

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

CAPISTRANO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008110306

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 20-24, 2009, in San Juan Capistrano, California.

Student was represented at the hearing by Jack Anthony, Attorney at Law. Student, who is 18 years of age, and her mother (Mother) were present for the entire hearing. Student's father (Father) was present on April 20-22 and April 24, 2009.

Capistrano Unified School District (District) was represented at the hearing by Ricardo Soto, Attorney at Law. Megan M. Moore, Attorney at Law, was present as an observer on April 20, 2009. Leisa Winston, Program Specialist for District, was present on April 20, 22, 24, and the morning of April 23, 2009. Kim Gaither, District employee, was present on April 21, 2009 and the afternoon of April 23, 2009.

Student filed a Due Process Hearing request (Complaint) on November 6, 2008. Continuances were granted for good cause on December 26, 2008 and February 25, 2009.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing the parties requested leave to file written closing argument. The matter was continued to May 11, 2009, to permit the filing of written closing arguments. The parties timely filed written closing arguments on May 11, 2009, at which time the record was closed and the matter was submitted.

ISSUES¹

1. Whether District should have assessed Student and found her eligible for special education services after November 6, 2006 pursuant to its “child find” obligation.
2. Did the District deny Student a free and appropriate public education (FAPE) by not finding her eligible for special education and developing an appropriate individualized education program (IEP) after November 6, 2006?
3. Was Student denied a FAPE because the District failed to assess Student in response to parent request and failed to provide parents with written notice of procedural safeguards prior to October 19, 2007?

FACTUAL FINDINGS

Background

1. Student was 18 years of age at the time of the due process hearing. She lives with her parents in the jurisdictional boundaries of the District.
2. Student was enrolled as a freshman at Tesoro High School (Tesoro) in the 2005-2006 school year. During her freshman year Student took college preparation classes in Spanish, Algebra 1, Biology, and accelerated English 1. She received one “A+,” one “A,” two “A-s,” and a “B+” in the fall semester and an “A+,” one “A,” two “A-s,” a “B+” and a “B-” in the spring semester. She obtained a grade point average (GPA) of 3.83 in the fall semester and 3.50 in the spring semester. She was also active on the school swim team.

Child Find - 2006-2007 school year

3. Student explained at hearing that during the 2006-2007 school year, her sophomore year, she began to lose focus on her school work and on her grades. On November 13, 2006, she arrived at school and was very upset about something that occurred at home. Student did not specify what or who had caused her upset. Student’s mother received a call from Jamie Runyan (Runyan), Student’s school counselor. Runyan informed Mother that Student was upset and was threatening to harm herself by self-mutilation. Runyan told Mother Student was threatening to commit suicide. Runyan further informed Mother that Student refused to assure her that she would not harm herself. Consequently, Runyan instructed Mother to retrieve Student from school and take her to a hospital for evaluation. Mother admitted Student the same day to College Hospital, Cerritos, where she

¹ The issues have been slightly reorganized and reframed by the ALJ consistent with the due process complaint and evidence presented at the due process hearing.

was placed under psychiatric observation and treated for eight days. She received a diagnosis of Bipolar disorder and was released after eight days.

4. On November 17, 2006, Mother apprised Runyan of the length of Student's anticipated absence from school. Mother did not want Student to fall behind and requested assistance from Runyan to enlist her teachers to provide her with homework assignments until after the Thanksgiving break when she would be returning to school. Runyan contacted Student's teachers by e-mail and requested they provide work assignments for Student during her absence from school. Some of Student's teacher responded and provided assistance to Student. Student was absent from November 13-23, 2006, and returned to school following the Thanksgiving Holiday break.

5. Runyan contacted Mother about Student after her release from the hospital and her return to school to ascertain her condition. Mother told Runyan of Student's diagnosis and that she was receiving therapeutic treatment and medication. Runyan told Mother that District was there for Student if she needed any further assistance. Upon returning to school from her hospitalization, Student regularly attended school without incident. Runyan received no further reports of Student from Mother or Student herself during the remainder of the fall and spring semester of the 2006-2007 school year.

6. After her release from College Hospital, Student came under the care of Therapist Terry Wilshin (Wilshin) for 26 sessions from November 17, 2006 to September 10, 2007. She also received family and individual therapy from Dr. Darrel J. Burnett, Ph.D. (Dr. Burnett) on eight occasions from December 13, 2006 to May 3, 2007. Student was also treated by a psychiatrist, Dr. Zachariah (Dr. Zachariah), on eight occasions from December 5, 2006 to August 28, 2007. Therapy was self-referred by Student's Parents to work through Student's emotional problems and family conflicts. No details were provided at hearing concerning therapy provided by either Wilshin or Dr. Zachariah and neither testified at hearing.

7. At hearing, Mother described a series of events that occurred during Student's sophomore year that revealed Student was not doing well at home. Student became uncontrollable, began to violently act out by fighting with her family, kicking the family dog, abusing drugs and alcohol, engaging in promiscuous sexual conduct, and sneaking out of the house by disabling the alarm system.

8. In contrast to her grades in the freshman year, Student's grades began to slip. Student obtained an "A-," "B+," "C," "C-," and "C+" in the fall semester. In the spring semester, she obtained Cs and Bs. Her GPA fell to 2.67 and 2.83, respectively. Student was not a truant from school, nor was she ever reported in trouble at school. She was not referred by teachers, counselors or administrators at school for misconduct or discipline. Counselor Runyan would have been notified of any school related issues or problems concerning Student and would have been notified if Student was "at risk" for failing. Despite Student's slipping grades, Runyan did not receive teacher reports or referrals that Student was at risk for failing any of her classes.

9. Brian Clark (Clark) was Student's World History teacher in the 2006-2007 school year. He described Student as a quiet pupil who did her homework and did well in his class. She received a grade of A- in the fall semester and B+ in the spring semester. Student was not a problem and he did not recall that there were any issues concerning her classroom behavior.

10. Dr. Burnett is a Clinical Psychologist and Licensed Marriage and Family Therapist with 25 years experience in the field of adolescent psychology. His first contact with Student was for a sports psychology consult in approximately 2004 when Student was in seventh or eight grades. Parents referred Student for consultation because she no longer wanted to swim competitively. He treated Student for stress and anxiety. According to Dr. Burnett, Student had manifested symptoms of anxiety and depression for which he had been consulted as early as 2004. These symptoms were on going. Dr. Burnett next saw Student on December 13, 2006. He provided Student individual therapy to treat her depression and provided family therapy to Student and her family on December 21 and 26, 2006; January 4 and 18, 2007; February 8, 2007 and May 3, 2007. According to Dr. Burnett, Student's behavior was out of control. She continuously violated boundaries and was not accountable to her family for her actions. He informed Parents of the options to consider if Student's behaviors continued to escalate, including placement in a structured environment with 24-hour supervision.

11. At hearing, Dr. Burnett opined that Student had significant indicators for emotional disturbance (E.D.) as of November 2006, based upon the following: admission to College Hospital for psychiatric evaluation, which caused her absence from school; when he treated Student in 2006 she talked about having stress and anxiety as she prepared for final examinations; and her slip in grades during the spring and fall semester of her sophomore year. Dr. Burnett's opinion was not persuasive on this point as he had no training as a school psychologist and was not familiar with the disability category of severe emotional disturbance. In addition Dr. Burnett had limited contact with Student as he had provided therapy for three sessions in December 2006 and four sessions from January to May of 2007.

12. However, the opinion of Joseph Kenan, District's expert, was more persuasive. Joseph Kenan, M.D. (Dr. Kenan), is a forensic psychiatrist with more than 10 years of experience in the field of psychiatry with a specialization Adolescent Psychiatry. He had experience in the development and implementation of IEPs and had worked extensively with adolescents and families in the treatment of mental health disorders. He had made numerous determinations pertaining to placement of adolescents in residential treatment. Based upon his review of Student's records at Tesoro and at CCA, he opined that overall, nothing in her medical and educational records would suggest that Student's psychiatric problems impeded or adversely affected her education after November 2006 to the beginning of the 2007-2008 school.

13. In November of 2006 Student experienced a series of problems at home that pit Student against her family, causing conflict and family discord and grave parental

concern for Student's welfare. There is no evidence that any of these problems in the home manifested themselves at school or in the classroom to adversely affect Student's education at anytime in the 2006-2007 school year.

Child find - 2007-2008 school year

14. In August 2007, Parents terminated Student's treatment with Dr. Zachariah and referred Student to Dr. Vivien Chan, a child psychiatrist, at University of California at Irvine Medical Center (UCI) for a second opinion. Student began a course of treatment with Dr. Chan that lasted through the time of hearing. The fall semester of the 2007-2008 school year, Student's junior year, began after Labor Day in September 2007. Mother reported to Dr. Chan that Student's behaviors had escalated at home and Student became increasingly impulsive, defiant and out of control at home.

15. On September 16, 2007, Dr. Chan admitted Student to UCI Neuropsychiatric Center for eight days for self-mutilation and suicidal ideation. Student was released on September 24, 2007, returned home, and attempted to re-injure herself. She was readmitted to UCI on September 26, 2007 for an additional six days. Student missed two weeks of school and had only attended school for a few days in the fall semester of the 2007-2008 school year. Student was released on October 2, 2007. Student continued under Dr. Chan's care upon her release from UCI, and was prescribed a course of medications, including Effexor for daily treatment of Major Depressive Disorder, Obsessive Compulsive Disorder (OCD) and Anxiety.

16. Dr. Chan had more than 10 years experience as a Board Certified Physician and Surgeon with licensure in Psychiatry and Neurology with a sub-specialty in Adolescent Psychiatry. She is the Chief of Mental Health Services at UCI. Dr. Chan had no training as a school psychologist. At hearing, Dr. Chan opined that based upon her knowledge of Student's treatment history, review of Student's records, and her personal knowledge of Student as her patient, that Student was symptomatic for several aspects of the criteria for E.D. including (1) inappropriate types of behaviors or feelings under normal circumstances, exhibited in several situations; (2) a general pervasive mood of unhappiness or depression; and (3) a tendency to develop physical symptoms or fears associated with personal or school problems. In her opinion, as of the time she treated Student in the fall of 2007, Student suffered from an emotional disturbance that adversely affected Student's education. Dr. Chan could not say, however, that Student's condition qualified her for special education services from the time she was hospitalized at College Hospital in November 2006.

17. Parents expressed their concerns to District that Student was unable to benefit from her education due to the concurrent psychiatric hospitalizations, which prevented Student from attending school. As a result of the concurrent hospitalizations at UCI, Mother requested District to provide home hospital instruction. District advised Mother that Student had not met the requirements for home hospital instruction.

18. Student returned to School on October 4, 2007. Even after the hospital stays supported with on going treatment, Student continued to direct violence and out of control actions toward her family, at home. Parents became increasingly concerned for Student's safety and the safety of other family members.

19. On October 5, 2007, Father wrote an e-mail message to Evevon Gelsinger (Gelsinger), Special Education Director, for District. In the message he told Gelsinger that he was concerned about Student's ability to function in the normal school environment because of her recent illness. Father further inquired in the e mail message about an "individual education program (AB3632) or any other help District could provide for Student." Gelsinger forwarded this message to Runyan and requested Runyan schedule an SST meeting. The e-mail message was sufficiently framed as to constitute Parent's request for an initial assessment and for the provision of special education services to Student.

20. District convened a Student Study Team (SST) meeting on October 9, 2007, in response to Father's e mail request. Student and Parents attended the meeting. District members present included Runyan; Rebecca Von Deuring, Ph.D. (Dr. Von Deuring), District's school psychologist; and Heidi Reed (Reed), Assistant Principal at Tesoro. The purpose of the meeting was to discuss Parent's concerns about Student's hospitalizations, her deteriorating mental state, and Parent's request for District to assess Student for special education eligibility. Parents told the SST members about Student's behavior issues at home and her increasingly risky behaviors including her promiscuity and the adverse impact these behaviors were beginning to have on Student's academic performance. The SST documented that Student had low test grades but always completed assignments during her absences. District SST members determined that a number of interventions would be employed so Student would be permitted time to make up assignments she was behind on because of the concurrent hospital admissions. District acknowledged and discussed Parent's request for assessment for special education services. District did not agree it was required to consider provision of special education services at that time on the grounds that Student's grades were "stellar" and that no assessment was required. The SST also proposed a meeting to assess the effectiveness of the interventions in 12 weeks. Parents signed the SST document, but did not agree with District's recommendation.

21. At hearing, Parents explained they obtained the assistance of an advocate and presented a letter dated October 9, 2007, entitled "Initial Request for Special Education Assessment AB 3632 DMH", at the SST meeting on October 9, 2007. In this letter, Parents reiterated the request for an AB 3632 evaluation and for a comprehensive assessment for special education services. The contents of the letter was substantively similar to the October 5, 2007 e-mail message and contained a further request for an assessment for eligibility for services under Section 504 of the 1973 Rehabilitation Act.² Runyan denied

² "Section 504" is commonly used to refer to Section 504 of the Rehabilitation Act of 1973. Under Section 504, school districts have a duty to provide "regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the need of non handicapped persons are met." (34 C.F.R. § 104.33.) Although section 504 and IDEA eligibility may overlap, the eligibility criteria, services and procedures under the IDEA are distinct.

receiving the October 9, 2007 letter or discussing its contents at the SST meeting. Runyan believed the letter was not received by District until after October 20, 2007 because it was similar to an e-mail message received by District from Parents on October 27, 2007. District contends that the letter was fabricated by Parents and dated “10/9/07” to support their claims against District before they unilaterally removed Student from the District. Parents denied having sent the October 27, 2007 e-mail message to District. According to Runyan, receipt of the letter at the SST meeting would have triggered District’s obligation to give Parents notice of procedural safeguards. Runyan further claimed that although not compelled to do so, District may have proceeded at that time to develop an assessment plan to initiate an assessment of Student. The evidence supports a finding that the letter was not received at the SST meeting. However, as stated in Factual Finding number 19, District had prior notice of Parent’s request for an assessment for provision of special education services as of the date of the SST meeting.

22. Parents also received Student’s fall semester six-week progress report revealing Student had received grades of “D” and “F.” Parents believed the SST team members had knowledge of these grades at the time of the SST meeting. At hearing Student described being completely out of focus in her classes during this time. She stated that she would request permission to leave class ostensibly to go the bathroom in order to meet up with other students so she could “numb out” by snorting vicodin, popping Advil, smoking marijuana, drinking alcohol, and having sex with male students in the school bathroom. Neither school counselor Runyan, nor Parents, had knowledge of this activity.

23. Even though District apparently had no information about Student’s on-campus activities, during the period between September 2007 to October 2007, based upon Parent’s written and verbal communications with District, Student’s recent concurrent psychiatric hospitalizations, and her October 2007 progress report, where she received failing grades, District had sufficient information that Student might require an evaluation for special education services and should have initiated a referral for an assessment either at the SST meeting or within a reasonable time after the meeting.

24. On October 15, 2007 Mother learned from a friend of Student’s that she had contemplated suicide the previous night. Parents became desperate and believed they could no longer protect Student from herself. Parents did not believe they could wait for a 12-week follow up by the SST. Based upon a prior recommendation from Dr. Burnett that parents may need to consider residential treatment as an option to addressing Student’s mental health issues, Parents contacted Copper Canyon Academy Boarding School for Girls in Rimrock, Arizona (CCA), to discuss placing her there.

25. Mother called Runyan on October 15, 2007, and informed her Student was spiraling out of control at home. Mother told Runyan of Parents’ decision to place Student at CCA effective October 16, 2007 due to an emergency situation and because Parents believed Student was a danger to herself. This was the first notice Parents gave District of their

intention to place Student out-of-state. Mother also informed Runyan that Parents would seek funding from District for Student's placement at CCA. Runyan informed Mother of the law requiring parents submit written notice of their intention to place a student 10 days prior to such placement. Runyan further informed Mother that failure to comply with the 10-day rule could result in the denial or reduction of reimbursement claims by parents. Runyan contacted Dr. Von Deuring following this conversation with Mother and advised her of Mother's intentions.

26. Dr. Von Deuring followed up and telephoned Mother. Dr. Von Deuring reiterated District's policy on reimbursement for placement in a residential treatment facility. Dr. Von Deuring requested time to conduct a comprehensive psychoeducational evaluation of Student before her placement at CCA. Mother advised Dr. Von Deuring she would consider delaying placement but later informed Dr. Von Deuring she had changed her mind and would proceed to immediately place Student at CCA.

Placement at CCA

27. Parents immediately removed Student from District and enrolled Student at CCA on October 16, 2007. CCA is described as an institution designed to assist young women 14 to 17 years of age to work to develop themselves in the areas of emotional, mental, physical, spiritual, and social growth and development. The program includes (1) a fully accredited college prep based academic program; (2) individual, group and family therapy; (3) optional therapies for issues such as drug and alcohol abuse; (4) leadership skill building; (5) competitive sports programs; (5) nutritional programs; (6) outdoor activities; (7) community service and interaction; and (8) social and life skills development.

28. On October 16, 2007, the same day Student enrolled at CCA, District first provided Notice of Procedural Safeguards with a letter to Parents summarizing District's request to conduct an assessment of Student prior to her placement at CCA. Parents did not receive the letter until October 19, 2007.

29. On October 17 and 18, 2007, after her arrival at CCA, Student was evaluated by George R. Davies (Davies), a marriage and family therapist, licensed in Arizona and Michigan. He interviewed Student and Parents and he administered various psychological assessments to Student that included the Adolescent Psychopathology Scale (APS); and the Millon Adolescent Clinical Inventory (MACI). The evaluation resulted in a provisional diagnosis of Major Depressive Disorder, recurrent, moderate by history; oppositional defiant disorder; parent-child relational problems³; depressive, borderline, self-defeating personality features, diagnosis deferred; and R/O Bipolar Disorder NOS. A course of treatment was prescribed based upon the assessment results. Davies did not testify at hearing.

³ Student presented no evidence to explain what the underlying causes of her violent behaviors at home were. The nature and extent of the family discord and parent-child relational problems was never disclosed at hearing.

30. On October 20, 2007, Parents gave written notice to District that they held District responsible for failing to provide timely notice of their parental rights and notice of the services available to Student in assessing her “ ‘serious emotional disturbance’ in order to help Student with her emotional, NOT academic problem [emphasis in original].”

31. Sometime after Student enrolled at CCA, Parents learned, for the first time, the extent to which Student had acted out inappropriately while at home. Student wrote Parents an “amends letter” in which Student described behavior that included drinking, snorting vicodin, popping Advil, smoking marijuana, and having sex with boys in various locations.

32. On October 30, 2007, Counselor Runyan wrote Father an e-mail message. In which she requested Parents make Student available to start the assessment process. Runyan further indicated in the message that District would prepare an assessment plan for their signature and that after the assessment an IEP meeting would be convened within the statutory time frame to enable the IEP team to make the appropriate placement for Student. Runyan was not aware that Parents had already removed Student from District and placed her at CCA.

33. Sara Wasserman, MA, (Wasserman), Board Certified Art Therapist, was assigned as Student’s primary therapist and was responsible for overseeing Student’s placement at CCA. Wasserman was not licensed to conduct psychological assessments and used art therapy as part of Student’s treatment. Student’s treatment modalities under her supervision consisted of: (1) individual therapy once weekly; (2) family or conjoint therapy with Student once monthly; (3) group psychotherapy twice weekly; (4) consultation with significant others once weekly; and (5) student seminars once bimonthly. Wasserman had not reviewed Student’s records from Tesoro, nor had she spoken to District representatives concerning Student. She based her beliefs on information she obtain from Student and Parent interviews. At hearing, Wasserman was provided with the criteria to qualify for special education under the E.D. category. Wasserman believed that upon her enrollment at CCA, Student showed signs of E.D. She further described the symptoms as so pervasive to have affected Student’s ability to function in school and to have prevented her from accessing her education. Wasserman opined that Student was eligible for special education services as a child with E.D. when she enrolled in CCA on October 16, 2007. Wasserman concluded that Student’s treatment at CCA was successful because Student met substantially all of her treatment goals and she showed substantial improvement in her overall mental outlook.

34. Ken Bruxton (Bruxton) is the Academic Director and Principal of Academic Programs at CCA. He described CCA’s program as a therapeutic program with a regular comprehensive academic curriculum. Student received a cumulative GPA of 2.80 when she started in the fall of the 2007-2008 school year at CCA. By the time she had completed the program at CCA Student’s overall academic performance improved dramatically. Student received GPAs of 3.30 and 3.80 in the spring and summer semesters of the 2007-2008 school year and 3.40 in the fall semester of the 2008-2009 school year. Bruxton believed that

CCA's academic program satisfied the State of California accreditation requirements for high school graduation, but no further evidence was presented supporting his belief.

35. Cherie Mills (Mills) was Student's clinical therapist. She was recommended by Wasserman to provide Student therapeutic support after her graduation from CCA. She worked with Wasserman and George Davies and was familiar with Student's therapeutic program at CCA. According to Mills, Student's mental health improved markedly in the year since her enrollment at CCA and Student finished near the top of her class academically. She believed that CCA was an appropriate placement for Student.

Assessment

36. Sometime in the spring of the 2007-2008 school year Parents followed up with District concerning their previous request for District funding of Student's placement at CCA.

37. On June 6, 2008, Leisa Winston (Winston), M. Ed., Program Specialist for District, wrote Parents that in order to consider their funding request, District needed to complete an assessment to determine if Student qualified for special education services. District also proposed to initiate a concurrent mental health assessment to be conducted by the Orange County Health Care Agency ("OCHCA"). District proposed to fly an assessor to CCA as well as to fund the travel of an OCHCA assessor to complete the assessment. Winston enclosed an assessment plan, a mental health referral form, and a procedural safeguards booklet. Winston requested that Parents sign and return the consent forms.

38. On June 11, 2008, Parents signed the proposed assessment plan but objected to the mental health referral form because they believed the form contained various inaccuracies that indicated District had provided certain pre-referral interventions and psychological services to Student, which Parents believed had not been provided by District. In the meantime, District was informed that OCHCA no longer permitted its assessors to travel out of state for mental health assessments. District made a further attempt to travel out of state to assess Student. However, CCA did not make Student available.

39. On August 8, 2008 Parents signed and submitted a self-revised mental health service referral form to District. On September 4, 2008, OCHCA notified District it was not able to provide an assessment because Mother informed Pat Gaston, Psy.D., OCHCA, that Parents had declined their services. At hearing, Mother denied that she declined mental health services. Instead, she advised OCHCA that Student was in an out-of-state residential treatment program and was not permitted home travel for an evaluation at that time. At hearing Mother provided clarification by explaining that OCHCA mistakenly believed that Parents declined mental health services when Mother informed them Student could not be made available at the time OCHCA requested. Pat Gaston was not produced to testify on this point. Based on Mother's explanation it is found that Parents did not make Student available when OCHCA initially requested it, but they had no intention of declining mental health services for Student.

40. Parents produced Student for the District assessment on October 7, 15, and 20, 2008, at Chaparral Elementary School in the District. The assessment was conducted by School Psychologist, Katrina Van Der Wal (Dr. Van Der Wal). Dr. Van Der Wal used a variety of validated assessment tests and instruments, reviewed educational records at Tesoro and CCA, reviewed health records, interviewed Student, Parents, school therapists at CCA, and teachers, and conducted observations. The purpose of the assessment was to determine Student's eligibility for special education services and in particular whether Student suffered a severe emotional disturbance adversely affecting Student's educational performance. Student was 17 and one-half years of age at the time of the assessment.

41. A mental health assessment of Student was begun by OCHCA on October 2 and 8, 2009. The assessment was not completed and an additional day was required to interview Father on November 17, 2008.

42. On November 6, 2008, Student filed the complaint in this matter.

43. Dr. Van Der Wal issued a Psychoeducational Assessment Report on November 11, 2008. The report was signed on November 20, 2008. In evaluating the five characteristics of E.D., the report noted that (1) Student was within the average range of cognitive ability. Her scores fell in the average to superior ranges on the intellectual achievement tests. Student was performing at or above her ability level in all academic areas and displayed the ability to learn; (2) although Student demonstrated defiant behavior with some adults and had a history of sexual promiscuity, she was able to enter into functional relationships with staff and was capable of establishing friendships with peers, however, her behavior in this area still needed to be closely monitored; (3) while Student did not demonstrate bizarre behavior at this time, however, her previous history indicated atypical behaviors, such that this area should be closely monitored; (4) Student had a history of clinically significant symptoms of depression with hospitalizations, suicidal ideations, and other self-destructive behaviors and was currently under therapy and treatment with prescribed medications. Student's depression appeared to be to a marked degree and had existed over a long period of time (more than six months) and adversely effected her educational performance; and (5) Student's anxiety appeared to be to a marked degree, had existed over a long period of time (more than six months), and adversely affected her educational performance. Dr. Van Der Wal concluded that Student was eligible for special education services under the disability category of E.D., based upon her pervasive mood of unhappiness or depression and her tendency to develop symptoms or fears associated with personal or school problems. The report recommended the IEP team offer an appropriate program and placement.

44. Sometime after November 17, 2009 OCHCA issued a mental health assessment, dated November 15, 2008, in which it found Student required continuing mental health services once she returned from CCA.

45. District determined Student was eligible for special education services under the disability category of E.D. on November 20, 2008.

46. Student graduated from CCA with full academic credits on December 19, 2008. Parents believed that CCA had resulted in an improvement in Student's academic performance and in their relationship with Student.

47. At hearing Parents presented documentation of the expenses they incurred for Student's therapies, hospitalizations, placement and travel for family to and from CCA as follows:

- a. Tuition at CCA October 16, 2007-November 20, 2008 - \$95, 843.33
- b. Travel Costs to and from CCA - \$5, 516.84
- c. Hospital admissions at UCI-September 13-October 2, 2007 - \$8, 768.45
- d. Self-funded therapies prior to placement at CCA-November 12, 2006-September 12, 2007 - \$1, 805.38

48. District visitation guidelines for nonpublic school (NPS) and residential treatment center placement (RTC) require 21 day advance purchase and notice of intent to travel. All reservations are to be made at budget rate. Reimbursement will be for budget rate only. The guidelines allow one visit for one parent per semester or three trips per fiscal year, to include: one roundtrip fare, one night's lodging, two-day car rental, one day meals at the District per diem rate of \$45 per day. If Student makes a trip home, it is counted for one of the three trips allowed in District guidelines. The guidelines were subject to amendment based upon agreement and recommendation of the IEP team.

LEGAL CONCLUSIONS

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

Issues One and Two: "Child Find" and Eligibility after November 6, 2006

2. Student contends that District failed in its "child find" obligation to identify and provide special education services to Student, who suffered from a severe emotional disturbance which was known to District at all times after November 6, 2006. Student also contends District denied her a FAPE by failing to determine that she was eligible for special education services after November 6, 2006 to November 20, 2008. Student asserts that District initiated Student's admission to a psychiatric hospital on November 13, 2006, when Student threatened to hurt herself and to commit suicide while at school. Student was held in the hospital and evaluated for treatment for eight days. Student was discharged with a diagnosis of probable Bipolar Disorder. Student asserts that Student's education was adversely affected by her circumstances and District took no action to evaluate or assess Student's needs for special education services. Student's emotional state further deteriorated

in the 2007-2008 school year when in the fall of her junior year Student suffered two additional psychiatric hospitalizations in September and October 2007. Student further asserts at the time of the concurrent psychiatric hospitalizations, Student's academic performance was further adversely affected and her ability to function at school was severely impaired. Student finally contends that District's child find obligations extended until, the very least, when it presented the parents with a plan of assessment in June 2008.

District contends that District did not violate "child find" because any facts and events related to Student did not indicate that she may have a disability, adversely affecting her education, particularly in the 2006-2007 school year. District contends one school-related issue or problem, such as failing grades, is not usually sufficient to trigger child find. District asserts therefore, a change in Student's academic progress brought on by problems outside of school is not sufficient to trigger District's child find obligations; rather, a series of facts and events must clearly impact Student's educational program such that District has reason to suspect that Student has a disability that may require special education services. District finally contends that District could not have determined Student's eligibility for special education services until Student submitted to an assessment, which did not occur prior to June 2008. District contends that Student was not eligible for special education services and therefore not entitled to an IEP until after Student was assessed in November, 2008, and an IEP was provided to Student on November 20, 2008.

3. "Child find" refers to the duty that IDEA imposes upon states to identify, locate and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171 & 56301, subs. (a) & (b).) "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.)

4. California specifically obligates a district actively and systematically to seek out "all individuals with exceptional needs." (Ed. Code, § 56300 et seq.) A district's child find obligation toward a specific child is triggered when there is a reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's obligation to identify, locate, and assess applies to "children who are suspected of being a child with a disability... and in need of special education, even though they are advancing from grade to grade." (43 C.F.R. § 300.125, subd. (a)(2)(1999); 34 C.F.R. § 300.111(c)(1)(2006).) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*) The district must respond within a reasonable time after obtaining notice of the potential disability and need for special education services. (*Dept. of Ed. v. Cari Rae S.*, *supra*, 158 Supp. 2d at pp. 1193-1194.) However, failing grades alone do not necessarily establish that a district has failed in its child find obligation or that it failed to provide an educational benefit to a student. (See *Sherman v. Mamaroneck Union Free Sch. Dist.* (D. Vt.

1996) 928 F.Supp. 437, 446; *Las Virgenes Unified School District v. Student* (2004) SEHO Case No. SN-01160.)

5. A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not “be determined to be an individual with exceptional needs” if they do not meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability “requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a [FAPE].” (Ed. Code, § 56026, subd. (b).)

6. California Code of Regulations, title 5, section 3030, subdivision (i), describes the criteria for determining whether a child qualifies for special education under the category of emotional disturbance:

Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect 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.

7. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil’s educational needs shall be conducted. (Ed. Code, § 56320.)⁴ The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4) (2006).)

⁴ Federal law uses the term “evaluation” and California law uses the term “assessment,” but the two terms has the same meaning for purposes of this Decision and will be used interchangeably.

8. A district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district is not held to a standard based on "hindsight." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

9. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the state's educational standards, and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that are needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include in pertinent part developmental, corrective, and supportive services, such as mental health counseling services, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

10. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the ALJ must determine whether the district has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*)). Second, the ALJ must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

11. Here, from November 2006 following Student's hospitalization at College Hospital, to the end of the 2006-2007 school year, the evidence did not demonstrate that District would have had reason to suspect Student had a disability or that she may have been in need of an evaluation for provision of special education services. The expert testimony of Dr. Kenan supports this conclusion. In addition, Runyan credibly testified that Student returned to school after Thanksgiving break and District heard nothing further from Student or her Parents for the balance of the school year. Runyan also testified that she would have been aware of any problem or inappropriate behaviors at school, including whether Student was in academic distress or in danger of not passing any of her classes. While Student's grades began to slip in the fall and spring semester of the 2006-2007 school year, in contrast to her freshman year, a slip in grades alone was not sufficient to trigger District's child find obligation.

12. Student's situation changed dramatically in the beginning of the 2007-2008 school year. Student's concurrent psychiatric admissions to UCI in September and October of 2007, coupled with excessive absences, and failing grades gave District sufficient reason to initiate an evaluation of Student. The expert testimony of Dr. Chan supports this conclusion. District initiated a referral for an assessment on October 16, 2007 and made its initial attempt to satisfy its obligation to identify and locate a child with a disability.

13. Though understandably frustrated and profoundly concerned for their daughter's well being following the SST meeting, Parents' unilateral placement of Student at CCA on October 16, 2007, made Student unavailable to District for an assessment. Mother testified that Student had one home-visit from CCA to be with her family. According to Mother, the visit was successful. Parents should have attempted to but did not make Student available for assessment at that time. Student remained unavailable to District until after the start of the 2008-2009 school year, when Parents arranged for her to travel home for the assessments. District also delayed in the process by failing until June 6, 2008 to produce an assessment plan which included a mental health referral form for assessment by OCHCA. Parent signed the assessment plan on June 11, 2008, but further delays ensued when Parents refused to sign the mental health referral form to OCHCA, because they believed it contained material inaccuracies. District attempted to arrange an out-of-state assessment by offering to travel to CCA, but could not get CCA to make Student available. On August 28, 2008, OCHCA cancelled the mental health referral on the mistaken belief that Parents declined to have Student assessed for mental health services. Parent's level of desperation over Student's well being in October 2007 was understandable. However, it was unreasonable for Parents to have placed Student in a position where she could not be produced within a reasonable time after District's initial attempts to assess Student. Student was not produced for these critical assessments until October and November 2008. The assessment results concluded Student was eligible for special education services as a child with E.D. based upon symptoms of depression and anxiety adversely affecting Student's educational performance.

14. As to Issue one, District violated its "child find" obligation as of October 9, 2007. However, although District was on notice of facts that would trigger its "child find" obligations, District did not timely complete its assessment of Student because of Parent's precipitous unilateral placement of Student, out-of-state at CCA and out of District's jurisdiction, on October 16, 2007, which made Student unavailable for assessment. (Factual Findings 14 to 45; and Legal Conclusions 1 and 3 to 13.)

15. As to Issue two, the evidence supports the District's contention that Student was not eligible for special education and not entitled to an IEP until after she was assessed and determined eligible for special education services under the disability category of E.D. District assessed Student when she was made available. The results of the assessment established she was eligible for special education and services after November 20, 2008. District did not deny Student a FAPE by not finding her eligible for special education and developing an appropriate individualized education program (IEP) after November 6, 2006 to November 20, 2008. (Factual Finding 3 to 13 and Legal Conclusions 1 and 3 to 14.)

Issue Three: Procedural Violations - Failure to Provide Parents with Written Notice of their Special Education Rights prior to October 19, 200, and Failure to Assess in Response to Parent Request

16. Student contends that District committed procedural violations that denied a FAPE when it failed to provide Student's parent notice of procedural safeguards upon Student's initial request for services prior to October 19, 2007. Student also contends that District violated Student's procedural rights when District failed to initiate an assessment upon Parent's request. District contends that it complied with its requirements for FAPE. District asserts that parent notice was timely provided upon initial referral by District and parents' request for an assessment which was October 15, 2007.

17. A child's parents, the state educational agency, other state agency, or the LEA may request an initial evaluation of a child for purposes of determining his or her eligibility for special education services. (20 U.S.C. section 1414(a)(1)(B).) If a child is referred for assessment, the school district is obligated to develop a proposed assessment plan within 15 calendar days of the referral for assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code, § 56043, subd. (b).) An IEP required as a result of an assessment of a student must be developed within a total of time not to exceed 60 calendar days from the date the school district received the parent's written consent to assessment, unless the parent agrees to extend these timeframes in writing. (Ed. Code, § 56043, subd. (f)(1).) All referrals for special education and related services shall initiate the assessment process and shall be documented. (Cal Code Regs., tit. 5, section 3021, subd. (a).)

18. During the relevant time period, Education Code section 56301, subdivision (d)(2) provided that parents of a child with a disability shall be given a notice of procedural safeguards only one time a school year, and: 1) upon initial referral or parental request for assessment; 2) upon the first complaint to the state department of education within a school year; 3) upon receipt of the first due process hearing request in a school year; 4) upon a change of placement for an eligible student because of a violation of a code of conduct; and 5) upon parent request. (See also 20 U.S.C. § 1415(d)(1)(A) & former Ed. Code, § 56301, subd. (d)(2) (prior to October 10, 2007, procedural safeguards notice must be given at least once a year and/or upon initial referral for assessment, parent request for assessment, filing for due process, or parent request).) There is no duty to provide a notice of procedural safeguards to parents if a child was never deemed eligible or referred for special education assessment. (*Firth v. Galetton Area School Dist.*, (M.D. Pa., 1995) 900 F.Supp. 706, 714.)

19. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the student received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Nevertheless, in matters alleging procedural violations, a denial of a FAPE may only be shown if the procedural

violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505. subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

20. The referral process may be initiated either by parent request or initial referral by District. The credible testimony of Parent established that Parent made a written inquiry about assessment on October 5, 2007. District could have provided Parents notice of procedural safeguards as early as the October 9, 2007, SST meeting when the referral process could have begun because Parents had requested an assessment. The evidence established that notice was provided as an attachment to District's letter to Parents dated October 16, 2007, received by Parents on October 19, 2007. The failure to provide notice of procedural safeguards one- week earlier did not constitute a procedural violation which rises to the level of a denial of FAPE. (Factual Finding 14 to 45; and Legal Conclusions 1 and 3 to 19.)

21. Here, the evidence supports Student's contentions that Parents made at least two requests to District to assess Student, by e-mail on October 5, 2007 and again verbally, during the SST meeting on October 9, 2007. District responded at the SST on October 9, 2007 that an assessment was not appropriate. As discussed in Legal Conclusions 17 and 18, California law requires that a district refer a student for assessment where parents make the request. District did not have the option to determine that an assessment was not appropriate at that time and that in the absence of an assessment that Student did not qualify for special education services. District's failure to assess Student upon Parents' request constituted a procedural violation of the IDEA. However, the procedural violation does not amount to a denial of FAPE. Runyan testified that October 15, 2007, District requested Parents make Student available for assessment before her placement at CCA. District followed this request in writing on October 16, 2007 and again on October 30, 2008. Parents removed Student from District and placed her out-of-state rendering her unavailable for a timely assessment. Because Student was not available for assessment and had been unilaterally placed by Parents, the failure to immediately assess did not impede Student's right to a FAPE, or impede Parent's opportunity to participate in the decision making process regarding Student. Nor did it cause Student a deprivation of educational benefit. (Factual findings 14 to 45; and Legal Conclusions 1 and 3 to 20.)

Remedies

22. Student seeks reimbursement for (1) Tuition at CCA October 16, 2007-November 20, 2008 - \$95, 843.33; (2) Travel Costs to and from CCA - \$5, 516.84; (3) Hospital admissions at UCI-September 13-October 2, 2007 - \$8, 768.45; (3) Self-funded therapies prior to placement at CCA-November 12, 2006-September 12, 2007 - \$1, 805.38. The District contends that Student cannot recover medical expenses or travel expenses unless she can show that they provided some educational benefit. District also contends that reimbursement for placement at CCA should be denied or substantially reduced because Student failed to provide ten days notice and otherwise acted unreasonably.

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

24. Reimbursement may be denied or reduced if at least ten days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district’s placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).) Reimbursement must not be denied on this basis if the parents had not been provided notice of the notice requirement or compliance with the notice requirement “would likely result in physical harm to the child.” (20 U.S.C. § 1412(a)(10)(C)(iv)(I)(bb) & (cc); 34 C.F.R. § 300.148(e)(1)(ii) & (iii).) The cost of reimbursement, may, in the discretion of the ALJ, not be reduced for failure to provide the required notice if compliance with the notice requirement “would likely result in serious emotional harm to the child.” (20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 C.F.R. § 300.148(e)(1).) Reimbursement may also be denied based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.” In *Patricia P.* reimbursement was denied where the parents had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

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

26. During periods of hospitalization, psychiatric hospitalization or placement in “a health facility for medical purposes,” educational responsibility rests with the district

where the psychiatric hospital is located. (Ed. Code, § 56167, subd. (a).) District is not responsible for medical expenses where treatment is not for educational purposes (See *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635.)

27. Based upon the credible testimony of Parents, Runyan, and Dr. Von Deuring, Parents were not aware of the notice requirement until after they notified District on October 15, 2007 of their intention to place Student at CCA the next day. Even if they had advance notice of the 10-day requirement, Parents are excused from their failure to give notice because Student was becoming more violent in her interactions with the family and Mother credibly testified to learning of Student's imminent suicide threat the day Parents decided to place her at CCA.. However, as explained below, Parents' conduct precludes reimbursement of their expenses. It was not reasonable for Parents to drive Student out-of-state in response to the imminent threat of suicide. The reasonable course of action would have been to keep Student within the District, consult with Dr. Chan, and re-admit Student at UCI where she had recently been treated. Parents' failure to make Student available for assessment was also unreasonable. The evidence shows there were several opportunities to produce Student after District made the first attempt to initiate a referral or assessment on October 15, 2007. District made further attempts in writing on October 16 and 30, 2007. Further attempts were made to assess Student when District prepared and produced an assessment plan and mental health referral plan on June 6, 2008. Parents signed the District assessment plan immediately but did not sign the mental health referral form until August 8, 2008. District offered to fly to CCA to conduct the assessments out-of-state. Even after District was advised by OCHCA of a change in their policy prohibiting its employees out of state travel to conduct the mental health assessment of Student, District still attempted to conduct its psychoeducational assessment at CCA, but CCA either could or would not make Student available. Parents did not make Student available until October 2008, almost one year from the initial referral for assessment. As discussed above, Student is not entitled to reimbursement for expenses related to the CCA placement because Parents unreasonably failed to make for assessments. (Factual Findings 14 to 48; and Legal Conclusions 1 and 3 to 26.)

28. As to reimbursement for the self-funded therapies from November 17, 2006 to September 11, 2007; and Student's admission to UCI September 16-25, 2007 and September 26-October 2, 2007, Student is not entitled to reimbursement. Pursuant to Legal Conclusion number 14, above District violated its child find obligations at the earliest October 9, 2007. Parent incurred these expenses prior to that date. Moreover, Student's request for reimbursement of treatment at UCI is not warranted as a medical service because the hospitalization was for medical and not educational purposes for which Student receives an educational benefit. Because these expenses were incurred prior to any child find violation Student failed to meet the burden of proof by a preponderance of the evidence that she is entitled to reimbursement. (Factual Findings 3 to 48; and Legal Conclusions 1 and 3 to 27.)

29. Student failed to meet the burden of proof by a preponderance of the evidence, in part, on issue one and failed to meet the burden of persuasion on issues two and three.

