student had built and maintained satisfactory relationships with both Mr. Ramos and Mr. Aronio. Student did not meet his burden to show that he met this characteristic.

51. Regarding the third characteristic, Student did not establish inappropriate behavior or feelings under normal circumstances as his behavior, at the time of the assessment and IEP team meeting was typical for a third grade student. As to Student's feelings, there was no evidence presented that Student had inappropriate feelings that the District was aware of at the time of the assessment and the IEP team meeting. Although Student had expressed a desire to die a month or so earlier, Student reported to Dr. Burke

that he likes to go to school and likes his new teacher and did not indicate any inappropriate feelings during the time of the assessment and May 30, 2012 IEP team meeting.

52. As to the fourth characteristic, while Student expressed thoughts of wanting to die in March 2012, prior to his placement in Mr. Ramos' class, there was no evidence presented that at the time of the IEP team meeting, Student was unhappy or depressed. The results from the testing indicated that his teacher and Mother rated him "at risk" for anxious/depressed, but neither scales were reported to be in the clinically significant range. At the time of the May 30, 2012 IEP team meeting, Student had not been diagnosed with Mood Disorder, not otherwise specified (NOS).¹⁸ Student did not meet his burden to show he had a general pervasive unhappiness or depression.

53. The evidence did establish the Student was psychiatrically hospitalized beginning May 29, 2012. However, the evidence was clear that while Parent informed school personnel on May 30, 2012 that Student was hospitalized, Parent never indicated that Student was psychiatrically hospitalized and the District had no way of learning this information at the time of the May 30, 2012 IEP team meeting.

54. Finally, as to the fifth characteristic, there was no evidence that Student experienced physical symptoms or fears related to personal or school problems when in the school environment. Nor had such information been reported to District personnel by either Student or Parents. Student did not meet his burden to show that he met this characteristic.

55. Student did not present any expert testimony or other evidence to contradict Dr. Burke's assertion that he did not qualify for special education services under the category of ED when she assessed Student. Student did not present evidence to contradict Mr. Ramos' and Mr. Aronio's observations that Student got along with his classmates and staff and did not present any serious emotional problems. Information from Mother, including the ODD diagnosis, which the District possessed, was not sufficient to meet the eligibility requirements under the category of ED. Therefore, Student failed to establish that the District was incorrect when it did not determine that Student met the eligibility criteria of ED at the May 30, 2012 IEP team meeting.

IEP Team meeting on October 9, 2012

56. Student contends that he was eligible for special education under the category of ED at the time of the October 9, 2012 IEP team meeting. During the summer of 2012, Student was hospitalized from his home on three occasions. All three were due to uncontrollable behavior and threats to harm himself and others. Student was additionally diagnosed in his summer hospitalizations with Mood Disorder NOS. Several medications were tried and are still in use.

¹⁸ Student received this diagnosis during the summer of 2012.

57. Student was enrolled at Willow Cove for the 2012-2013 SY, due to District overflow issues. Student was assigned a general education fourth grade classroom. His teacher was Mr. Aaron Hatfield.¹⁹

58. The District was notified by Parent on August 23, 2012, that Student had been hospitalized several times for mental health and behavioral issues. On the same day, the District responded by asking Parent for permission for the District to get records from the hospitals and Student's psychiatrist so that the District could provide that information to Dr. Burke. The District also asked that Parent sign a new assessment plan so that Dr. Burke could evaluate Student for special education eligibility based upon the new information, and to allow Dr. Burke to speak to the staff where Student was hospitalized.

59. Student's behavior in Mr. Hatfield's class at the beginning of fourth grade was typical. Student no longer had the paraeducator or a behavior plan in place, as his behavior at the end of the previous SY indicated that these were no longer necessary. On September 25, 2012, Student was suspended for two days for an incident on the playground that ended with him throwing rocks at the principal, trying to hit him, and elopement from school grounds, although he returned to campus. After the suspension, Student apologized to the principal and had no further behavioral incidents prior to the IEP team meeting on October 9, 2012.

60. Mr. Hatfield reported that Student made friends since coming to his class. Student was functioning at grade level in all academic subjects. When asked to compare Student to other students in his classroom, Mr. Hatfield said Student was working as hard, behaving slightly less well, learning as much and seems as happy as his peers. Up through the time of the new assessment in October 2012, Student only had one incidence of misbehavior in the classroom when Student was frustrated, talking out and being rude to classmates. Mr. Hatfield intervened by getting down to his level and asking "where is my [Student]" and Student "snapped out of it."

61. Since Student's psychiatric hospitalizations, he has been seen intermittently by Anitra Clark, licensed clinical social worker (LCSW), through the Kaiser Permanente Child and Family Psychiatry Clinic. She saw Student and his family on an "as needed" basis. At the time of Dr. Burke's updated assessment, Ms. Clark shared concerns with Dr. Burke about Student's escalating behaviors at home and in her office. She noted that Student responded well to the high structure of the hospital environment. She worried that Student's unpredictable behavior may continue make Student a danger to himself and his family.

62. Ms. Clark testified credibly regarding her knowledge of and interactions with Student. She sent a letter to school staff in August 2012, at the request of Parent. In the letter she described Student's hospitalization on May 30, 2012, as being due to his posing a danger to himself, including having suicidal ideation. The hospitalization on July 17, 2012,

¹⁹ Mr. Aaron Hatfield has a bachelor's degree in liberal arts and a multiple subject teaching credential.

for being a danger to self and others was due to him banging his head and threatening to harm himself or others. Student was then hospitalized on July 26, 2012, for being a danger to self or others by again banging his head and threatening to harm others. Ms. Clark explained in the letter that Student was taking three medications prescribed to help stabilize his mood and help him to sustain focus. She stated that based upon the recent hospitalizations, Student would benefit from additional support at home and school and placement in a therapeutic behavioral program/school which offers increased structured, emotional support and therapeutic drug monitoring.

63. However, Ms. Clarks' school placement recommendations are given little weight. First, Ms. Clark never contacted District staff regarding Student's behavior and need for support in the school environment. Ms. Clark never observed Student at school nor was she aware of the interventions the school already had in place. Ms. Clark never attended any IEP team meetings for Student. Finally, Ms. Clark testified that at the time she wrote the letter to the school with the placement recommendation, she did not know what his educational needs were and she was unsure of how Student was functioning in the school environment.

Updated Assessment

64. Dr. Burke observed Student in school as part of the updated assessment completed in the fall of 2012. She noted that his behavior was similar to other same aged peers in the assembly she observed. He was also observed in the classroom and the playground. Overall, Student's behavior and learning were unremarkable. Dr. Burke did more projective testing that showed that Student had limited insight into his past behavior problems and showed a tendency to minimize his actions.

65. Dr. Burke gave the Achenbach Behavior Checklist to Parent and Mr. Hatfield. In comparison to the same checklist she filled out in May 2012, Parent showed increases in the almost every area. Student was "at risk" in the areas of withdrawn, anxious/depressed, social problems, thought problems, and rule-breaking behaviors. Student was rated by Parent as "clinically significant" in the area of somatic complaints, attention problems and aggressive behavior. Parent responded that Student continues to exhibit numerous problematic behaviors in the home environment including temper tantrums, behaving irritably, not following rules, inattention, and difficulty sitting still.

66. On the Achenbach Behavior Checklist, Mr. Hatfield rated student in the average range in all areas, with the exception of aggressive behavior, in which he received a 60 – the lowest score in the "at risk" range. At the time of the updated assessment, Student had been in Mr. Hatfield's class for about five weeks.

67. Overall, Dr. Burke concluded that Student was having problems in the home, but doing well in school, with the exception on the one two-day suspension. Dr. Burke concluded that Student's behavioral difficulties are best explained by his ADD and ODD, and the secondary social problems associated with the diagnosis. She determined that Student has not yet mastered the strategies for dealing with his anger and is not able to self-

soothe or deescalate when angry. She noted that Student reported he was feeling better and doing better in school this year than last. At the time of the assessment, Student liked his new school and teacher. He made new friends at school and knew other students from his community and his old schools. He reported that he was getting along better with Mother and shared that “I am a changed man!” Dr. Burke determined in her updated assessment that Student was not eligible for special education as a student with emotional disturbance.

68. The IEP team met again on October 9, 2012, to determine whether Student was eligible for special education as a student with ED. Student’s grandmother attended the IEP team meeting but Mother did not. Dr. Burke’s updated assessment was reviewed. The team discussed the results of the assessment, and noted that Student was at grade level or above in all academic areas. The team did note that Student needed to develop self-soothing strategies and referred Student to LCC for counseling through the general education program. The IEP team determined that Student did not meet the eligibility requirements for ED.

69. Student did not meet his burden to show that he was eligible for special education under ED at the October 9, 2012 IEP team meeting. Student’s repeated hospitalizations and threats to harm himself were inappropriate behavior and feelings under normal circumstances in several situations. However, Student did not meet his burden of showing that his education was adversely affected as a result, or that he was in need of special education. Student’s hospitalizations during the summer did not cause Student to miss school. He was attending school regularly, doing his work and participating in class prior to the October 9, 2012 IEP team meeting.

Alleged Procedural Denials of FAPE by the District

70. Student contends that the District committed multiple procedural violations that resulted in him being denied a FAPE. However, a student who is not eligible for special education cannot be denied a FAPE even if a school district has committed procedural violations. In other words, a student must be able to establish eligibility for special education to have an actionable claim for procedural violations that he believes denied him a FAPE.

Time Period of March 20, 2012 until May 30, 2012

71. Student did not allege eligibility during this time period. There can be no procedural violation which results in a denial of FAPE until such time as Student is found eligible. The earliest that Student alleges that the District should have made him eligible was the May 30, 2012 IEP team meeting. Therefore, Student cannot prevail on any claims of procedural violations until at least May 30, 2012.

May 30, 2012 to Present

Failure to Provide School Records, Provide Prior Written Notice and Errors in the IEP invitation

72. A District is required to provide Student with a copy of his school records within five business days of a request. Student alleged that the District committed the procedural violations of failing to provide the parents the nurse report, the full Lincoln Center report from May 2012, test protocols, emails and the service log for 1:1 aide.

73. A District must also provide a Student with prior written notice when a District proposes or refuses to provide services and assessment to a Student. Student also alleged that the District failed to provide prior written notice when the District failed to conduct assessments in all areas of disability and by making error(s) in the invitation to the May 30, 2012 IEP meeting. Student alleges that these procedural violations resulted in a denial of FAPE.

74. However, a Student who is not eligible for special education cannot be denied a FAPE. Student did not meet his burden to show that he was eligible for special education at the time of the May 30, 2012 and October 9, 2012 IEP team meetings, so even if the District committed these alleged procedural violations, there could be no denial of FAPE. Therefore, it is unnecessary to analyze each alleged procedural violation and the ALJ declines Student's invitation to do so.

Failure to Assess

75. A District must assess the student in all areas of suspected disability including assessing for related services. However, if a student has needs for a related service, but is not eligible for special education, the Student is not entitled to the related services. Student alleges that the District failed to provide an ERHMS assessment and a nurse assessment, both related services, and that these failures denied Student FAPE. Since Student did not meet his burden to show that he was eligible for special education, the alleged failure to provide related service assessments cannot result in a denial of FAPE.

76. Further, Student abandoned his claim that the District should have provided him with a neuropsychological assessment and an occupational therapy assessment when he failed to put on evidence during the hearing regarding his need for these assessments. Therefore, the ALJ declines Student's invitation to analyze this part of the issue.

Failure to tailor an appropriate educational program from March 20, 2012 to the Present

77. Student claims the District denied him a FAPE by failing to tailor an appropriate educational program to meet his unique needs from March 20, 2012, to the present. As indicated above, Student does not allege he is eligible until at least May 30,

2012. Therefore, even under Student's theory of his case, the District would not be responsible for offering or providing FAPE to Student until at least May 30, 2012.

78. Student failed to meet his burden and show that he was eligible for special education at the time of the May 30, 2012 IEP team meeting and the October 9, 2012 IEP team meeting. Therefore, the District was under no legal obligation to offer or provide Student a FAPE and did not deny Student a FAPE.

LEGAL CONCLUSIONS

Burden of Proof

1. Because Student filed the request for due process hearing, he had the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

Elements of a FAPE

2. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the IEP required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(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).)

3. There are two parts to the legal analysis of a school District's compliance with the IDEA. First, the tribunal must determine whether the District has complied with the procedures set forth in the IDEA. Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

4. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective." (Id. at p. 1149, quoting *Fuhrmann v. East Hanover Bd. of Educ.*, *supra*, 993 F.2d at p. 1041.) An IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; see also *Carlisle Area School v. Scott P.* (3d Cir. 1995) 62 F.3d 520, 534; *Roland M. v. Concord School Comm.* (1st Cir. 1990) 910 F.2d 983, 992, cert. denied, 499 U.S. 912 (1991).)

Special Education Eligibility

5. A student is eligible for special education if he or she is a "child with a disability" such as an emotional disorder, specific learning disability, or language and speech disorder, and as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subds. (a) & (b); 5 C.C.R. § 3030, subd. (g).)

6. "Special education" is instruction specially designed to meet the unique needs of a child with a disability that cannot be met with modification of the regular instruction program, and related services that may be required to assist the child to benefit from the specially designed instruction. (20 U.S.C. § 1401(a)(29); 5 C.C.R. § 3001, subd. (ac).) "Related services" (referred to as designated instruction and services or DIS in California) are defined as transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a); 5 C.C.R. § 3001, subd. (z).) A child is not considered a "child with a disability" for purposes of the IDEA if it is determined that the child only needs a "related service" and not special education. (34 C.F.R. § 300.8(a)(2)(i).)

Issue I: Did the District deny Student a FAPE by failing to make him eligible for special education and related services at the May 30, 2012 and October 9, 2012 IEP team meetings, specifically under the eligibility categories of SLD, OHI, or ED?

Eligibility under Specific Learning Disability

7. A student is eligible for special education under the category of "specific learning disability" if: 1) the student has a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or do mathematical calculations, and; 2) based on a comparison of "a systematic assessment of intellectual functioning" and "standardized achievement tests" has a severe discrepancy between intellectual ability and achievement. (34 C.F.R. § 300.8(c)(10)(i); Ed. Code, § 56337, subd. (a); Cal. Code Regs., tit. 5, § 3030, subd. (j).) "Specific learning disability" does not include "learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." (34 C.F.R. § 300.8(c)(10)(ii); Ed. Code, § 56337, subd. (a).)

8. If standardized tests do not reveal a severe discrepancy between intellectual ability and achievement, the IEP team may still find that a severe discrepancy exists as a result of a disorder in a basic psychological process based on: 1) data obtained from standardized assessment instruments; 2) information provided by the parent; 3) information provided by the pupil's present teacher; 4) evidence of the pupil's performance in the regular and/or special education classroom obtained from observations, work samples, and group test scores; 5) consideration of the pupil's age, particularly for young children; and 6) any

additional relevant information. (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(C).)²⁰ "Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(1).)

9. In *Larry P. v. Riles* the Ninth Circuit Court of Appeals enjoined California schools from using standardized intelligence tests for the purpose of identifying African-American students for special education and services. (*Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963.) The rationale behind the prohibition was that there appeared to be a disproportionate number of African-American students found eligible for special education services under the eligibility category of mental retardation based on intelligence testing.

10. In 1984, the court expanded the original *Larry P.* injunction, where the parties stipulated to a settlement which provided a complete ban on the use of I.Q. testing on African-American students for any purpose. (*Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969.) Furthermore, the IDEA and the Education Code prohibit the use of discriminatory testing and evaluation materials. (34 C.F.R. § 300.532(a)(1)(i); Ed. Code, § 56320, subd. (a).)

11. Based on Factual Findings 21-44 and Legal Conclusions 1-10, Student did not meet his burden to show that he met the criteria for an SLD at the time of either the May 30, 2012, or the October 9, 2012 IEP team meetings. Student argues that his ADHD constitutes a disorder of basic psychological process as shown by his behavior which he describes as unpredictable and that his lack of focus. He argues that he has difficulty completing work independently, he gets upset and needs to leave the classroom, and he loses self-control and is impulsive, aggressive and blurts out. Student did not put forth evidence that the behaviors he described were symptomatic of a basic psychological disorder. Student cites his diagnosis and then lists the behaviors that he contends affected his attention and therefore led to him having an SLD, but he did not produce evidence that these behaviors were linked to an attention disorder for purposes of SLD eligibility. Further, there was no evidence that

²⁰ "When standardized tests are considered to be valid for a specific pupil, a severe discrepancy is demonstrated by: first, converting into common standard scores, using a mean of 100 and standard deviation of 15, the achievement test score and the ability test score to be compared; second, computing the difference between these common standard scores; and third, comparing this computed difference to the standard criterion which is the product of 1.5 multiplied by the standard deviation of the distribution of computed differences of students taking these achievement and ability tests. A computed difference which equals or exceeds this standard criterion, adjusted by one standard error of measurement, the adjustment not to exceed 4 common standard score point, indicates a severe discrepancy when such discrepancy is corroborated by other assessment data which may include other tests, scales, instruments, observations and work samples as appropriate." (Cal. Code Regs., tit. 5, § 3030, subd. (j)(4)(A).)

Student was exhibiting these behaviors at the time of the assessment and the IEP team meeting on May 30, 2012.

12. Student then argues that his score of Basic on STAR tests and the testimony of his teachers that they believed he was capable of scoring proficient on the STAR tests is evidence of a significant discrepancy between intellectual ability and achievement. This argument fails. Student failed to put on any expert testimony to support the contention that STAR test results and teacher's estimates of capability of a student can be used to determine whether a significant discrepancy exists. Even if the STAR testing results could be used to establish a significant discrepancy for purposes of SLD eligibility, the STAR test Student relies upon was given more than one year before the IEP team meeting on May 30, 2012. Student's academic achievement scores from Dr. Burke's assessment show that Student was functioning in at least the average range in all academic areas. His report card, issued shortly after the May 30, 2012 IEP team meeting, showed that he was meeting or well on his way to meeting grade level standards.

13. The District's determination that Student does not have an SLD, relied on Dr. Burke's DAS-II results, but these results cannot be relied on in this matter because no testimony was elicited regarding the use of the scores from this test to determine eligibility of an SLD in African-American students in California. Student did not produce any evidence to establish that his academic achievement levels are below his cognitive abilities. Student put on no evidence regarding his cognitive abilities. Therefore, Student did not meet his burden of establishing that he meets the criteria for having an SLD that makes him eligible for an IEP. As to whether Student was eligible under the category of SLD at the time of the October 9, 2012 IEP team meeting, Student relies on the same arguments and again failed to meet his burden to establish eligibility under this category.

Eligibility under Other Health Impaired

14. "Other health impairment" is defined, in relevant part, as "having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that . . . due to chronic or acute health problems such as . . . attention deficit disorder or attention deficit hyperactivity disorder...and [a]dversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (f) [defining OHI as "[a] pupil has limited strength, vitality or alertness, due to chronic or acute health problems . . . which adversely affects a pupil's educational performance."].)

15. Based on Factual Findings 1-38, 45, and 46, and Legal Conclusions 5-6, and 14, Student did not meet the eligibility criteria for OHI at the time of the May 30, 2012 and October 9, 2012 IEP team meetings. Student argues that Dr. Burke's reports, the records from the behavioral coach, the BSP, disciplinary records, letters from his therapist and psychiatrist, hospital records, and documentation by Mrs. Gonzalez show Student's chronic and acute health condition, limited vitality and heightened alertness to environmental stimuli across all environments establish his eligibility under OHI. At the time of the May 30, 2012,

the District was aware that Student had been diagnosed with ADHD. However, a diagnosis of ADHD alone does not establish that Student meets the eligibility criteria for special education. The District established at hearing that at the time of Dr. Burke's assessment and the IEP team meeting on May 30, 2012, Student was not exhibiting limited strength, vitality or alertness. Student did not demonstrate that he had a heightened alertness to environmental stimuli at this time either. The evidence shows that from the time Student was placed in Mr. Ramos' class on March 27, 2012, his behavior was well within the parameters of general education students. The presence of the behavioral coach is noted and considered, but by the time of the IEP team meeting, the behavioral coach was faded back considerably, and Student was under the instructional and behavioral control of his general education teacher. Student attempts to rely upon past behaviors that were no longer occurring to support his contention that he met the criteria for OHI. However, eligibility is determined at the time of the assessment and IEP team meeting. The evidence established that the general education interventions had resolved Student's behavioral issues.

16. Student did not meet his burden to show that he was eligible under OHI at the October 9, 2012 IEP team meeting, as well. The IEP team did not make a determination regarding OHI at the October 9, 2012 IEP team meeting. At the time of that IEP team meeting, the District was aware that Student had been also diagnosed with Mood Disorder NOS. However, Student did not produce evidence that either his ADHD or Mood Disorder caused limited strength, vitality, alertness or a heightened alertness to environmental stimuli. At the time of the IEP team meeting in October 2012, Student's behavior in school was a far cry from what his behavior had been in Mrs. Gonzalez's class. He was doing his work, making academic progress and socializing appropriately with peers. Although there was a single behavioral incident on the playground with the principal in September 2012, Student received consequences and the behavior did not appear again prior to the IEP team meeting. The evidence showed that Student was completing his school work and homework and making educational progress.

Eligibility under ED

17. A child meets eligibility criteria for ED if the child exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance: 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)(i); Cal. Code Regs., tit. 5, § 3030, subd. (i).) Neither the IDEA nor its regulations, nor the Education Code nor its regulations, define "to a marked degree" or "a long period of time." With respect to eligibility under subdivision (3), the focus is on the student's ability to control the behavior and to act pursuant to socially acceptable norms. (Off. of Special Education Programs (OSEP), interpretative letter (August 11, 1989), 213 IDELR 247.)

18. While IDEA regulations at 34 CFR 300.8(c)(4)(i) state that a student with an emotional disturbance must manifest at least one of the characteristics described in subsections (A) through (E) "to a marked degree" for "a long period of time," neither the IDEA statute nor its regulations define how long a qualifying "long period of time" must be. OSEP has stated that a generally acceptable definition of "a long period of time" is a range of time from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. (*Letter to Anonymous*, 213 IDELR 247 (OSEP 1989); See also *R.B. v. Napa Valley Unified Sch. Dist.*, 48 IDELR 60 (9th Cir. 2007) [because a child made significant improvements in her classroom behavior once she adjusted to her placement, her inability to maintain peer relationships did not persist for a long period of time].)

19. Neither the IDEA statute nor its regulations at 34 CFR 300.8 (c)(4)(i) define the requirement that a student's qualifying behavior manifest itself "to a marked degree." OSEP has taken the position that it generally refers to the frequency, duration or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and can be indicative of either degree of acuity or pervasiveness. (*Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).)

20. Based on Factual Findings 1-38, and 47-69 and Legal Conclusions 5-6 and 17-19, Student did not meet the criteria for emotional disturbance at the time of the May 30, 2012 and October 9, 2012 IEP team meetings. Student argues that he has acute bipolar disorder and that this condition, suicidal threats or attempts and threats or attempts to hurt others establish his eligibility as ED. However, mental health diagnosis and suicidal attempts are not enough to establish that a student meets special education eligibility criteria.

21. At the time of the May 30, 2012 IEP team meeting, Student did not establish that he met any of the ED criteria. He was learning in Mr. Ramos' class and doing well. His teacher, aide and Dr. Catalde described him building satisfactory relationships with themselves and peers. Since his arrival in Mr. Ramos' classroom, Student's behavior and feelings were appropriate, based on the test results from Dr. Burke, Student's own report, teacher reports and information from LCC and even by Parent report. There was no evidence that Student had a general pervasive mood of unhappiness or depression. While Student may have met some of these criteria while in Mrs. Gonzalez class, after his placement in Mr. Ramos' class and the general education interventions of the BSP and the behavioral coach, Student was not exhibiting any of the criteria to make him eligible as a student with ED at either the time of the assessment by Dr. Burke, or at the May 30, 2012 IEP team meeting.

22. By the time of the October 9, 2012 IEP team meeting, the IEP team was aware that Student had been hospitalized several times for suicidal ideation and attempt(s). This does constitute inappropriate types of behavior or feelings under normal circumstances in several situations. These inappropriate behaviors occurred for over a period of at least 5 months, which meets the criteria for a long period of time. The suicidal ideation and

attempt(s) occurred both in the home and school environment²¹ and resulted in three hospitalizations of more than a week each and this was to a marked degree.

23. However, Student did not establish by a preponderance of the evidence that these inappropriate behaviors and feelings adversely affected his educational performance. All of Student's hospitalizations took place over the summer months and Student did not miss any school because of the hospitalizations. After Student began school in the fall of 2012, Student was doing well academically, behaviorally and socially. Student did have the one behavioral incident with the Vice-Principal in September 2012, which resulted in a suspension for two days. However, he did not establish that this was related to his previous suicidal ideations and attempt(s), nor was this type of incident repeated. It had been more than six months since Student had any other behaviors which resulted in a suspension or even removal from class. Student did not meet his burden to show that he met the criteria for ED at the time of the October 9, 2012 IEP team meeting.

24. Even if Student had met the eligibility criteria for SLD, OHI or ED, he still would have had to prove by a preponderance of the evidence that he needed specialized instruction to qualify under the IDEA. Student never showed that he had a need for specialized instruction of any type to benefit from his education. The evidence showed that Student was accessing and succeeding in the general education curriculum at the time of both the May 30 and October 9, 2012 IEP team meetings.

Procedural Errors when a Student is not eligible for special education

25. A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place. (*Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 612 (6th Cir.2006) [procedural violation denies a FAPE "only if such violation causes substantive harm to the child or his parents" (internal quotation marks and citation omitted)].) In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief. . . . Because we affirm the district court's acceptance of the SEHO's [Special Education Hearing Office] determination that R.B. does not qualify for IDEA relief, we hold that the District's procedural violation in the composition of R.B.'s IEP team is harmless error. (*R.B., ex rel. F.B. v. Napa Valley Unified School Dist.* (9th Cir. 2007) 496 F.3d 932, 942.)

Issue II: Did the District deny Student a FAPE by failing to include parent in the decision making process regarding FAPE from March 20, 2012 to present by: failing to provide the Nurse report, full LCC report from May 2012, test protocols, emails, service log for 1:1 aide and failing to provide prior written notice when the District failed to conduct assessments in all areas of disability; and by making error(s) in the invitation to the May 30, 2012 IEP meeting?

²¹ There was only one suicidal ideation in March 2012 in the school environment and Student did not miss any school and was not hospitalized.

26. Based on Factual Findings 70-74 and Legal Conclusion 25, Student did not meet his burden to show a denial of FAPE for procedural violations. Student alleges a variety of procedural violations in this case including failure to provide records, failure of prior written notice, and procedural errors in the invitation to the May 30, 2012 IEP team meeting. Since Student was not eligible for special education services, he is not entitled to the provision of a FAPE. Therefore, the District cannot have committed a procedural violation which results in a denial of FAPE.

Issue III: Failure to assess in the areas of ERMHS and a Nurse assessment

27. Based on Factual Finding 75 and Legal Conclusion 6, Student did not meet his burden to show that District's alleged failure to complete ERMHS and Nurse assessments denied Student a FAPE. Student alleges that the District failed to complete assessments for related services in the areas of ERMHS and a Nurse Assessment. However, these assessments are to determine whether an otherwise eligible special education student needs related services to benefit from his education. Since Student failed to meet his burden to show he was eligible for special education at the time of the May 30, 2012 and October 9, 2012 IEP team meetings, Student would not be entitled to receive any related services. Therefore, any failure of the District to provide these assessments does not result in a denial of FAPE.

Issue III: Failure to provide a neuropsychological assessment and an occupational therapy assessment

28. Based on Factual Finding 76, Student did not meet his burden to show that the District failed to complete these assessments. Student is deemed to have abandoned these issues when he failed to provide any evidence at hearing that Student required a neuropsychological assessment or an occupational therapy assessment.

Issue IV: Failure to tailor an appropriate educational program from March 20, 2012 to May 30, 2012

29. Based on Factual Finding 77 and Legal Conclusions 2 and 5, Student did not meet his burden to show that the District denied Student a FAPE by failing to tailor an appropriate educational program. As indicated above, Student does not allege he is eligible until at least May 30, 2012. Therefore, even under Student's theory of his case, the District would not be responsible for offering or providing FAPE to Student until at least May 30, 2012 and no denial of FAPE could have arisen.

Issue IV: Failure to tailor an appropriate educational program from May 30, 2012 until present

30. Based on Factual Finding 77 and Legal Conclusions 2 and 5, Student failed to meet his burden. Student did not show that he was eligible for special education at the time

