

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT, through his Educational Rights
Holder,

v.

WHITTIER CITY SCHOOL DISTRICT.

OAH Case No. 2015010046

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on December 19, 2014, naming Whittier City School District. The matter was continued for good cause on January 29, 2015.

Administrative Law Judge Judith L. Pasewark heard this matter in Whittier, California, on April 28, 29, and 30, 2015.

Rosa Hirji and Jenny Chau, Attorneys at Law, represented Student. Educational Rights Holder for Student, attended the hearing on behalf of Student. Student did not attend the hearing.

Darin W. Barber and Jeremy J. Rytky, Attorneys at Law, represented District. Frances Stearns, Director, Pupil Services and Special Education, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until May 19, 2015. Upon timely receipt of the written arguments, the record was closed and the matter submitted for decision.¹

¹ At the end of the hearing, Student was granted time to file a motion for reconsideration of the ALJ's denial of Student's request to compel production of documents by District. On May 12, 2015, Student's counsel notified OAH that in lieu of the motion for reconsideration, she was attaching a new remedy request which had not been presented at hearing.

ISSUES²

1. Whether an exception to the two year statute of limitations applies to Student's Child Find claims for the period of December 6, 2011 through December 19, 2012?
2. Whether District denied Student a free appropriate public education by failing in its Child Find obligations?
3. Whether District denied Student a FAPE by failing to assess in all areas of suspected disability?
4. Whether District's January 24, 2013 individualized education program denied Student a FAPE by:
 - a. failing to place Student in a non-public school;
 - b. failing to conduct a functional behavior assessment; and
 - c. failing to provide an educationally related mental health service assessment?

SUMMARY OF DECISION

Student's most crucial percipient witness, his grandmother, did not testify at hearing. As a result, Student's statute of limitations claims were based upon unsubstantiated, multi-hearsay statements, which was not factually established. Therefore, Student was unable to sustain his burden of proof regarding an exception to the two year statute of limitations.

Without an exception of the statute of limitations, Student's claims against District run from December 19, 2012 through January 19, 2013, which was the last date of Student's attendance within District. During this one month period of time, District did not fail in its child find obligations as District assessed Student and held his initial IEP team meeting.

Without percipient witnesses to contradict District testimony, Student was unable to meet his burden of proof regarding the allegations of denial of FAPE in assessing Student. In great part, Dr. Rome's expert testimony regarding District's assessment was significantly tainted by reference to confidential information unknown to District, some of which occurred after Student was removed from District.

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

Student did not establish that a non-public placement was necessary to support or implement Student's IEP. Further, the weight of the evidence supports a finding that the January 24, 2013 IEP was appropriate. Student did not require a non-public school placement. Further, District was not obligated to conduct a functional behavior assessment or mental health assessment based upon the information known to District at the time.

FACTUAL FINDINGS

Background and Jurisdiction

1. On December 6, 2011, Student enrolled at Mill Elementary School within the jurisdictional boundaries of District. Student resided with his maternal grandmother, acting as his guardian.³ With the exception of a short period in August/September 2012, Student continued to reside within District, until January 24, 2013, when he was removed from Grandmother's custody, and placed in foster care. Following a Student Study Team referral, District provided Grandmother with an assessment plan on October 25, 2012, which was executed that same day. District assessed Student, and the IEP team determined Student qualified for special education and related services under the eligibility category of emotional disturbance. Grandmother consented to Student's initial IEP on January 24, 2013.

2. Subsequent to the IEP team meeting, Student was placed in foster care. January 24, 2013, was Student's last day of attendance in District. While in foster care, Student attended school in the Lake Elsinore Unified School District from February 1, 2013 through the end of the 2012-2013 school year. Commencing in September 2013, Student attended school in the Charter Oak Unified School District.

3. Student remains in foster care and has resided with Ms. C., his current foster mother, since September 2013. Student currently takes Adderall for his attention deficit hyperactivity disorder and emotional disturbance. She describes Student as a brilliant child who likes to learn and be challenged, although it is still difficult for him to concentrate. Ms. C. has never had any contact or communication with District.

4. Student offered the testimony of Raymond Fong, a social worker for the County of Los Angeles regarding Student's foster care history. Mr. Fong provided guarded information regarding Student. He had no personal knowledge of or involvement with Student or Grandmother prior to foster care, and could provide no relevant information regarding the issues in this case. Further, none of the investigative or factual findings reported to Los Angeles County Department of Children and Family Services was reported to District during the relevant time frame of Student's complaint.

³ Student's grandmother obtained legal guardianship on May 3, 2011, while residing in San Bernardino County.

5. Lisa Blanchard, a clinical psychologist with the Children's Institute, testified in this matter based upon her psychological evaluation of Student in January 2014. As with Mr. Fong, Ms. Blanchard was not a percipient witness to the events prior to January 24, 2013, and her reporting of Student's background information and history was largely based upon hearsay and confidential Department of Children and Family Services information, none of which had been shared with District prior to this litigation.

Statute of Limitations

6. Between September 2008 and December 2011, Student attended Elderberry Elementary School in Ontario, California. His educational records from Ontario-Montclair School District, commencing with Student's kindergarten enrollment, reflect a troubling pattern of escalating behaviors and excessive absenteeism. Student's behaviors steadily increased from screaming outbursts and pushing to tantruming and physical violence resulting in injury to others. Student's behavior resulted in suspensions in both the first and second grades. As a result, Ontario-Montclair convened a Student Study Team meeting to address Student's behavior and ADHD. Behavior interventions were addressed and outcomes reported. Although Student's academic performance remained high in all levels, his tantrums and violent behaviors continued through the remainder of his enrollment at Elderberry.

7. Upon enrollment in District in December 2011, Student was placed in Angel Mercado's third grade class at Mill Elementary School. Mr. Mercado possesses a multiple subject teaching credential, and has been employed by District as an elementary school teacher since 2003. He understands the special education referral system, and has previously referred students for special education assessment. He has experience with special education students, though never with emotionally disturbed students.

8. Mr. Mercado believes Grandmother had been provided the Parent Handbook,⁴ which is given to all parents at the beginning of each school year. Mr. Mercado did not give Grandmother the handbook, as Student was a mid-year enrollee. As a standard business practice, however, late enrollees are given the handbook in the school office during registration. The handbook contains specific information related to the Individuals with Disabilities Education Act, special education and special education needs.⁵ The handbook references District obligation to "search and serve," and instructs parents to request assessments to determine eligibility for special education by contacting the local school or telephoning the District office.

⁴ This is a 14-page document also known as the 2011-2012 Notice to Parents and Guardians.

⁵ Ed. Code, § 56031; Ed. Code, § 56301.

9. Trudie Efstratios, the school principal at Mills Elementary, confirmed that the Parent Handbook is given to all parents, and was given to Grandmother as part of Student's enrollment packet.

10. In the third grade, Student was very bright, an "awesome student academically." Initially, Student got his work done, related to his peers, but he was plagued with absences. Student continued to do well academically; however in February 2012, he began developing inappropriate behaviors. He was often off task, and did not finish his work. He began banging his head, name calling, and using profanity.

11. While Mr. Mercado reported these behaviors to the principal and school psychologist, he did not find them to be overly significant. The behaviors were "few and far between." Student was not a danger to himself or others. He still had friends at school and interacted with peers. Further, when Mr. Mercado spoke with Grandmother, he learned Student had been diagnosed with ADHD and was out of his medication. Grandmother opined, and Mr. Mercado agreed, that when Student took his medication, he was an entirely different child; he returned to being on task and his behaviors decreased. Student's attendance, however, remained a concern.

12. Additional concerns arose in February 2012. On February 28, 2012, Ms. Efstratios, the Mill Elementary principal, emailed Paola Tapia, the school psychologist, with concerns about Student's behavior. She noted Student's history of serious anger issues from his educational records, and reported that earlier in the day Student was sent to her office "very angry, tense, closed fists, heavy breathing, hitting himself, saying he wanted to die."

13. Ms. Efstratios was able to calm Student down, and he returned to class. She contacted Grandmother, who indicated Student was still out of his medication and was awaiting therapy. The email further noted Ms. Efstratios questioned if she should have called for a 48-hour evaluation, then at least Student would get his medication.

14. Ms. Tapia responded by email on February 29, 2012, indicating Ms. Efstratios did the right thing by allowing Student to calm down before returning to class. A 48-hour evaluation would be done if the Psychiatric Mobile Response Team had been called, which she did not think was necessary at that point. The response team "usually will only take students if they're remain in an extremely angry state when the team arrives or if serious aggression to self or others is involved." Ms. Tapia later explained that calling for assistance from the response team is a relative determination, based upon many considerations, such as how long the behavior has continued, and how intense dangerous the behaviors are.

15. Ms. Tapia has a master's degree in educational psychology, an educational specialist degree in school psychology, and a Pupil Personnel Services Credential. She left District employment in June 2012. At hearing, Ms. Tapia articulated limited recollection regarding the 2011-2012 school year, in response to counsels questions, which in most instances, were generalized, hypothetical or vague.

16. Ms. Tapia began working with Student in response to Student's meltdown incident on March 1, 2012, in which the response team was called at approximately 12:20 p.m. Grandmother was contacted. Student was out of his medications. Student had a therapy appointment on March 2, 2012, and would obtain refills on his medications then. By the time the response team clinicians arrived at 1:10 p.m., Student had already calmed down, and was eating his lunch. District reported nothing further in Student's educational records regarding this incident.

17. Ms. Tapia attempted further observations of Student over the remainder of the school year, however Student was often absent from school. She spoke with Grandmother three times, primarily about Student's behaviors. Ms. Tapia recalled Student had difficulties calming down, and vaguely recalled another incident in which Student crawled under the principal's desk.

18. Ms. Tapia's counseling notes reflect she met with Student on March 29, 2012. Student reported he liked school, liked Grandmother, and got along with his extended family. Ms. Tapia noted Student had a hard time expressing how he felt at the moment, and they discussed his meltdown earlier in the month.

19. When considering a student's behaviors in relation to possible special education eligibility, Ms. Tapia would consider all types of interventions. Ms. Tapia had informal counseling sessions with Student in March and again on May 24, 2012, in which they worked on and practiced relaxing techniques. Ms. Tapia observed that Student responded well to techniques, such as deep breathing, counting to three, asking for a break, or removing himself from a situation inside the classroom, but he had a hard time applying those skills in class. In spite of his outburst behaviors, there were no concerns regarding Student's academic performance.

20. Ms. Efstratios had been the principal at Mill Elementary for 13 years, until her retirement in 2014. She too had little independent recollection of the 2011-2012 school year, yet, upon review of documents, she was forthcoming with her recall. Ms. Efstratios confirmed the February 28, 2012 email, and added that her serious concerns arose from Student's prior anger issues contained in his cumulative file, rather than from the incident in her office. She described the February 28, 2012 outburst as a "minor incident." Student calmed down and was fully capable of going back to class. She did not believe Student "wanted to die." She heard that from many kids. Ms. Efstratios was primarily concerned with Student's lack of medication as he was a great student when on his medications. Similar to Mr. Mercado, Ms. Efstratios observed that after Student took his medication, he returned to being "the old (Student)."⁶ She sent the email to Ms. Tapia for follow up as an appropriate support person for Student, not as a cry for help.

⁶ District cannot force a parent to medicate a child. (20 U.S.C. § 1412(a)(25).) There was no evidence that District attempted to coerce Grandmother to medicate Student as the evidence was that Grandmother wanted Student to take his medication.

21. Two behavior incidents in May 2012, were reported, one of which resulted in Student's first suspension. The lesser incident involved Student's use of foul language during lunch on May 25, 2012. Ms. Efstratios sent a written report of the incident to Grandmother. The second incident, which occurred earlier on May 1, 2012, resulted in a one day suspension. The antecedent to this event was Grandmother's failure to pay for Student's laptop computer. When asked to turn in his laptop, Student threw a temper tantrum, and threw the laptop, which was school property.

22. Student's grades for the third grade indicate, despite his absences, behaviors, and suspension, he was proficient in all subjects, except algebra and functions, in which his performance was approaching standards. Mr. Mercado still recorded Student's citizenship as satisfactory for the 2011-2012 school year.

23. Student left District after the end of the 2011-2012 school year, but returned to Mill Elementary on September 17, 2012. For the 2012-2013 school year, Student attended David McKinnon's fourth grade class. Student's return to District was extremely problematic as he demonstrated extremely improper conduct.

24. On September 18, 2012, Student hit another boy while involved in "play fighting" during lunch recess, and was also involved in several other minor incidents the first week of his enrollment.

25. On September 21, 2012, Student was suspended for two days for expressing ethnically foul language towards a male student and graphically lewd language towards a female student.

26. On September 21, 2012, after suspending Student, Ms. Efstratios emailed the new school psychologist, Shauna Allen. Ms. Efstratios wrote that she had previously worked with Grandmother regarding Student's behavior. "Student is under a doctor's care for counseling and medication. Last year, off his medication he was impossible." Ms. Efstratios also indicated she was aware that during his short, intervening attendance in Ontario-Montclair, that district was "already preparing a behavioral history, etc., on him." Ms. Efstratios' concluded with: "We need to get him into a setting for emotionally disturbed kids, and you know I don't say that very often."

27. At hearing, Ms. Efstratios recalled that she was looking for a "setting" within the school that would provide Student with a quiet place to calm down, as well to partake of counseling. She was reluctant to refer to Student as "emotionally disturbed," as that was a heavy label. She opined that, unfortunately, it appeared to be the road they were heading toward.

28. In response to Ms. Efstratios concerns, Ms. Allen inquired if Student was already identified as emotionally disturbed or was a general education student that needed to begin the process of identification. Additionally, Ms. Allen commenced informal observations to examine Student's behaviors firsthand.

29. On September 27, 2012, during an incident at lunch, District suspended Student for a half-day for throwing dirt clods at other students, defiance towards adult authority, and foul language. Student remained defiant, and refused to talk to Ms. Allen. When Grandmother arrived to take him home, Student became visibly angry about being asked to leave his laptop in the office until he returned to school. Student dropped to the floor in a very small space, began yelling that he wanted his computer back, and refused to get up. When he finally stood up, Student eloped for some distance up a busy street. District staff and Grandmother followed him. He did not respond to requests to stop running, and often looked back to see if he was being followed. Student eventually stopped and got in the car with Grandmother. This was Student's third day of suspension in the 2012-2013 school year.

30. On October 4, 2012, Ms. Allen was called to assist with Student. Late in the school day, Student refused to re-enter the classroom. Student was observed outside the classroom, sitting on the ground. He willingly accompanied the Ms. Allen, but only responded to questions and answers back and forth on paper. There had been a concern about chalk missing from the classroom, which Student later admitted taking.

31. On October 5, 2012, Ms. Efstratios issued a notice for a student team meeting regarding Student, to be held on October 11, 2012. As she stated at hearing, Student was a distinctly different student in the fourth grade, than he had been in the previous 2011-2012 school year.

32. On October 10, 2012, in an email to Ms. Allen, Ms. Efstratios recounted a visit from a Los Angeles County Sheriff's deputy regarding Student. In essence, Student took a skateboard from a younger and smaller child he was bullying and pushing at the local park. The child's older brother "came back to take care of Student, and Student took a ride in an ambulance." Student was not seriously hurt. Witnesses confirmed the incident was really Student's fault, as he frequently used bad language and caused problems at the park. The deputy further shared that Student had been a victim of a childhood trauma involving his mother, and she thought Student was required to see a psychiatrist weekly because of what he witnessed.

33. Ms. Efstratios informed the deputy about the student team meeting scheduled for the next day, and indicated the student team would be developing a behavior plan for Student. She also indicated that further down the line, District would probably be moving towards an emotional disturbance recommendation. The email also suggested that Ms. Allen obtain a release of information for Student's doctor, "so we can really work together as a team to help Student."

34. Ms. Allen began informal counseling sessions with Student on October 11, 2012, to discuss social skills with peers and respect for authority, partially in response to the visit from the deputy sheriff.

35. Also on October 11, 2012, District held the student team meeting regarding Student. Grandmother attended this meeting, along with Ms. Simonoff, the resource teacher, Ms. Allen, and Mr. McKinnon. The SST meeting is a tool used by District, and was called for several reasons. District wanted to obtain additional background information from Grandmother. Like Ms. Efstratios, Ms. Allen considered the emotional disturbance label a serious one, and wanted to consider other behavior interventions as well. Additionally, the student team discussions can be used as the foundation for a referral to special education and to assist in the development of an appropriate assessment plan. Notes from the student team meeting are sparse.

36. At the meeting, participants discussed that Student works well in a structured environment, and does his best between 8:00 a.m. and 10:30 a.m. Without structure, Student is more difficult, but his academics are at grade level in all areas. Grandmother informed the student team that Student was being seen by a therapist at Pacific Clinics and she signed a Consent for Exchange of Information for Pacific Clinics.⁷ Grandmother also signed an authorization for Ms. Allen to provide Student with counseling on an as needed basis through June 2013. The counseling offered at the student team meeting was not special education related, and was available to all students. It was intended to provide Student with coping strategies, and a safe area where he could confide in Ms. Allen. Unfortunately, this counseling was impacted by Student's sporadic attendance at school.

37. The day after the student team meeting, on October 12, 2012, Student was suspended for five days for stealing an envelope containing \$330.00 off Ms. Efstratios' desk. The Sheriff's Department was notified.

38. On October 22, 2012, Ms. Allen contacted Student's therapist, Erika Frausto, at Pacific Clinics. Ms. Frausto, has a master's degree counseling, and was a Marriage and Family and Child therapy intern in 2012-2013. Ms. Frausto previously assessed Student in March of 2012. All background information was provided by Grandmother. Ms. Frausto diagnosed Student with ADHD and Oppositional Defiance Disorder. She did not believe Student was suicidal or intended to hurt himself. The information and conclusions presented in this assessment were never shared with District, nor was District contacted for any information regarding Student's academics or behaviors at school in the preparation of this assessment.

39. Ms. Frausto also provided Student with weekly family or group therapy. She noted Grandmother canceled many of the scheduled appointments, and Student did not attend sessions during the summer of 2012. In October 2012, Ms. Frausto became more concerned about Grandmother's inconsistencies and Student's home life with extended family. It became clear to Ms. Frausto that Grandmother needed additional support. She determined Student required a higher level of care, due to his increasing behaviors, anger outbursts and eloping from home. Therapy once a week was no longer sufficient; Student

⁷ Although Grandmother dated the Release October 10, 2012, it is believed the Release was actually signed on October 11, 2012 as part of the SST meeting.

needed a therapist who could go to his home. Ms. Frausto referred Student to a full service program. Ms. Frausto informed Ms. Allen she was considering reporting Grandmother to Department of Child and Family Services for neglect. None of this information was shared with District until she spoke with Ms. Allen in late October 2012. Ms. Allen and Ms. Frausto discussed coordinating services and providing school based counseling. However, Ms. Frausto and Pacific Clinics' services were terminated in November 2012, when Community Family Guidance Center accepted Student into its full service program.

40. Student returned from suspension on October 23, 2012, and was suspended again on October 24, 2012. This time Student received a two day suspension for stealing a stamp off his teacher's desk.

41. Student's behaviors continued. On October 31, 2012, Student hit another student in the stomach with a closed fist. On November 5, 2012, Student was observed trying to get out of the principal's office by kicking the door, yelling profanity, crying, screaming, and spitting on the principal's shoes. Student was placed in a crisis prevention intervention restraint to keep him safe. This behavior continued for approximately 35 minutes. It was believed that Student had not taken his medication that morning. Grandmother brought his medication so Student could focus and remain at school. Student again became upset that he was not leaving with Grandmother. Approximately 45 minutes after taking his medication, Student calmed down by crawling on the floor and lying underneath the principal's desk. A few minutes later Student was observed to laugh and smile. He became very polite with an extremely calm demeanor, and began doing his work in Ms. Efstratios' office.

Student's Initial Assessment

42. On October 25, 2012, 14 days after the student team meeting, District provided Grandmother with an assessment plan, which was signed and returned the same day. Although Ms. Allen, did not prepare the assessment plan or give it to Grandmother, she reported that District, in its usual course of business, always attaches a copy of Parental Rights and Safeguards to the assessment plan when it is provided to a parent.

43. Subsequently, a multi-disciplinary assessment team, consisting of a school psychologist, resource specialist, and Student's fourth grade general education teacher, completed Student's initial psycho-educational assessment.

44. Ms. Allen, District's school psychologist for Mills Elementary, conducted Student's psycho-educational assessments⁸, and completed the written assessment report, dated January 10, 2013. Ms. Allen possesses a master's degree and Pupil Personnel Credential in educational psychology, as well as a master's degree and Pupil Personnel Credentials in school counseling. She is a certified as Behavior Intervention Case Manager

⁸ Student's assessments were completed on or before December 14, 2012, prior to the statute of limitations.

and receives crisis prevention intervention training annually. She was employed by District from 1996 to June 2014.

45. Ms. Allen provided psychological services to students in District's elementary schools. She conducted psycho-educational assessments, including Educationally Related Mental Health Services assessments for students who were candidates for special education programs. She provided individual and group counseling services in the areas of behavior, motivation, self-esteem, social skills, study skills, and anger management, including developing written goals and reports for IEP support services. Ms. Allen also provided behavior consultation for students by designing and implementing measurable behavior interventions.

46. Additionally Ms. Allen trained close to 100 participants (staff and parents) in suicide prevention for District for the 2013-2014 school year. She was also a member at each school site for the Response to Intervention-Tier Three Intervention meetings for academics and behavior progress monitoring.

47. Ms. Allen coordinated Student's assessments. She confirmed that Student was assessed by qualified personnel in areas related to his suspected disabilities. The assessment materials selected and procedures were valid for the purposes for which they were used, and deemed to be unbiased with regard to race, gender or culture, and took Student's primary language into account.

48. Assessment information was collected from a variety of sources, including observation, review of Student's records, information provided by Grandmother, information from classroom teachers and individualized assessment. As will be discussed, several different standardized tests as well as parental/teacher rating scales were administered. An educational history, commencing in kindergarten, was presented. Extensive observations and interviews were reported.

49. Grandmother was interviewed on three separate occasions and provided Student's medical history. Student had been prescribed Adderall since 2006; however his medication was obtained inconsistently. Student's therapist, from Community Family Guidance Center reported Student's diagnoses as ADHD, Oppositional Defiance Disorder, and depression. Student's background information and history was provided by Grandmother. No reference is made to Student's living in a motel, as District was not informed of Student's homeless status until January 2013.

50. Student was interviewed twice for the assessment, and had several meetings with the school psychologist in the fall 2012, due to his behaviors. These interviews took place prior to District's request to assess Student. Ms. Allen noted that prior to late November 2012, Student was willing to discuss ways to handle his conflict with other students. After Thanksgiving break, however, it became difficult to get Student to answer basic questions about himself or school. Student's moods fluctuated based upon internal stressors and his day often depended upon his mood when he arrived at school. Although

District made counseling available to Student, his poor attendance made it difficult for him to access school-based counseling.

51. Student's fourth grade teacher, David McKinnon, was also interviewed for the psycho-educational assessment. Student, along with many other students, rotated to different classrooms for different instruction and subjects. Mr. McKinnon similarly reported Student's moods fluctuated from one day to the next. Regardless, Student always appeared "on edge," even on a good day. Student rarely completed classroom assignments, but when he did, it was done accurately. He was most focused during computer based activities.

52. The best way for Student to maintain focus was to sit by himself at a table. When working in a group, or when Student sat next to another child, it often led to conflict. Student was suspected of taking items from the classroom, such as markers and chalk. Other children complained about Student touching their personal items, taking items, and calling them names. Student's interaction with his peers was fragile. Many children reported being afraid of Student.

53. Another of Student's teachers reported that academically, Student scored well on tests, whenever he was present to take one. He did well in math and grasped new concepts fairly easily. Student, however, never took notes or did classwork unless Ms. Franco sat with him or was watching over his shoulder. She also noted Student was absent quite often due to suspensions and inconsistent attendance.

54. Classroom observations were also conducted. On September 27, 2012, during math class, the entire class was instructed to work independently from their workbooks. Student was observed standing up, socializing and not doing his work. When Student asked for a bathroom break, he made several stops to chat with other students. Similarly, on December 13, 2012, while the teacher was reading aloud to the class, Student was fiddling in the back of the classroom, clearly not listening to the teacher. Although Student appeared unfocused on both the teacher and the reading, when engaged in some questions about the book, Student responded appropriately and answered the questions.

55. Student was also observed during recess, where he appeared nervous or hesitant to walk from the classroom to the playground. During recess, Student had brief interactions with peers, and joined in a game for a short period. He behaved appropriately when the bell rang for the return to class.

56. Ms. Allen administered cognitive development assessments to Student over three testing sessions in early December 2012. He was fairly cooperative. On each occasion, Student was quiet, task focused, and appeared to put forth his best effort on all tasks. He appeared to exhibit some anxiety or caution with paper/pencil type tasks, as he would engage in those tasks very slowly and carefully. Ms. Allen considers the test results to be valid and reliable.

57. Ms. Allen administered the 10 core subtests of the Wechsler Intelligence Scale for Children, Fourth Edition. Based upon his composite scores, Student's cognitive ability fell within the Average range. It was Ms. Allen's opinion that, when using a 95 percent confidence interval, Student's actual ability is likely much higher.

58. Results of the Beery-Buktenica Developmental Test of Visual-Motor Integration assessment indicated Student's visual motor integration skills were average.

59. Ms. Allen utilized the Conners - Third Edition, Teacher and Parent Rating Scale, Behavior Assessment System for Children, questionnaire, and the Parent/Teacher Disruptive Behavior Rating Scale, which are comprehensive measures of both adaptive and problem behaviors in school, home and social settings. Both Grandmother and teacher rated Student with many "at risk" and "clinically significant" behaviors at school and home as well. Grandmother rated Student clinically significant or at risk in the areas of hyperactivity, aggression, conduct problems, attention problems, adaptability and social skills. Teacher's scores were similar, but also included atypicality, withdrawal, depression, attention, all adaptive skill areas, and study skills.

60. The Conners Rating Scale and the Disruptive Behavior Rating Scale, indicated Student was displaying disruptive behaviors at home and at school, which correlated with his diagnoses of ADHD, Oppositional Defiance Disorder and depression.

61. A District resource specialist administered Woodcock-Johnson III, Normative Update Tests of Achievement (Form B), and the Kaufman Test of Academic Achievement to measure Student's academic skills. Testing took place over several days due to Student's emotions or sleepiness. The assessor noted that for the first couple of days, Student was receptive to testing. As time went on, Student was less cooperative, appeared worried during the examination, and would take several minutes thinking about test questions before responding. He seemed unusually absorbed by the tasks. Student's changes in behavior did not affect the validity of the assessment.

62. The results of these standardized academic test indicated Student was able to complete grade level work, which correlated with Student's grade level baseline assessments and California State Test assessment scores. These scores, however, did not coincide with Student's classroom grades. To explain the gap, it was noted that Student had not completed or turned in many in-class assignments, which was strongly dependent upon his mood of the day. Further, Student's behaviors had been present for a long period and to a marked degree, which was affecting all aspects of his school performance.

63. The assessment team concluded that Student had educational needs in the area of task completion, social/emotional, and behavior, and qualified for special education and related services under the eligibility categories of emotional disturbance and other health impairment due to his ADHD and behavioral issues. The assessment team also recommended that the IEP team consider: (1) creating a behavior support plan; providing

positive behavior reinforcements; (3) establishing and reinforcing social rules; (4) fostering socialization with peers; and (5) providing school based counseling.

64. District did not conduct a functional behavior assessment of Student. Ms. Allen explained District already had frequent involvement and observations of Student, which provided enough current information for the development of a behavior support plan. Further, the behavior plan was based upon observations. Because of the amount of prior interaction with Student, a collection of additional data was not necessary.

January 24, 2013 IEP⁹

65. District held Student's initial IEP team meeting on January 24, 2013. All necessary parties were in attendance. Grandmother attended this meeting as Student's legal guardian with full educational rights on his behalf. Rosalva Garcia, Student's private therapist, also attended the meeting. Grandmother was offered an explanation of the 2012 revised Procedural Safeguards, and did not have any questions.

66. The IEP team discussed the results of Student's assessments. They concluded Student met the criteria for special education and related services under the eligibility of emotional disturbance. The IEP team determined that, although Student was very bright, he was experiencing significant behavioral concerns and work avoidance that interfered with his ability to perform academically in the classroom, and required support in all aspects of his educational experience. Student's behaviors were interfering with his academic performance. Student took medication for ADHD. Additionally, the IEP team noted Student had a history of chronic absences and tardies.

67. The IEP team determined Student required goals in behavior and social/emotional needs. Three goals were crafted. Goal One addressed Student's need to decrease his emotional interferences, which reduced his ability to complete his classwork. Goal Two addressed Student's need to appropriately communicate his desire to escape an academic task or social situation. Goal Three sought to replace Student's use of foul language with the development of relaxation or calming techniques to reduce anxiety and tension.

68. Accommodations of preferential seating and use of a graphic organizer were provided to address Student's ADHD needs.

69. At no time did Grandmother or Ms. Garcia provide any outside reports, assessments or documents from Student's therapist or social services. District was unaware of Department of Child and Family Service intervention as no one at District had been

⁹ Although Student's initial IEP team meeting was scheduled for January 10, 2013, the meeting was convened and closed without discussion, as Grandmother was not present. The IEP team meeting was rescheduled for January 24, 2013, at which time the Student's IEP was crafted and District's offer of FAPE made.

contacted or interviewed. Grandmother had been the source of most all of the information regarding Student. Grandmother has been cordial and cooperative with teachers and District staff. As Ms. Allen expressed, Grandmother truly cared about Student, and District believed she was doing the best she could.

70. District's offer of a FAPE provided Student's continuing placement in the general education classroom. Student's academic skills were at grade level and he did not require a more restrictive environment. Support services offered, consisted of (1) access to resource specialist support for 60 minutes per month in the classroom, which is itinerant support of an educational specialist to ensure needed classroom support and accommodations as consult to the general education teacher; and (2) counseling with the school psychologist for 60 minutes per month to address Student's social/emotional needs.

71. Ms. Garcia attended the IEP meeting as Student's therapist. She has a master's degree in social work, and is a clinical social worker. In 20120-2013, Ms. Garcia was employed by Community Family Guidance Center, and acted as Student's therapist. In November 2012, she completed an initial assessment of Student after a referral to a 'full service program.' All information and background for her assessment was provided by Grandmother. She did obtain Student's educational records, but did not recall ever speaking with Student's teachers or the school psychologist.

72. At the IEP team meeting, Ms. Garcia provided minimal mental health information regarding Student. She was aware Grandmother was afraid of Student, and would let him act out at home. She knew Grandmother was resistant to the recommended twice a week outside therapy, and had a history of non-compliance. She knew Grandmother would not make Student go to school or take his medications.

73. In reviewing the January 24, 2013 IEP, she opined that the goals and services contained in the IEP were sufficient. The goals and behavior support plan were appropriate based upon the information available, including her report. School based counseling alone would not be enough for Student; however, coupled with Student's outside therapy it could be appropriate.

74. The behavior support plan crafted by the IEP team was designed to address Student's behaviors of the use of foul language, including swearing and insults, with peers and adults, which had been observed as disruptive verbal outbursts, sometimes accompanied by yelling. These behaviors impeded Student's learning because Student spent less time receiving instruction due to office referrals and the behaviors created negative interactions between Student and others in the school setting. The behavior support plan identified environmental factors, which were largely undisputed. Based upon the observations of Ms. Allen, Mr. McKinnon and Ms. Efstratios, the IEP team determined Student's behaviors occurred as a means to escape academic demands and certain social situations. Student also exhibited problem behavior because it served as an automatic reinforcer that reduced Student's tension from built up anxiety. The behavior support plan provided nine interventions designed to provide Student with positive reinforcement and supports. It

discussed replacement behaviors and strategies to be utilized during Student's counseling. Both Grandmother and Ms. Garcia were present during the discussion of the behavior support plan. No objections or additions were suggested.

75. Grandmother consented to the January 24, 2013 IEP in full. Later that day, Student was removed from Grandmother's custody, and placed in foster care. Student's IEP was never implemented in District, as Student was immediately transferred to another school district. Student's IEP, was provided to subsequent school districts as part of Student's educational file.

Dr. Rome's Expert Opinion

76. Robert J. Rome has a Ph.D. in psychology, along with several other advanced degrees in non-related subjects. He maintains a private practice in clinical and forensic psychology. Dr. Rome has an extensive professional history with related experience providing psychological evaluations, psycho-educational assessments, forensic assessments, and individual, group, and couples/family psychotherapeutic intervention for children, adolescents and adults. He provides consultation and advocacy services to families, professionals, community organizations and agencies. Dr. Rome has provided evaluations of children and adolescents for Dependency and Juvenile Courts in Los Angeles County. He is a member of the Expert Panel of Psychologists and Psychiatrists for Dependency Court. Dr. Rome has provided testimony in dozens of cases and hearings in Superior Court, in administrative hearings, and in federal court. He has provided independent evaluator and consultant services under contract with 12 school districts.

77. Student's attorney and social worker initially contacted Dr. Rome in August 2014. He was informed that Student was classified as gifted, but his academic performance was below grade level. He was asked to see what was going on with Student academically.

78. On April 19, 2015, Dr. Rome conducted a partial psycho-educational assessment of Student. This 2015 assessment took place over two years after Student ceased attending school in District. In preparing this assessment report, Dr. Rome indicated he did not have the school records from District, (only the education records from Student's subsequent school districts). Additionally, when Dr. Rome interviewed Student and asked how he did when he was in school in Whittier, Student responded that he simply could not remember.

79. Nonetheless, Dr. Rome provided generally good news regarding Student's progress. Based upon his academic assessments, Dr. Rome ascertained Student showed academic functioning in most areas either at the average range, ranging from the low end of average through the average range, relative to his peers. These scores were similar to those obtained by District assessment.

80. Dr. Rome noted Student had previously attended therapy, which was now discontinued. Student no longer appeared to show behavioral or emotional problems, other

than his displaying symptoms of ADHD. Dr. Rome recommended Student be reassessed for special education and reclassified as other health impairment due to his ADHD. He opined Student was no longer emotionally disturbed. Further, he also recommended a medical evaluation to determine whether Student's medications, other than Adderall, could be terminated.

81. Dr. Rome's testimony regarding his review of District records was animated and dramatic. In essence, Dr. Rome opined that Student's school performance was severely impacted by behaviors and his behaviors as of spring of 2012 "screamed out for assessment." Student had been sent to the principal's office on numerous occasions; he was very angry and visibly tense with closed fists and heavy breathing. Student hitting himself, and most importantly, Student reported "he wanted to die." The delay of nearly 11 months (from December 2011) in finding Student eligible for special education was unreasonable.

82. Dr. Rome chided District for failing to diagnose Student's mental health. He opined District downplayed Student's behaviors, which, upon his reflection, indicated serious mental disorders. District failed to adequately consider Student's ADHD, which should have been included as a secondary eligibility category for Student.

83. Dr. Rome also pointed out that District's assessment was based upon observations of Student, which occurred prior to the assessment plan. Student's interview also predated the assessment plan, and the assessment team did not observe Student in his classroom or unstructured environments. District also failed to obtain pertinent information from Student's therapist to be included in the assessment report. The only background information relied upon by District had been provided by Grandmother. Dr. Rome opined District should have known Grandmother was abusive and unfit, therefore the information District derived from its assessment conclusions were faulty. According to Dr. Rome, it followed that the resulting IEP, was based "entirely upon lies."

84. These opinions, however, proved of limited value, as they were, at minimum, heavily influenced by confidential information obtained from the Dependency Court, Student's therapists, and his own subsequent assessment of Student. This hindsight was based on significant information not available to District during 2012-2013. Further, Dr. Rome made several dramatic assumptions regarding District's failure to appropriately respond to obvious warning signs. However, many of these assumptions were based upon conjecture of who actually knew what, and when.

85. Dr. Rome zealously opined that by the time District assessed Student, Student belonged in a residential treatment placement, and his behaviors and school absences in fall 2013 were a "call for help" that District ignored. This conclusion, however, appeared to be equally based upon a belief Student should have been removed from Grandmother's custody

much earlier. As Dr. Rome impassionedly stated, “as of January 24, 2013, she (Grandmother) was already found guilty of child neglect.”¹⁰

86. Dr. Rome repeatedly stated District should have made an “AB 3632” referral¹¹ As an expert in the special education field, Dr. Rome failed to acknowledge that funding for county mental health referrals terminated in 2011. Further, Dr. Rome failed to acknowledge the criteria under which a child is referred and accepted for a mental health assessment. He did not distinguish why residential placement was educationally necessary, or whether other placements might have been appropriate for Student.

87. Frances Stearns, District’s Director of Pupil Services and Special Education, testified regarding District policy and compliance with special education requirements. Ms. Stearns confirmed District policies regarding special education. Pursuant to *District’s Special Education Procedural Manual*, District maintains a written policy regarding child find. District has an affirmative obligation to actively locate, identify, and assess all students within its boundaries who may require special education services. The manual goes on to explain, at length, District employee obligations, including school-based referrals. District policy requires that each new “case” must be brought to the attention of the Student Learning Committee for screening. Among those District staff members who testified, the Student Learning Committee equates to a student team meeting, to which the parent is invited.

88. Ms. Stearns also confirmed District policy regarding “Parents’ Rights and Procedural Safeguards,” a 16-page document, which contains and explains special education rights for parents and guardians. Ms. Stearns also confirmed that, in the usual course of business, a copy of the “Safeguards” is provided to a parent along with the assessment plan. She also noted that parents are provided with a copy of the Parent Handbook at the beginning of each year, or upon enrollment in District.

89. It is noted that the Parental Safeguards were amended in October 2013. Although Student subpoenaed a copy of the pre-2013 Safeguards, Ms. Stearns, as Custodian of Records for District, testified that she was unable to produce a copy, as the “old” Safeguards were discarded after the amended version was developed. Although Ms. Stearns provided all subpoenaed documents in her possession as Custodian of Records, she did not

¹⁰ This statement is unsubstantiated, and if true, was part of the confidential Dependency Court investigation which was unavailable to District.

¹¹ “AB 3632” references Assembly Bill 3632, which provided for mental health assessment referrals to be made to the State Department of Mental Health, and its county designees. Effective July 1, 2011, county mental health departments’ obligations to provide services to special education students, were suspended and repealed, and the statutory responsibilities were transferred to the local education agencies, such as District. (See Gov. Code, § 7573.)

search other sources or inquire of other staff, if a copy of the pre-2013 Safeguards was still available.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*¹²

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them an appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which meet state educational standards, and which conform to the child’s individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.)¹³ “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, to make progress in the general education curriculum, and to participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an

¹² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹³ All citations to Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents to expansion of the issues. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student has the burden of persuasion.

5. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.)

“First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

6. In considering the substance of an educational plan, “(T)he test is whether the IEP, *taken in its entirety*, is reasonably calculated to enable the particular child to garner educational benefits.” (*Lessard v. Wilton-Lyndeborough Cooperative School Dist.* (1st Cir. 2008) 518 F.3d 18, 30 (italics added) (*Lessard*); see also *T.Y. v. New York City Dept. of*

Educ. (2nd Cir. 2009) 584 F.3d 412, 419 [judging the “IEP as a whole”].¹⁴) Further, a court or tribunal must judge an IEP at the time of its development, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*); *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801 (*Douglas County*); *Tracy N. v. Department of Educ., Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) Here, under this “snapshot rule,” evidence of events that occurred after the January 24, 2013 IEP meeting are irrelevant in evaluating the appropriateness of the IEP, which is the subject of this case.

Issue 1: Two-year Statute of Limitations

7. Congress recognized that it is critical to assure appropriate education for handicapped children at the earliest time possible. Failure to act promptly could irretrievably impair a child’s educational progress. (*Alexopolous v. San Francisco Unified Sch. District* (9th Cir. 1987) 817 F.2d 551, 555.) Congress’ desire to obtain timely and appropriate education for handicapped children by conferring substantial substantive and procedural rights on parents and guardians on behalf of their children clearly indicates that it is not intended to authorize filings of claims on behalf of or by children many years after the alleged wrongdoing occurred. It is reasonable to assume Congress expected and intended the child’s representative to file actions and apply for hearings on his behalf near the time the contested event occurred. The child may not later come before a court and invoke the tolling provisions of state statute. (*Id* at p.556).

8. Education Code section 56505, subd. (l), provides that any request for a due process hearing shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (See also, 20 U.S.C. §1415(f)(3)(c).) The two year limitations period does not apply if the parent was prevented from filing a due process request due to either (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request, or (2) the local educational agency withheld information from the parent which is required to be provided to the parent. (Ed. Code, § 56505, subd. (l)(1),(2); 20 U.S.C. § 1415 (f)(3)(D).)

9. The narrow exceptions of misrepresentation and withholding of information require that a school district’s actions be intentional or flagrant rather than merely a repetition of an aspect of determining whether a student received a free appropriate public education. (See *M.M. & E.M. v. Lafayette School District* (N.D.Cal. February 7, 2012 Nos. CV 09–4624, 10–04223 SI) 2012 WL 398773, **17 – 19.)

¹⁴ The Ninth Circuit has referred to the educational benefit standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213.

10. Student contends the child find claim for the time period between December 2011 and December 2012 should not accrue until Student was under the supervision of the Juvenile Court and Department of Child and Family Services because (1) District withheld information from Grandmother required under IDEA; (2) District misrepresented the nature of Student's behaviors and District responses in spring 2012 in his educational records depriving *his future representatives* from knowing the facts; and (3) Student had no representative to pursue his rights until at least January 25, 2012, when Department of Child and Family Services initially detained Student. Student contends that the statute of limitation should toll where Grandmother, who was the sole representative that knew or should have known the facts, was no longer available to represent the child as a result of his removal from her custody, and neglected his rights during the period prior to removal. As a result, once detained, Student's new representatives had no basis of knowledge of the facts underlying the child find claims.

11. While the domino effect of Student's subsequent history is tragic, Student's contentions regarding District's responsibility are unfounded. Student contends he had no legal representative during 2011-2012. This is patently untrue. Grandmother was Student's legal guardian pursuant to a Superior Court order, and she maintained her legal status until *after* Student's initial IEP team meeting on January 24, 2013. The quality of Grandmother's parenting skills is not at issue in this matter, nor is District allowed to make such relative determinations regarding parents in general. District cannot infer any more or any less intelligence of an adult who is not conserved, or otherwise subject to independent court order making such factual determinations. Further, District became aware of Student's homelessness in 2012. Homelessness itself, is not a determining factor in special education eligibility, nor does it negate parental rights. Grandmother's parental rights were not terminated until after Student was removed from District. Further, District was not privy to the confidential dependency investigation prior to Student's removal from school or thereafter.

12. No doubt Grandmother was less than candid with District regarding her situation. Student suggests no authority that requires a parent or guardian to be forthcoming with all relevant information. The fact that a school district may not have all pertinent information regarding a child, is precisely why a school district's responsibilities are mitigated by "what it knew or should have known at the time." (*Adams, supra.*)

13. The exceptions to the statute of limitation are clear and narrow. The school district must have withheld information from the parent that it was *required* to provide. Student has made several assumptions regarding District conduct that are not substantiated by the facts provided in this hearing. There was nothing offered to suggest Grandmother did not receive her Parental Handbook or Parental Safeguards. Testimony indicated these documents were appropriately provided to Grandmother in the normal course of business. Grandmother was aware of Student's behaviors at school and cooperated with District personnel. Arguably, it was Grandmother who withheld pertinent information as well as Student's medication.

14. Student condemns District for failing to maintain a copy of the pre-2013 Parental Safeguards. While it may have been a best practice to retain a copy, Student has provided no authority to suggest District has a legal requirement to do so. Ms. Stearns, under penalty of perjury, stated District did not retain copies of the obsolete Safeguards and Student failed to demonstrate why District should have done so. Failing to preserve the pre-2013 Safeguards does not equate to failing to provide a copy of the document to Grandmother; nor does it result in a conspiracy to deny Student his educational rights. The IEP notes indicate that Grandmother declined a copy of the Safeguards at the January 24, 2013 IEP meeting. This would support witness testimony that Grandmother had previously been provided the Safeguards when presented with the assessment plan. District was not required to provide the Safeguards prior to the decision to assess Student.

15. Student contends that District misrepresented the severity of Student's behaviors. However, District's failure to assess for special education eligibility is subject to the two year statute of limitations. While facts exist that create concern whether District should have assessed Student, those facts are outside the two year statute of limitations and Student did not establish any exception to toll the statute of limitations. At no time however, did District represent to Grandmother that District had solved Student's behavior problems or prevent her from seeking an assessment to determine special education eligibility. To the contrary, Grandmother sought outside therapy for Student. Denial of a FAPE in hindsight, however, is not the standard for finding an exception to the statute of limitations. Given the entire record presented at hearing, District's conduct did not rise to the level of intentional misrepresentation or deliberate withholding of required information. Therefore, Student has failed to demonstrate an exception to the statute of limitations as the operative statute of limitations in this matter commenced on December 19, 2012.

Issue 2: Child Find Duties

16. Student contends District failed in its child find obligations. Based upon the determination of a two-year statute of limitations above in Legal Conclusion 15, the issue of District's failure under its child find duties is moot.

17. The IDEA places an affirmative, ongoing duty of the state and school districts to identify, locate and evaluate all children with disabilities residing in the state that are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) This duty is commonly referred to as "child find." California law incorporates child find in Education Code, section 56301, subdivision (a). While no specific activity is required, a school district must actively and systematically seek out "all individuals with exceptional needs, from birth to 21 years of age," including children not enrolled in public school programs, who reside in a school district. (Ed Code, § 56300.)

18. At the commencement of Student's two-year window for raising claims on December 19, 2012, District had already identified Student as a possible child in need of special education and related services. District provided Grandmother with an assessment plan on October 25, 2012, which was executed that day. District commenced its initial

assessment of Student thereafter, and held Student's IEP meeting on January 24, 2013, to discuss assessment results and determination of eligibility for special education and related services. District did not violate its child find obligation.

Issue 3: Assess in all Areas of Suspected Disability

19. Student contends District failed to assess Student in all areas of suspected disability by failing to assess Student for mood disorders.

20. A district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) In evaluating a child with a disability, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304, subd. (c) (6).) A school district's failure to conduct appropriate assessment or assess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F. 3d 1025, 1031-1033.)

21. District was aware Student was undergoing outside therapy and was being evaluated for mood disorders. District staff also noted swings in Student's moods. As a result, Student contends District was obligated to evaluate Student for mood disorders. Dr. Rome opined that several of Student's behaviors were characteristic of mood disorders, and criticized District for downplaying the significance of these behaviors. Student's argument ignores the purpose of Student's psycho-educational assessment. This was Student's initial assessment to determine eligibility for special education and related services, not to diagnose a mental health illness. Academically, Student was doing well. Student's improper behaviors and ADHD appeared to be the only areas of need as they prevented him from accessing his school curriculum. Student did not demonstrate that the psycho-educational assessment was not an accurate as to Student's emotional difficulties and their impact on his ability to progress.

22. Student further contends District improperly assessed Student.

23. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the local educational agency." (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, § 56320, subd. (g).)

24. Student's psycho-educational assessment was administered by Ms. Allen, a credentialed and fully competent school psychologist. The academic portion of Student's assessment was administered by a District resource specialist.

25. Tests and assessment materials must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

26. 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. (20 U.S.C. § 1414(b)(2)(B); Ed. Code, § 56320, subd. (e).) A district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining whether he is eligible for special education, and what the content of his program should be. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) An assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).)

27. Student contends District failed to gather relevant information about Student by failing to interview Student as part of its assessment since the reported conversations with Student were obtained and related to events prior to the assessment. The procedural requirements regarding assessment tools do not specify when information must be obtained, but rather provides that, the tools, i.e., interviews, provide relevant information that directly assists persons in determining the educational needs of the child. Ms. Allen had extensive contact and discussions with Student, especially between September and December 2012. This information, though not initially obtained for an assessment, was nevertheless current and relevant.

28. Student further contends District failed to interview Student’s outside counselor or report on that interview in the assessment report. No outside assessment reports were forthcoming to District. Ms. Frausto was in the process of assessing Student at the same time as District. In argument, assuming a procedural violation, this omission did not affect the validity of the assessment or prevent the IEP team from making an offer of FAPE. Student still qualified for special education under the category of emotional disturbance and the information District obtained painted an accurate picture as to Student’s deficits and educationally related mental health needs. Further, Ms. Garcia, Student’s subsequent therapist, accompanied Grandmother to the IEP meeting and was available to answer questions or correct misconceptions regarding Student’s mental health needs.

29. A district must ensure that the child is observed in her learning environment (including the regular classroom setting) to document academic performance and behavior in the areas of difficulty. (34 C.F.R. § 300.310(a).)

30. Student contends he was not observed in his classroom or during non-structured times such as recess. The majority of the observations of Student were made prior to the assessment. Again, these observations were close in time and relevant to the areas of suspected need, specifically, Student’s behavior and ADHD. Additional classroom observations were provided by two of Student’s fourth grade teachers. Each teacher reported Student’s failure to complete work, behaviors, and mood swings. Each teacher reported Student was capable of accurately completing grade level academics. Student was also observed during standardized testing. The assessments provided enough information to accurately conclude Student’s behaviors and ADHD had a negative impact on his ability to access his education.

31. To aid the IEP team in determining eligibility, an assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subs. (a), (b).)

32. The evidence shows that District completed a comprehensive psycho-educational evaluation that assessed Student in all areas of suspected need, and acknowledged educational concerns in the areas of hyperactivity, aggression, conduct, attention, adaptability, social skills, and depression. The assessment team provided a written assessment report to the IEP team, including Grandmother, in which its conclusions were supported by the information known by District at the time of the assessment; it appropriately concluded that Student had educational needs in the area of task completion, social/emotional, and behavior, and qualified for special education and related services.

Issue 4(a): Need for a Non-Public School

33. Student contends the placement offered by District was insufficient to meet Student's needs.

34. District offered Student continuing placement in a general education classroom with supports consisting of three goals related to Student's behaviors and inability to complete his classwork. The goals were supported by school-based counseling, access to a resource specialist, and accommodations to address Student's ADHD needs. Grandmother consented to the January 24, 2013 IEP in its totality. Further, Student's therapist did not object to the placement and services as proposed in the January 24, 2013 IEP. She believed the goals, and school-based counseling services could be appropriate with his twice weekly (outside) therapy sessions. Reiteration of these findings is important as the goals and services drive the placement.

35. In addition to providing a FAPE, a child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56342.) When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

36. Student contends that the requirements of *Rachel H.* necessitate a non-public school placement for Student. First, Student argues that Student had already been placed in a general education classroom and did not derive an educational benefit. While it is true that Student was previously a general education student, he had never before been a special education student in a general education class with the supports and services provided by an

IEP. While Student's academic progress was impacted by his behaviors, academically before the creation of his IEP, Student was still performing at grade level. This does not suggest a need for a more restrictive environment as the IEP would provide with special education supports and services.

37. Second, Student contends that his unique needs in the area of socialization resulted in conflict with others when he worked in group settings. While this behavior had been observed, Student had also been observed to be compliant when on his medications. The non-academic benefits of interaction with his peers far exceed Student's difficulties observed in close proximity to others. Further, Student's goals were crafted to address his social/emotional needs.

38. Third, Student contends his disruptive presence in the general education classroom impedes learning. Student's outbursts took time away from educating others, and Student himself spent less time in the classroom due to referrals. There was little testimony regarding Student's disruptive presence in the classroom. Mr. McKinnon, Student's fourth grade teacher, the person most closely involved with Student's classroom conduct, provided information and observations of Student in the classroom. Mr. McKinnon was also a member of the IEP team and did not suggest Student required anything other than the general education setting.

39. Student also suggests that Student required a more restrictive placement due to his attendance difficulties. While Student's attendance may speak to other issues, attendance is not a determining factor for a more restrictive classroom environment. Dr. Rome's determination that Student belonged in residential treatment, was also unmerited, based upon the information available to District and therapists alike in 2011-2012. Information from Student's witnesses, which was unknown to the District until Student's removal, was that his attendance problems were more the result of his living situation.

40. Lastly, Student suggests that placement in a non-public school was more expensive than a general education placement. This remains nothing but conjecture.

41. Based upon the above findings, the January 24, 2013 IEP provided approved goals and services for Student that comported with Student's unique needs as understood by the IEP team based upon the information, data, and observations available to them at the time. The IEP could be easily implemented in the general education setting, and it was reasonably calculated to provide Student with educational benefit. As such, it constitutes an appropriate placement for Student. Student has failed to establish otherwise.

Issue 4(b): Functional Behavior Assessment

42. Student's contentions are unclear. Student's issue contends District denied him a FAPE by failing to conduct a functional behavioral assessment. On the other hand, Student argued District had an obligation to conduct a functional analysis assessment based

upon California Education Code sections 56520, et seq., which was still in effect in 2011-2013.

43. Education Code section 56520, et seq., commonly known as the Hughes Bill, concerns behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill required that a school district conduct a functional analysis assessment, resulting in a behavior intervention plan, when a student develops a “serious behavior problem,” and the IEP team finds that the instructional/behavioral approaches specified in the student’s IEP have been ineffective. (Former Cal. Code Regs., tit. 5, §§ 3001, subds. (d), (e), and (g), repealed July 1, 2014.)

44. A serious behavior problem means the individual’s behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil’s IEP are found to be ineffective. (Former Cal. Code Regs., tit. 5, § 3001, subd. (ab) , repealed July 1, 2014.)

45. Student exhibited behaviors, which included statements he wanted to die, hitting himself, and banging his head against the wall. This is in addition to his use of explicit language, and aggressive conduct towards others. There is no dispute these behaviors are maladaptive; however, these behaviors did not rise to the level asserted by Student. In the third grade Student’s behaviors were “few and far between.” Mr. Mercado reported Student was not a danger to himself or others. Ms. Efstratios reported Student was not serious about wanting to die. Student’s therapist, Ms. Frausto also indicated Student was not suicidal and did not intend to harm himself. Student’s behaviors were noticeably reduced when he was properly medicated. Even during the few incidents where Student would tantrum on the floor, spit, swear, and crawl under a desk, District staff was able to calm him, and Student was able to return to normal activities. Student’s conduct did not rise to the level of a serious behavior problem that warranted the requested assessment.

46. Student further contended that District denied him a FAPE by failing to conduct a functional behavior assessment.

47. An IEP team must consider whether a child’s behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) A school district must develop and implement a behavior intervention plan if the IEP team finds that the child’s behavior impedes his own learning or the learning of others. (34 C.F.R. § 300.324(a)(2)(i)(2006).)

48. Neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for the behavior intervention plan contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations

of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

49. Although failure to develop a behavior plan where required can deny a FAPE, the lack of a written or formal plan, specifically called a behavior intervention plan, is not a per se denial of a FAPE. (*Neosho R-V School District v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *E.H. v. Board of Education of Shenendehowa Central School District* (2d Cir. 2009) 361 Fed.Appx. 156, 160 (cert. denied (2010) 559 U.S. 1037, 130 S.Ct. 2064.)

50. In California, the IEP team must also consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).)

51. The IEP team created a behavior support plan for Student, which addressed the behaviors that were impeding Student's learning. The behavior support plan identified Student's problem behaviors, and crafted positive behavior interventions that were designed to present Student with options to appropriately modify his behaviors and express his needs. While District developed the plan without a formal behavior assessment, with no data formally collected, the behavior support plan was based upon undisputed District extensive observations of Student's behaviors, which Ms. Allen concluded was sufficient to develop a positive behavior support plan.

52. Student contends the behavior support plan was based upon interventions, which were proven ineffective. While Student continued to exhibit maladaptive behaviors prior to the IEP meeting, not all of the interventions were ineffective. As example, Student could be appropriately calmed and returned to class. Medication that Grandmother obtained for Student could be properly administered. Student had responded well to calming techniques. Other interventions had not yet been utilized, such as developing a hand signal to request a break. Further, Student's negative behaviors prior to the IEP determined Student's behavior predictors, and District developed the proposed interventions in response to those very behaviors. The weight of the evidence demonstrated that District created appropriate interventions to address the behaviors that impeded Student's learning, and the behavior support plan was designed to make positive and lasting behavioral progress with those interventions in place. Student presented no evidence that the proposed interventions did not comport to Student's identified behaviors or could not be successful if implemented. District was not required to conduct a functional behavior assessment to provide Student with an appropriate behavior support plan.

Issue 4(c): Educationally Related Mental Health Assessment.

53. Student contends Districts failure to provide Student with an educationally related mental health assessment denied him a FAPE. This contention is primarily based upon the opinion of Dr. Rome.

54. Special education related services may include psychological services, social work services, and counseling, including rehabilitation counseling...as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34 (a); Ed Code, § 56363, subd. (a) & (b).)

55. Student contends that his critical mental health issues were abundantly evident to District and required an educationally required mental health assessment. In hindsight, Student's trajectory is apparent. By reading Student's education file, Student's history of maladaptive behaviors is apparent. What is not apparent from simply reading Student's history is the observations of District personnel, and interactions with Student on a day to day basis. Reading a history does not create a percipient witness to the events as they transpired. District witnesses recounted the same events that Dr. Rome interpreted in his review of Student's records. In spite of defining the same events, District witnesses presented a completely different perspective of Student's behaviors based upon their personal observations of Student's moods, intensity and demeanor. Given the contradictions between Dr. Rome and District, significantly more weight is given to the consistent descriptions of Student presented by District witnesses who interpreted Student's behaviors in the context of the time and settings they actually occurred.

56. The consensus of those actually involved with Student, Mr. Mercado, Mr. McKinnon, Ms. Allen, Ms. Tapia, Ms. Efstratios, and even Ms. Frausto, concluded that Student was not suicidal, not a danger to himself or to others. Student's teacher saw no reason to remove Student from his general education setting. District was not provided with any information regarding Student's abusive family, alleged traumas or Department of Child and Family Services intervention until well after Student left District. Student's therapists shared little information regarding his therapy. No one, including Student's therapists suggested that Student needed an educationally related mental health assessment, even when presented with the opportunity at the January 24, 2014 IEP meeting.

57. Ms. Tapia, Ms. Allen and Ms. Efstratios all reported that positive interventions were often successful in reducing Student's behaviors. Further, Student's behaviors appeared to be often tied to his medication and school attendance. The January 24, 2013 IEP addressed Student's behavioral and social/emotional needs as known to District in 2012-2013. The accommodations appropriately addressed Student's ADHD concerns. The goals comported with Student's specific needs as well as with the behavior support plan. In spite of his behaviors and lack of class attendance, Student was capable of exhibited grade level academic ability when he completed his work. There was no reason to believe that Student's behaviors at school, while maladaptive, could not be manage in a general education setting with the added support of a behavior plan and corresponding behavior goals, and the utilization of school-based counseling to reinforce positive behaviors and modify problem behaviors. Based upon the information available to District at the time of the January 24, 2014 IEP meeting, District determination that Student did not require an educationally related mental health assessment was appropriate. District's January 24, 2013 IEP did not deny Student a FAPE.

