

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

SADDLEBACK VALLEY UNIFIED  
SCHOOL DISTRICT.

OAH CASE NO. 2010090212

SADDLEBACK VALLEY UNIFIED  
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2010100932

**DECISION**

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Mission Viejo, California on June 1, 2, 3, 7 and 8, 2011. Student was represented by Timothy Adams and Drew Massey, Attorneys at Law. Student's mother (Mother) and maternal grandmother were present for the hearing. Epiphany Owen, Attorney at Law, represented the Saddleback Unified School District (District). Dr. Rona Martin, Director of Special Education, and Susan De Pass, Program Specialist for the District, attended each day of hearing.

Student filed a due process hearing request (complaint) on September 2, 2010. District filed its own complaint on October 18, 2010. A joint motion to continue Student's case was granted on October 20, 2010. A joint motion to consolidate the two cases and continue District's case was granted on November 5, 2010. At that time, Student's case was designated the lead case with all statutory timelines running from the filing date of Student's complaint. On December 29, 2010, Student filed an amended complaint. The amended complaint reset all statutory timelines. An additional joint motion to continue was granted for good cause on February 10, 2011. A subsequent continuance was granted on March 1, 2011 for good cause. At the close of the hearing on June 8, 2011, the parties requested, and

were granted leave to file closing briefs in lieu of oral argument by June 22, 2011. Both parties timely filed closing briefs and the record was closed on June 22, 2011.

## ISSUES

### *Student's Issues*

1. Did District deny Student a free appropriate public education (FAPE) by failing to identify Student as a child with disabilities and provide her with a FAPE from October 2009 until March 2010?
2. Did District deny Student a FAPE by conducting an inappropriate psycho-educational assessment on or around March 12, 2010?
3. Did District deny student a FAPE for the 2009-2010 and 2010-2011 school years in the individualized educational program (IEP) dated March 26, 2010:
  - (a) by failing to include all appropriate participants in the IEP team;
  - (b) by failing to include baselines of performance in the IEP;
  - (c) by failing to offer an appropriate placement on a small campus, with small class size, removed from a peer group that reinforced negative behaviors; and
  - (d) by failing to offer appropriate supports including counseling, individual, group and family therapy.

### *District's Issue*

4. Was District's psycho-educational assessment performed on or around March 12, 2010, appropriate such that Student is not entitled to an independent educational evaluation (IEE)?

## FACTUAL FINDINGS

1. Student is a 16-year-old young woman eligible for special education under the categories of other health impaired (OHI) and emotional disturbance (ED). Student was first found eligible for special education and related services on March 26, 2010. Student has a diagnosis of Dsthymia, a mild, but prolonged form of depression, and an unspecified mood disorder.
2. Student attended school in Michigan until her parents divorced in 2007. At the time of the divorce, Student was in sixth grade. Around the same time, Student's boyfriend was killed in an accident. The combination of the death and the divorce left Student very sad and her grades deteriorated. After the divorce, Student initially remained in Michigan with her father to complete her sixth grade year while Mother moved to California. Student moved to California and enrolled in a religious school affiliated with Mother's employer for

seventh grade during the 2007-2008 school year. Student was not happy in California and did not want to obey Mother's rules, so she moved back to Michigan to live with her father in October of 2007. When she returned to Michigan, Student started using drugs and experimenting sexually. Mother flew back to Michigan and met with Student's father and school officials concerning Student's poor academic performance and behavior issues. Notes from Student's therapist reference an incident of sexual abuse by a boyfriend and fear of a potential pregnancy. These factors resulted in Mother, in May 2008, moving Student back to California to live with her, which was the last month of seventh grade. Student attended District's Santa Margarita Intermediate School (Santa Margarita) for the final month of the 2007-2008 school year and the entire 2008-2009 school year. Mother maintained contact with the school counselor during Student's attendance at Santa Margarita.

3. Mother and Student clashed on a regular basis. According to Mother, Student was disrespectful and refused to follow Mother's rules. Beginning in December of 2008, Student and Mother participated in counseling at Kaiser Permanente Medical Group (Kaiser) with licensed social worker J.E. Churchill (Churchill). Churchill saw Student and Mother for issues related to their relationship and Student's behavior. Churchill referred Student to Kaiser Psychiatrist Dr. David Allyn (Allyn) for a medication evaluation. Student began treating with Allyn on January 23, 2009. Allyn diagnosed Student with Dsthymia, Oppositional Defiant Disorder, alcohol abuse (in remission) and Cannabis abuse (in remission). Allyn prescribed 20 milligrams of Prozac per day for Student, placed her on regular urinalysis schedule and continued to see her on a quarterly basis. Mother and Student both felt that the Prozac was helping Student. In May of 2009, Mother terminated the therapy with Churchill because she believed it was not really helpful, but Student continued to receive treatment from Allyn. Student had a few relapses of alcohol and Marijuana use in the following months.<sup>1</sup>

4. In July of 2009, Mother took Student to the emergency room at Sand Canyon Hospital (Sand Canyon) because Student had a temper outburst. Student's temper outburst resulted from Mother taking away Student's cellular telephone as a punishment for not coming home the night before. Student refused to either go home with Mother or go to her maternal grandmother's house. She was released by the hospital, because she was not a danger to herself or others.

5. On July 30, 2009, Mother and Student went to see Allyn on an urgent visit following Student's trip to Sand Canyon. At that time, Mother expressed her frustration with Student's behavior and outbursts. She expressed to Allyn that she would like to send Student away for awhile. Allyn discussed with Mother that sending Student away to live with a relative would not change her behavioral issues and that Student was not a candidate for in-patient psychiatric care. He also advised her that a residential treatment center (RTC) was not an option unless she wanted to pay for it herself. Allyn recommended that Mother and Student participate in the Kaiser Resolving Adolescent Problems (RAP) program. Allyn

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<sup>1</sup> Allyn's November treatment notes indicated that Student advised him that she used marijuana three times during the period of July 30, 2009 to November 2, 2009.

opined that the RAP program, which was led by licensed clinical psychologist Adam Pollock (Pollock) and licensed clinical social worker Margaret Poole (Poole), would provide the more intensive intervention that Mother sought.

6. Beginning in July of 2009, Mother and Student participated in the RAP program. RAP was a continuing program which consisted of family and group therapy. Parent attended one to two hours of group therapy a week, while Student attended a separate group therapy for the same time. Mother and Student also attended a family therapy group twice per week as part of RAP.

7. On September 9, 2009, Student enrolled in the ninth grade at District's Trabucco Hills High School (Trabucco Hills), a 3000 student comprehensive high school. Student was enrolled in general education classes, which included Spanish 1, Earth Science, Physical Education, Algebra 1A, History through Film, and English 1.

8. With Mother's permission, on October 15, 2009, Pollock sent an email to Trabucco Hills guidance counselor Christa Schulz (Schulz). Schulz has been a guidance counselor at Trabucco Hills since 1998. Before serving as a guidance counselor, Schulz was a middle school English teacher and associate student body advisor at District's Los Alisos Intermediate School. Schulz received a bachelor of arts degree in English from the University of California, Irvine in 1989 and a single subject English teaching credential in 1992. She received a master of arts degree in school counseling and a Certification in Personnel Services from California State University at Long Beach in 1998. Schulz's responsibilities included designing career units, parent nights, participating in section 504 meetings, attending student study team (SST) meetings, preparing letters of recommendation, participating in the scholarship committee, handling at-risk appointments, handling crisis intervention, and foreign students.

9. In his email, Pollock asked that Student be given an opportunity to make up her missing home work. He advised Schulz that Student's "major depressive disorder, relationships/boyfriend issues, familial stressors and struggles with drug abuse have all combined negatively to impact her ability to concentrate and focus on school-work." Pollock did not ask for Student to be assessed for special education. His intention was to get some relief for Student from the stress she felt from being behind in her school work.

10. On October 15, 2009, Mother spoke to Schulz at Back to School Night. At that time, Mother approached her with concerns about Student's drug use and academic problems. Mother also advised her that Pollock had sent an email requesting make up work and consideration for Student. Schulz had not seen the email. She opened her computer and read the email with Mother at her side. Schulz opined that Student had enough time in the school year to raise her grades without doing make up work. Schulz was concerned that Student might become overwhelmed trying to do make up work and keep up with current assignments. Schulz responded to Pollock advising that there was plenty of time for Student to bring up her grades without making up work and that she would talk with Mother more

about monitoring of homework and address the issue. Schulz scheduled a meeting with Mother for October 21, 2009.

11. The meeting was later rescheduled to October 22, 2009 due to Schulz's scheduling conflict. On October 21, 2009, Mother cancelled the meeting by way of an email and advised that "I will have to cancel our appointment for Thursday Oct. 22nd. Per the advice of [Student's] therapist, we are seeking an alternate way to handle the situation." Schulz responded by email on October 26, 2009 asking Mother to "Let me know if I can do anything to lend support."

12. At hearing, Schulz explained that she regularly sees freshman with social and academic difficulties during the first semester of ninth grade. She opined that the transition from middle school to high school is more difficult for some students than it is for other students. It is not uncommon for students to have difficulties adjusting to the social environment, the larger campus and the more rigorous academics. After the first semester of ninth grade, the Trabucco Hills guidance counselor and staff typically review the grades of all ninth graders. For the ninth graders with poor grades, various resources are provided. Some of those resources include a ninth grade intervention program which involves teachers working individually with a student, a mentor program which matches junior and senior students with the ninth graders, guidance counselor services, changes to class schedules, and/or enrollment in a Pass Skills class that teaches study skills, organization and strategies to be successful in class. Schulz usually invites the parents of freshman that appear to be at-risk to the "freshman at-risk night." The "freshman at-risk night" is an opportunity for school staff to answer parent concerns and questions. She invited Mother, but Mother was unable to attend due to a schedule conflict.

13. At hearing, Schulz candidly and credibly testified that she was familiar with the District's "child find" obligations to find and serve students eligible for special education, and had a general understanding of the applicable law, but admitted that she did not know the details of the law governing District's duties.

14. In October 2009, Student was referred to, and attended, a Kaiser eight week outpatient chemical and drug dependency group therapy with Kaiser Marriage and Family therapist Tim Cyrus.

15. On the advice of advocate Juda Carter, Mother sent a letter dated November 23, 2009, to Schulz requesting a special education assessment for Student. Schulz forwarded the letter to school psychologist Stephanie Anderson (Anderson). Anderson received a bachelor of arts degree in psychology with a minor in education from the University of California at Irvine in 2003. She received a master of arts degree in school psychology in 2006. She also received a pupil service credential in school psychology. Anderson also had a certification in behavior intervention case management (BICM) from the Orange County Department of Education.

16. Anderson received the request for assessment on November 24, 2009. Anderson called Mother on November 30, 2009, after the Thanksgiving break. Mother and Anderson agreed to meet for a student study team (SST) meeting on December 7, 2009.

17. On December 7, 2009, a SST team, consisting of Anderson and Mother, convened. In preparation for the SST meeting, Anderson contacted the Trabucco Hills assistant principal Jonathan Von Tassel, as well as Schulz, regarding Student. Anderson also reviewed Student's academic information in the "Aries" computer system maintained by the District. The "Aries" system contains grades, information on homework and class work completion, attendance, state testing, and discipline records. Student's records contained a few insignificant discipline incidents involving the use of a cellular telephone during school hours, talking in class, chewing gum, putting on make up in class and not participating in physical education. In the most serious of the incidents, Student called the physical education teacher "a stupid fat ass." She received two in-house suspensions for not attending the assigned detention and Saturday school for the violations. Student's records did show poor grades which appeared to Anderson to be attributable to her failure to complete her homework. At the time, Student was failing four of her six classes. At the SST meeting, Mother expressed her concerns about Student's behavior and drug use which she believed were affecting her school work. Mother also disclosed that Student had received extensive counseling and was in the seventh week of an eight week outpatient drug counseling program provided by Kaiser.

18. Anderson and Mother agreed on a set of general education interventions to be implemented. They agreed that a planner check would be initiated wherein Student would write her assignments in a planner, the teachers were to sign off on the planner, and Mother was to check the planner and sign off each day. Mother and Anderson also discussed the possibility of changing Student's class schedule to remove Spanish and add a video/TV production class. They also discussed changing Student's physical education teacher due to a personality conflict between Student and the teacher. Anderson agreed to contact the teachers about make up work and tutoring for Student. Mother advised Anderson that Student had expressed an interest in going to Silverado Continuation High School (Silverado). Anderson told Mother that she would explain to Student that Silverado was designed for students that needed to make up credits and was not appropriate for Student at that time. Anderson agreed to talk to Student about the planner check, class changes, and teacher change, and would then contact Mother again.

19. During the course of the meeting with Anderson, Mother advised that Student was taking Prozac. At hearing, Anderson testified that she did not believe that the fact that Student was taking Prozac alone warranted a special education assessment. Anderson and Mother did not discuss placement at a residential treatment center (RTC) or Student's history of depression. Anderson was not aware of Pollock's email to Schulz, which referenced a depressive disorder at the time of the SST meeting.

20. Anderson and Mother agreed to hold a follow-up SST meeting in January of 2010, after the holiday break (December 19, 2009 to January 4, 2010) and agreed that a

special education assessment should be postponed until after the interventions were implemented. At the SST meeting, Mother signed a release of records for Pollock and marriage and family therapist Timothy Cyrus.

21. At Anderson's request, on December 7, 2009, Schulz drafted an email to all of Student's teachers advising that Student was "struggling with some personal issues that [Mother] may choose to share with you." In her email, Schulz asked the teachers to advise her of any make up work that Student could complete or tutoring that could be made available to Student. The email also asked the teachers to opine as to whether Student should remain in college preparation classes, so that a change could be made for the second semester, if needed. Schulz copied Mother on the email.

22. Student's English teacher, Katherine Petty (Petty), received a bachelor of arts degree in English literature with a minor in European history from the University of Nevada, Reno in 2001. She received a master of arts degree in teaching from the University of California at Irvine in 2003. She also holds a California single subject credential for language arts. Petty responded to Schulz's email the same day and copied Mother on her response. She opined that Student was not misplaced in her class and was an excellent writer. She noted that Student "is disorganized and either can't remember what to do or just chooses not to do it." Petty noted that she spoke to Student and would be meeting with her to provide make up work. She also noted that she posted all homework assignments on the internet so Student could check on her assignments if she forgot what to do and Mother could monitor progress. At hearing, Petty testified that Student participated when called upon and did not display signs of depression or problems in school. To Petty, Student appeared social and worked well with others on school projects and received good grades on the work she completed in class. However, by the end of December of 2009, Student was receiving a failing grade because of her failure to complete her homework

23. Linda Kimble was Student's teacher in History through Film, an elective class. Kimble received a bachelor of arts in history from the University of California in Los Angeles and a master of science in administration from the California State University in Fullerton. Kimble holds a clear administrative credential and a standard elementary school credential. She had been a District teacher for 23 years and had taught every grade and adult education. Kimble opined that Student was an excellent writer, but not motivated. She did not feel that Student had a problem that warranted a special education assessment. She saw Student as sometimes being sad about disagreements with Mother, but sociable with peers. Student never presented herself as hostile or argumentative in Kimble's class.

24. On December 9, 2009, Anderson called Student into the office and spoke with her regarding Student's desire to attend Silverado and about her school performance. Anderson advised Student that Silverado was not appropriate for a first semester freshman. Anderson also emphasized the importance of completing homework. At hearing, Anderson credibly testified that Student behaved appropriately during the meeting and gave no outward indications of sadness or depression.

25. On December 10, 2009, Anderson left a voice mail message for Mother, but did not receive a return call from Mother. At hearing, Mother testified that she did not remember receiving such a phone message. Anderson had no indication from Mother that she was dissatisfied with the results of the SST meeting or not in agreement with the course of action.

26. Mother met advocate Jillian Bonnington through another parent in the RAP group sometime in mid-December of 2009, and hired her as an educational advocate. In that capacity, Bonnington wrote a letter to District on December 21, 2009, during the winter break, requesting Student's records, an assessment plan and a referral to Orange County Health Care Agency (OCHCA), the county mental health provider, for assessment. The letter advised that Student would be available to OCHCA and District for 10 days for assessment; thereafter, Mother would be making a private residential placement and would seek reimbursement from District for the placement.

27. Mother testified that she was on vacation for two weeks during the winter holidays and had planned to have Student placed at an RTC on January 4, 2010. Mother planned to make the placement because of her growing concerns about Student's drug use, her failure to come home for days at a time, and defiance when she was at home. Mother had grown frustrated and weary over Student's behavior. Mother advanced the enrollment date when she was contacted by the police on the night of December 28, 2009, advising that Student had been detained with two young men who were in possession of drugs. Student was not in possession of drugs. Mother advised the police that Student would be enrolled in an RTC shortly. Student was released to Mother without charges. On December 29, 2009, an escort service hired by Mother transported Student to Solacium Sunrise (Sunrise), an RTC in Hurricane, Utah. Student was not aware that Mother intended to send her to an RTC and was taken by surprise.

28. Sunrise is a 24-hour residential treatment center (RTC) for adolescent girls. Sunrise is a private, for-profit entity and is not a certified California Non-Public School (NPS). The residential program combines therapy and school. Sunrise describes itself as designed for girls 13 years old to 17 years old, who are stable enough to engage in a long-term personal growth program and therapy, but who need the structure of residential care. Sunrise accepts girls who are struggling with defiance, substance abuse, depression, anxiety, school avoidance, learning disabilities, low self-esteem, Attention Deficit Disorder (ADD), Attention Deficit Hyperactivity Disorder (ADHD), sexual promiscuity, and eating disorders. Sunrise has a maximum staffing ratio of one staff member per six program participants. The facility is located in a house which has been converted to a treatment facility and living quarters. A typical program participant stays at Sunrise for six to nine months. Student ended up staying there for nine and a half months.

29. N. Brad Simpson (Simpson) is the Clinical Director of Sunrise and was Student's primary therapist. Simpson is a licensed clinical social worker. He received a bachelor of arts degree in social work from Brigham Young University in 2005. He also received a master of arts in social work in 2005 from the University of Utah. According to

Simpson's report and his testimony at hearing, Student was admitted to Sunrise for mood swings, parent-child conflict, substance abuse, poor academic performance, and poor peer relationships. Student was initially resistant to treatment when she arrived at Sunrise. She was very angry with her Mother for placing her at Sunrise. Student did not want to interact with the other program participants and generally expressed that she did not belong at Sunrise. After a few months, Student settled into the therapy and academic routine. She progressed through Sunrise's five-level system during the course of her stay. While at Sunrise, Student attended academic classes each day, participated in individual counseling once per week, and participated in family therapy on the phone, and in person, with her mother. Her treatment included three quarterly parent therapeutic weekends, equine therapy, dialectical behavioral therapy skills training, relational building groups, self-management and recovery training (SMART) recovery groups, recreational therapy, and milieu therapy.

30. When District reopened after the holiday break on January 4, 2010, District special education director Dr. Rona Martin (Martin) wrote a letter to Bonnington explaining that "the 10 days prior written notice timeline will commence once school reopens in January and [Student] will need to be made available to District staff for that 10 day period."

31. On January 6, 2010, District Program Specialist Susan De Pass wrote and faxed a letter to Bonnington advising that District had scheduled a meeting for January 7, 2010, to discuss the December 21, 2010 letter. Bonnington replied that she and Mother were not available on such short notice and could not participate in a meeting without the records requested in the December 21, 2009 letter. Also on January 6, 2010, De Pass requested Student's records from Kaiser pursuant to the release signed by Mother on December 7, 2009.

32. A SST meeting was held on January 12, 2010. At that time, Dr. Rona Martin, Program Specialist Susan DePass, school psychologist Stephanie Anderson, advocate Jillian Bonnington and Mother met. They discussed Student's depression, parent-child problems, the course of her mental health treatment and the events leading to student's placement at Sunrise RTC. On January 12, 2010, Mother signed an assessment plan giving permission for the District to conduct a psychoeducational assessment. The assessment plan provided for a school psychologist to assess Student in the areas of academic achievement, intellectual development, psycho-motor development, social-emotional, and behavior status. However, Student was not made available for the assessment. Mother asserted that Student was not stable enough to return to California for assessment and insisted that District assess Student in Utah.

33. On January 12, 2011, Mother signed a release for records from Kaiser providers Allyn, Pollock and Poole, as well as records from Sunrise. On January 14, 2011, DePass sent the additional releases along with requests for records to Kaiser and to Sunrise. From Sunrise, District received a master treatment plan and a psychosocial assessment. Kaiser only provided records from Churchill and Allyn. De Pass and other District staff made several requests to Kaiser for complete records, but were not provided any additional records.

34. On March 1, 2010, the parties agreed to extend the 60-day timeline for review of the District psychoeducational assessment to March 26, 2010.

35. District school psychologist Frances Dizon (Dizon) flew to Hurricane, Utah and conducted a psychoeducational assessment of Student at Sunrise on March 12, 2010. Dizon received a bachelor of arts in psychology and speech communications from the University of San Diego, a master of arts degree in educational psychology and a master of arts degree in counseling from Loyola Marymount University in 2005. He received a Tier I Preliminary Administrative Credential in 2008. Dizon has completed all coursework requirements for a doctorate in education from Chapman University and is scheduled to present his dissertation in December of 2011. Dizon is an experienced school psychologist and has served as a school psychologist for District since 2005. He is assigned to Mission Viejo High School for four and a half days per week. He also spends one half of a day each week at Trabucco Hills High School. Dizon conducts all assessments for District students placed in RTCs.

36. Dizon carefully selected assessment tools that were not discriminatory or biased. The assessment was administered in English, Student's primary language. Dizon administered the Woodcock Johnson Tests of Cognitive Abilities, 3rd Edition (WJ-III), Woodcock Johnson Tests of Achievement, 3rd Edition (WJ Achievement-III), Differential Test of Conduct and Emotional Problems (DTCEP), Connors' Rating Scale, 3rd Edition Parent and Teacher Rating scales (Connors-3), Behavior Assessment System for Children, 2nd Edition (BASC-2) Parent, Teacher and self-report adolescent scales, and the Million Adolescent Clinical Inventory (MACI). Dizon completed a health and developmental history with Mother, interviewed Student and conducted a review of records which included the Sunrise master treatment plan, Allyn's records, Churchill's records and District records. Dizon did not conduct a classroom observation or personal interviews with Student's teachers. He arrived after school had finished for the day and the teachers were no longer available. Dizon did not believe that it was necessary to conduct a classroom observation because there were no concerns about her classroom behavior. Instead, he concentrated on his interview and observation of Student during the assessment. He provided rating scales for the teachers to ascertain information about Student's social emotional status.

37. Dizon used the WJ-III to evaluate Student's cognitive functioning. Student received a general intelligence score of 102, within the average range. Dizon used the WJ Achievement-III to evaluate Student's academic achievement. Student performed in the average range on this measure. She received a standard score of 104 in broad reading, a standard score of 92 in broad math and a standard score of 98 in written language.

38. Dizon used the Connors-3 rating scales, MACI, DTCEP and BASC-II to evaluate Student's social emotional status. The Connors-3 is a multimodal assessment tool for the diagnosis of attention deficit hyperactivity disorder and related behavior problems. The scales include measures of inattention, hyperactivity, impulsivity, learning problems, executive functioning, aggression, peer relations, and oppositional defiance. Mother completed the parent rating scale. Mother's rating scales suggested the possible presence of

a conduct disorder or oppositional defiant disorder. Katherine Whittekiend (Whittekiend), the Sunrise academic director and Student's teachers Elizabeth Hess (Hess) and Jacob Grimm (Grimm) completed the teacher rating scales. The scales completed by Hess and Whittekiend did not contain any elevated ratings. Grimm's rating scales were consistent with the possibility of conduct disorder and oppositional defiant disorder.

39. The MACI is a clinically based 160 item self-reporting scale that identifies patterns of emotional discomfort, social difficulties and psychological traits in adolescents. There are 29 diagnostic scales listed as atypical behaviors and feelings. The responses are then scored by a testing service. The MACI report reflected elevated levels of abnormal internalizing and externalizing behaviors, feelings consistent with antisocial and aggressive/sadistic personality traits with histrionic and negativistic features, substance abuse, conduct disorder and parent-child relational problems.

40. The DTCEP is a 63 item true/false rating scale designed for individuals that know a student well enough to rate them based on certain behaviors related to conduct and emotional problems. The DTCEP does not use a self-report scale and according to the technical manual, its use with parents is not recommended. The DTCEP is designed to provide information about conduct problems and emotional disturbance. Whittekiend, Hess and Grimm completed the DTCEP rating scales. The scales completed by Whittekiend and Hess rated Student within the normal range. The scale completed by Grimm showed the potential presence of a serious conduct problem. Dizon opined that the overall results of the DTCEP did not suggest either an emotional disturbance or a conduct problem.

41. The BASC-II is an assessment rating scale that measures a wide range of internalizing and externalizing psychological and physiological behaviors. There are a total of 16 scales on the self-report form, and 14 scales on the teacher and parent rating scales. Student completed a self-report rating scale. Student's self-report did not have any rating in the clinically significant range. The parent rating scale was completed by Mother. Mother's responses showed clinically significant ratings in conduct disorder, aggression, hyperactivity, functional communication and activities of daily living. The rating scales completed by Whittekiend did not rate Student in the clinically significant range in any areas. The rating scales completed by Hess indicated clinical significance in the areas of somatization and atypicality. Grimm rated Student in the clinically significant range in aggression and atypicality.

42. Dizon opined that Student did not meet the criterion for eligibility under emotional disturbance or specific learning disability based upon the assessment results. In his report, Dizon reviewed the criterion as it applied to Student. Dizon reasoned that Student was capable of learning as evidenced by her performance on the WJ-III achievement, was able to build and maintain satisfactory relationships, despite her failure to select friends that were positive influences, and did engage in rule breaking and anti-social behavior. Dizon reasoned that Student had the ability, but not the willingness, to get along with others. Dizon opined that the rating scales and observation did not show exhibition of inappropriate feelings or behaviors under normal circumstances. Dizon also noted that although Student

had been diagnosed with depression, dysthymia, and mood disorders, the current behavior rating scales did not indicate concerns with unhappiness or depressive symptoms. Dizon also did not find any indications of physical fears or symptoms associated with school or personal problems.

43. Dizon ruled out a specific learning disability because Student's assessed academic achievement, state testing results<sup>2</sup> and cognitive level were all within the average range. He did not consider Student's eligibility under the category of other health impairment (OHI).

44. An IEP meeting was held on March 26, 2010. Parent, advocate Bonnington, general education teacher Kevin Biggs, District school psychologist Dizon, District Program Specialist De Pass, and District Special Education Director Dr. Martin attended the meeting. At the meeting, the IEP team reviewed the psychoeducational report prepared by Dizon. Although Dizon's report did not recommend that Student be found eligible for special education, the IEP team ultimately found Student eligible for special education and related services under the categories of Other Health Impaired based upon her mood disorder and secondarily under the category of Emotional Disturbance (ED). At hearing, Dizon testified that he agreed with the IEP team's determination of eligibility. The IEP team determined that Student had unique educational needs in the areas of language arts, math, and history, asking for help, work completion, and self-management. Although District requested baseline academic information from Sunrise, none was provided. Sunrise representatives were not available to participate in the March 26, 2010 IEP meeting. Accordingly, District used the WJ-III achievement scores, information from Parent, and the psychoeducational report to establish baselines for the goals.

45. Measurable annual goals were drafted to address Student's academic and social-emotional areas of need as follows:

(1) By 3/26/2011, when given grade level literary text, Student will describe how literary devices including figurative language, setting, tone and characterization connect to issues and themes within the text for 80% accuracy in 2 of 3 trials as measured by teacher observation and tests.

(2) By 3/26/2011, when given core literature reading passages Student will define, restate and correctly provide examples which show her understanding of specialized vocabulary words with 80% accuracy in 2 of 3 trials as measured by teacher made assessments.

(3) By 3/26/2011, when given a writing prompt, Student will write an expository essay with a controlling thesis statement, clearly definable topic sentences, and supporting detail sentences (facts, statistics and specific examples) with 80% accuracy in 2 of 3 trials as measured by writing rubric.

(4) By December 26, 2010, when given a set of data about parallel and perpendicular lines and how slopes are related, Student will find the equation of a line

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<sup>2</sup> Student's State testing scores were all in the basic range.

perpendicular to a given line that passes through a given point with 80% accuracy in 3 of 4 trials as measured by Student work samples.

(5) By December 26, 2010, when given ten systems of equations, Student will use the methods of substitution and elimination to solve the systems with 80% accuracy in 4 out of 5 trials as measured by Student work samples and teacher made test and quizzes.

(6) By March 26, 2011, when given 10 quadratic equations, Student will solve each equation using the quadratic formula with 80% accuracy in 3 out of 5 trials as measured by work samples and teacher made tests or quizzes.

(7) By March 26, 2011, after reading a brief passage within history curriculum, when asked to draw inferences, conclusions, or generalizations about text, Student will use prior knowledge to make and confirm inferences, conclusions, or generalizations and support them with historical textual evidence with 80% accuracy in 4 of 5 trials as measured by Student work samples/teacher charted observations.

(8) By March 26, 2011, when given a grade level history textbook, Student will demonstrate comprehension of historical content by making predictions, comparing and contrasting, distinguishing between cause and effect, and distinguishing between fact and opinion with 80% accuracy in 4 out of 5 trials as measured by teacher made materials indicated on work samples.

(9) By March 26, 2011, following teacher-led prewriting activities of grade level history curriculum, Student will produce a multiple paragraph composition addressing historical significance of events, cause and effect, or comparison and contrast of historical events that includes an introductory paragraph, three supporting paragraphs, and a concluding paragraph, Student will score at least 16 out of 20 on a teacher generated writing rubric on 5 writing assignments as measured by student work samples.

(10) By March 26, 2011, when in need of help, Student will use an appropriate method to get teacher's attention and will request assistance with 100% accuracy in three of four situations as measured by observation and charting.

(11) By March 26, 2011, when given a timeline, Student will complete and turn in classroom/homework assignments 85% of the time as measured by Progress Reports and teacher report.

(12) By March 26, 2011, Student will increase her ability to identify those situations which cause her a great deal of anxiety or frustration by appropriately seeking the assistance of a responsible adult, for 7 out of every 10 opportunities as measured by case carrier evaluations.

46. The IEP team's offer of placement and services was three class periods of resource specialist support (RSP) each day at Trabucco Hills. The RSP support was offered three times daily for 55 minutes each session for English, Math and Study Skills. An RSP History class was to be added in the fall of 2011. An RSP class is a smaller setting with a lower student-to-teacher ratio than a typical general education class and would provide Student with the extra attention she needed to catch up on her school work and develop study skills. The IEP did not provide any modifications or accommodations for Student and did not provide any counseling or therapy. The IEP team recommended a referral to the Orange County Health Care Agency (OCHCA) for assessment for mental health services. At the time, OCHCA provided the mental health services necessary for provision of FAPE to

District students. DePass handed Mother the OCHCA assessment referral for signature at the March 26, 2011 IEP meeting. Bonnington advised the IEP team that Mother would not be signing any documents at the IEP meeting. Ultimately, Parent did not sign the IEP or agree to any portion of the IEP. At the time of hearing, Mother had yet to sign the OCHCA referral.

47. At hearing, Mother acknowledged that District's offer of placement and services addressed Student's academic issues. However, she felt that it failed to address Student's anxiety and depression. She felt that Student would regress if she accepted the offer. She elected to keep Student at Sunrise to utilize the extensive daily therapy, full academic program, dialectical behavior therapy, and interpersonal skills training to help Student learn to understand her mood disorder and gain some tools to better manage her anxiety and anger.

48. Sunrise Director Simpson opined that Student was not ready to return home at the time of the March 26, 2010 IEP meeting because she had not finished the program. Home visits were made in June, July, August and September of 2009. Student's first visit was for three days, her second for five days, and the third and fourth visits were for seven to ten days each. On the fourth visit, Simpson accompanied Student for two of the days to meet with staff from Crean Lutheran School (Crean), a private religious school; Student's family; a friend; and Pollock to plan Student's transition home.

49. Originally, Student was scheduled to return home in August of 2009, but her return and discharge were delayed when Student began purging (self-induced vomiting after eating) during one of her visits home. Mother did not advise District of any of the home visits because she did not think it was appropriate and she deemed the visits "personal."

50. On April 19, 2010, Pollock wrote a summary of his treatment of Student. When he wrote the summary, he expected that it would be provided to District. Mother never provided the summary to District. Pollock's summary noted that Student was his patient from August of 2009 to January 2010. According to the summary, Student was treated for a major depressive disorder recurrent, polysubstance abuse and a parent-child relational problem. According to Pollock's summary, Student was "experiencing significant distress and struggling to cope with difficulties academically and in her relationships with her peers. High school appeared to be a very stressful place in which she struggled to reach her potential academically as a result of significant mood, relational and substance issues."

51. On April 23, 2010, Simpson also wrote a summary letter with recommendations. Mother never provided Simpson's letter to the District either. In his letter, Simpson explained that Student was admitted to Sunrise with a diagnosis of mood disorder, cannabis abuse and oppositional defiant disorder. According to Simpson, in therapy Student addressed self-harm, depression, relationships with family and peers, communication, impulsivity, emotional regulation, self image, distress tolerance, self-esteem, interpersonal skills, intrapersonal skills and substance abuse issues. In his letter, Simpson

recommended that Student not be returned to her old environment at home and that she attend a new school.

52. On June 15, 2010, Poole wrote a summary of her treatment of Student. The summary was prepared at Mother's request, but never shared with District. Poole had diagnosed Student with parent-child relationship problems, depressive disorder not otherwise specified, alcohol abuse and cannabis abuse. Poole wrote that Student had attended 30 sessions of RAP during the period of July to December 2009. Poole wrote that in RAP, Student worked "on issues concerning an absence of relationship with her father, and substance abuse issues." According to Poole, Student "worked to develop anger management skills, problem solving skill, cognitive behavioral skills to challenge distorted thoughts, skills to identify feelings, and communication skills." Poole described Student's acting out behaviors as defying parental rules, substance abuse, leaving home without permission and associating with friends that her mother disapproved of." In the summary, Poole opined that the behaviors were interfering with Student's relationships at home and her academic progress.

53. On September 27, 2010, six months after the March 26, 2010 IEP meeting, Mother, through her attorneys, notified District that she objected to District's March 2010 psychoeducational report and requested that District fund an independent educational evaluation (IEE) by Mitchel Perlman, Ph.d. District denied the request and timely filed a request for due process hearing on October 18, 2010 to defend the appropriateness of its assessment.

54. On October 11, 2010, Student was discharged from Sunrise. Mother did not advise District of Student's discharge because she felt "it wasn't any of their business." The discharge summary notes the reason for Student's referral to Sunrise as "non-compliance with treatment in the past, mood swings, parent child conflict, substance abuse, poor academic performance and poor peer relationships." She was admitted with a diagnosis of mood disorder, cannabis abuse and oppositional defiant disorder. Sunrise targeted mood disorder, oppositional defiant disorder, substance abuse and low self-esteem/trauma for treatment. The discharge summary contained recommendations that Student continue weekly individual and family therapy, bi-monthly group therapy, have bi-monthly urinalysis, attend a transition group, and follow up with her psychiatrist for medication management. At Sunrise, Student's Prozac dosage was doubled from 20 milligrams per day to 40 milligrams per day. According to Simpson's testimony at hearing, Student's primary issue was a mood disorder and her substance abuse was a result of the mood disorder. Simpson opined that Student needed to generalize the skills she learned at Sunrise to an academic setting. Simpson believed Student needed a new environment "void of her old peers."

55. In July of 2010, Mother moved within the boundaries of the District to an area where El Toro High School was the local high school. Had Student returned to District schools, she would have transferred from Trabucco Hills to El Toro High school when District learned of her change in residence. By the summer of 2010, Mother had already decided to place Student in private school. She visited Crean Lutheran School (Crean)

during the summer and made a deposit in September of 2010. Because Student's return home was delayed, she enrolled in Crean's classes on line and kept up with the Crean curriculum beginning in September of 2010, until she returned to California on October 11, 2010, and began attending classes at Crean.

56. On October 14, 2010, after Student had already enrolled at Crean, Mother's attorneys wrote to District and advised she was placing Student at Crean and would seek reimbursement from District. Crean is a Christian religious high school which opened on August 31, 2009, in Irvine, California. The school opened with 450 Students and is expected to grow to 1200 students. For the 2010-2011 school year, Crean had approximately 500 students in ninth through twelfth grade. The school offers a comprehensive curriculum which includes honors and advanced placement classes. Crean students wear school uniforms, and attend classes from 7:30 a.m. to 2:30 p.m. Crean offers a fifth period class from 2:40 to 3:30 p.m. when most athletic teams meet. The school also has a band, choir, service leadership team and sixteen different varsity sports and junior varsity sports. Crean students attend a modified block schedule of four periods per day of 80 minutes each period. The school does not have a special education program or special education teachers. College credit courses are also offered on campus as part of the school's early college program. Crean has a learning success program which provides accommodations to students that need them. To participate in the learning success program, a prospective student must provide a psychoeducational assessment. Mother presented District's psychoeducational assessment prepared by Dizon to Crean to support Student's application to Crean and participation in the learning success program. Crean used the assessment to design Student's accommodations and to alert her teachers to her needs.

57. Gabriel Castrillon (Castrillon), the Crean school psychologist, runs the learning success program. Castrillon has a master of arts degree in school psychology and is a credentialed school psychologist. He designs accommodations and modifications for learning success program participants like Student. At Crean, Student does not have an IEP. She is provided accommodations, but no curriculum modifications. Student's accommodations consist of extra time to complete tests and quizzes and the availability to take the tests and quizzes in the learning success lab room. Castrillon checks in on Student from time to time and is available to her if she needs guidance or counseling. A school counselor is also available to all students. Student has gone to Castrillon's office once or twice to discuss school matters. At hearing, Castrillon testified that Student did not need any additional services. Crean does not offer remedial programs to its students. Student had typical interactions with other peers and did not appear to have any extraordinary stressors. It took Student a while to adjust to the new school, the interruption of holidays during the first semester and the move of the school to a new location. Her participation and grades have improved during the second semester. There are generally 20 to 26 students in each class. Crean does not offer remedial classes to its students.

58. Jacob Hearney (Hearney) was Student's math teacher at Crean. Hearney has been a private school teacher for six years. He received an associate of arts degree in liberal studies from Gavilan College, a bachelor of science degree and a master of arts degree from

National University. He found Student to work hard and care about her grades. She was earning a C in his class at the time of hearing. In his class, Student had accommodations of extra time on tests and taking tests in a separate quiet room, if needed. Hearney opined that Student was making academic progress in his class at Crean.

59. On February 11, 2011, an IEP meeting was held for Student. District program specialist De Pass, District school psychologist Dizon, Mother, Student's attorney Timothy Adams, District regular education teacher Kelly McAlister, El Toro High School special education teacher Jan Coccliara, special education director Dr. Martin, and District's attorney Epiphany Owen attended the meeting. At the IEP meeting, District requested that Mother invite teachers from Crean to participate in the IEP meeting and asked for an update on Student's academic and mental health status. Mother reported that Student was receiving As and Bs at Crean. She also reported that Crean did not have special education classes or teachers but did offer modifications and accommodations to students in the learning success program. Student received accommodations such as extra time for tests and the availability of a separate quiet room for test taking. District again requested that Mother sign a consent for referral to OCHCA. District IEP team members also requested that Mother allow District to conduct updated assessments. Mother declined both requests. Mother also refused to sign District's release of information for District to communicate with Crean. Mother did not consent to District's proposed observation and release of information from Crean. Some of the specific limitations she sought to impose were that the District assessors were not to speak to Student or any staff member and must be accompanied by the Crean's psychologist at all times. She did not sign the release because she did not want District to have access to all of Student's information. The IEP meeting was ended before completion by Student's attorney.

60. Mother had no intention of removing Student from Crean by the time of the February 2011 IEP meeting. Mother declined District's requests to hold an additional IEP team meeting and to conduct a new comprehensive reassessment of Student.

#### *Student's Expert*

61. In October of 2010, Mother and her attorneys engaged Mitchel Perlman, Ph.d., to conduct a psychoeducational IEE of Student and to serve as Student's expert witness in this due process matter. Perlman received an associate of arts degrees in computer science and graphic arts from Miami Dade Junior College in 1973, and an associate of arts in psychology and philosophy from Dallas Bible College in 1979. Perlman received a bachelor of arts degree in psychology from the University of Texas at Dallas in 1980, a doctorate in clinical psychology from the California School of Professional Psychology in 1986 and a postdoctoral masters degree in clinical psychopharmacology from Alliant University in 2010. Perlman has 15 years of experience conducting a variety of psychological assessments and extensive experience with the MACI. He has no experience or credentials as a school psychologist.

62. Perlman began his assessment in October of 2010, but did not finalize his report until May of 2011, shortly before the hearing of this matter. District first received the report five days before the hearing on this matter. The report was not available to the March 26, 2010 IEP team or the February 11, 2011 IEP team. Although Perlman's report purports to be an IEE, it does not appear to be an objective assessment of Student. Although Perlman conducted an assessment of Student and the results of the assessment are contained in the report, Perlman acknowledged that the report was prepared in anticipation of litigation. As such, it focused on strategies to discredit the District assessor and weaknesses in the IEP. Mother reviewed and commented on a draft of the report before it was finalized.

63. Perlman used the Kaufman Assessment Battery for Children, Second Edition (KABE-2), Delis-Kaplan Executive Function System (D-KEFS), Minnesota Multiphasic Personality Inventory (MMPI-2), and the Rorschach Inkblot Test (Rorschach) to assess Student. Perlman also reviewed Student's records, all of Student's Kaiser medical and therapy records, and all of the records of both Crean and Sunrise, including records to which District never had access. Perlman interviewed Pollock, Simpson, Sunrise Residential Manager Kim Smith, Whittikiend, Grimm, Castrillon, and Student's Crean biology teacher Steve Hobus. District also made its staff available to Perlman. Trabucco Hills Assistant Principal Van Tassell, Kimble, Schulz, Dizon, DePass and Dr. Martin all participated in a telephone conference with Perlman to answer his questions about Student and the IEP process. Perlman found Student's intelligence and achievement levels to be within the average range. From his assessment data and the MACI administration by Dizon, he opined that Student was anxious, easily frustrated and overwhelmed. Perlman's assessment did not reveal any processing or executive functioning deficits. Perlman's interview with Student revealed that in addition to marijuana and alcohol, Student had experimented with stimulants and may have negative body image issues. Perlman asserted that Student has a mood disorder and as a result of the mood disorder, she is more susceptible to substance abuse as a way to deal with her anxiety and depression.

64. At hearing, Perlman testified that there were no errors in Dizon's report and that Dizon's assessment was not inappropriate. Perlman's only criticism of Dizon's assessment was that he believed that Dizon "left data on the table." By this, Perlman meant that Dizon could have analyzed more of the data that he collected. Perlman also acknowledged that a classroom observation was not necessary for this assessment to be appropriate. Perlman expressed concern that Student's IEP did not provide counseling and would have returned her to Trabucco Hills. At hearing and in his report, he expressed agreement with the IEP team's decision to make Student eligible for special education under the category of emotionally disturbed (ED). He asserted that ED should be Student's primary eligibility category. Perlman acknowledged that a referral to OCHCA was appropriate and that OCHCA would provide counseling and medication management, if an assessment determined that Student was eligible for OCHCA services.

65. Mother seeks reimbursement for a variety of expenses that she incurred related to Student and for placement at Crean through the date of issuance of this decision. Mother incurred \$5,690.00 in Crean tuition and expenses for the period of July 21, 2010 to May 17,

2011. Crean tuition includes a laptop computer and an ACT/SAT Princeton College entrance examination review. Crean also charges a \$500 registration fee, uniform fees and book fees. Mother incurred \$72,360.00 for Student's treatment at Sunrise between December 31, 2009 and October 26, 2010. Mother paid \$1,750.00 to Adolescent Escort services to transport Student from California to Sunrise. Mother paid Hurricane Family Clinic \$354.15 for Student's blood tests and urinalysis performed on January 11, 2010 and January 21, 2010. She also paid a second medical bill from Hurricane Family Medical Clinic for undisclosed services dated April 7, 2010 in the amount of \$79.00. Mother paid \$95.13 for a rental car for a trip to Sunrise during the period of September 2, 2010 to September 5, 2010 and \$69.70 for airfare for a trip to Utah. Mother also incurred \$5,861.50 for the assessment and expert witness services of psychologist Mitchel Perlman. Perlman testified that only \$1500.00 of the charge was for the evaluation.

## LEGAL CONCLUSIONS

1. The petitioning party has the burden of proof in an Individuals with Disabilities Education Act (IDEA) due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof on Issues One, Two, and Three, and District had the burden of proof on Issue Four.

### *Issue 1: Child Find*

2. Student contends that District should have suspected Student was a child with disabilities and referred her for a special education evaluation when Student's psychologist emailed the District guidance counselor about Student's missing homework on October 14, 2009. Student further contends that District should have referred Student for assessment when Mother made a written request for assessment on November 23, 2009. District contends that it did not have reason to suspect Student was a child with disabilities in October of 2009, and reacted appropriately to the concerns of Mother and the psychologist. District also contends that Mother agreed to postpone assessment until after general education interventions were implemented.

3. Under the IDEA and companion state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, §56363, subd. (a).)

4. “Child find” is expressly provided for in the IDEA at title 20 United States Code section 1412(a)(3)(A). “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 [“child find” applicable to private school children]; and Ed. Code, § 56301, subd. (a) and (b) [general “child find” obligation and applicability to migrant children or children suspected of having a disability who are nonetheless advancing from grade to grade].) “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.) A district’s child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae* (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 appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

5. Signs that trigger the child find duty include a pupil who is performing below grade average in basic academic functions such as reading; failing grades; behavior and discipline problems; a significant amount of absences from school; concerns expressed by parents and teachers; signs of substance abuse; a medical diagnosis of a recognized disability; psychiatric hospitalizations; suicide attempts; and a request for evaluation by the parents. (*Compton Unified School District v. Addison* 598 F. 3d at pp.1181, 1182-1183; *Rae, supra*, 158 F. Supp.2d at p. 1195; *Wiesneberg v. Bd. Of Education of Salt Lake City School Dist.* (D.Utah 2002) 181 F. Supp.2d 1307; 1311-1312; *Hicks v. Purchase Line School Dist.* (W.D.Pa. 2003) 251 F. Supp. 2d 1250, 1254; *N.G. v. District of Columbia* (D.D.C. 2008) 556 F. Supp. 2d 11, 18-21.)

6. A child may be eligible for special education and related services under the category of emotional disturbance if 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 behavior 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.

(5 C.C.R. § 3030, subd. (i); see also 34 C.F.R. §300.8(c)(4)(A)-(E)(2006.)

7. The eligibility category of "emotional disturbance" does not apply to children who are socially maladjusted. (34 C.F.R. § 300.8(c)(4)(ii)(2006); see also Ed. Code, § 56026, subd. (e); Gov. Code, §7576, subd. (b)(3)(D).)

8. "Other Health Impairment"(OHI) is also an eligibility category for special education. A child may qualify for special education and related services under the category of OHI when he/she has "limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases and hematological disorders such as sickle cell anemia and hemophilia which adversely affect a pupil's educational performance." (Ed. Code, § 56026, subd. (e); 34 C.F.R. §300.8 (c)(9)(2006).)

9. Here, the evidence showed that District had no reason to suspect Student had a disability as early as October 2009. When District guidance counselor Schulz was approached by Mother at Back to School night, she promptly responded to Mother's concerns by scheduling a meeting with Mother. When Mother told her that Student's psychologist had sent an email to her, Schulz opened her computer and read the email with Mother present. In his email, Pollock requested information about make-up work and tutoring for Student. Neither Pollock nor Mother requested that Student be assessed for special education. Schulz did not think it was unusual for a freshman to be experiencing difficulties adjusting to high school. Schulz responded by sending an email to Pollock opining that make-up work was not necessary so early in the semester and that she was scheduling a meeting with Mother to further explore and address the concerns. Mother later cancelled the meeting in an email because she had chosen to pursue private therapeutic treatment. Schulz understood the email to mean that Mother had chosen to keep Student's problems private, but nevertheless offered to be of assistance, if needed.

10. Despite Student's contention that District failed in its child find obligation by not referring Student for a special education assessment after its receipt of Pollock's email in October 2009, the evidence showed that although Pollock's email, referenced a depressive disorder as well as other issues, his concern and request was for tutoring and make-up work. Neither he nor Mother asked for an assessment of Student in October of 2009. Although a specific request for special education assessment is not required to trigger a school district's child find duty, Pollock's email on its face was insufficient to cause the District to suspect that Student should be assessed for special education. Instead, at the time, it was reasonable to conclude that Student, like others, was having adjustment problems to ninth grade that could be addressed in general education. Student's teachers Kimble and Perry both credibly testified that they saw no reason to refer Student for a special education assessment. Both teachers saw Student as a capable and social young woman who lacked motivation to complete her homework. Schulz responded to the concerns raised by Pollock and attempted to further explore the situation with Mother, but Mother cancelled the meeting with Schulz. The District cannot be faulted for not immediately assessing Student when Mother did not participate in providing further information to District.

11. When Mother did make a request for assessment on November 23, 2009, Schulz immediately contacted Mother and the school psychologist. The school psychologist, Anderson, met with Mother on December 7, 2009, and the two devised some general education interventions that were to be tried with Student. The evidence showed that Mother expressly agreed to postpone a special education assessment until the interventions were implemented. Anderson had no reason to suspect that Mother was dissatisfied with the interventions, as Mother conveyed no displeasure with Anderson. Mother and Anderson agreed to meet again after the winter break to discuss the next step, if any. Instead, during the winter break, Mother placed Student in an RTC in Utah without proper notice to District, and in immediate reaction to Student's outside of school association with drug users and brush with law enforcement.

12. Given the above factors, District had no reason to believe that Student had a disability nor did it have reason to suspect that Student might need special education services to address that disability, prior to the time Mother unilaterally enrolled Student at Sunrise. Mother cancelled the meeting with Schulz in October opting to handle Student's problems privately and then placed Student out of state in an RTC shortly thereafter. The District presented a reasonable plan of trying general education interventions prior to special education assessments, to which Mother expressly agreed. As such, Student has failed to demonstrate by a preponderance of the evidence that District failed to meet its child find obligations. (Factual Findings 1-45 and Legal Conclusions 1-12.)

*Issues 2 and 4: District's Psychoeducational Assessment*

13. Student contends that she was denied a FAPE because District's psychoeducational assessment was not appropriate. Specifically, Student contends that the assessment was inadequate because the assessor did not conduct a classroom observation at Sunrise or interview the Sunrise teachers. Student further contends that she was denied a FAPE because had the assessment been properly conducted, the District's subsequent IEP offer would have been different, and that she is also entitled to an IEE at public expense. District contends that its psychoeducational assessment was appropriate and as a result, Student is not entitled to an IEE. As discussed below, Student's contention lacks merit because District met its burden of demonstrating that its assessment was appropriate and Student failed to show it was inappropriate. Therefore, Student did not meet the threshold showing of a procedural violation of a FAPE, nor is Student entitled to an IEE at public expense.

14. A student's parent or the responsible public educational agency may request an initial evaluation to determine whether a child is eligible for special education and related services on the basis of a qualifying disability. (20 U.S.C. §1414(a)(1)(A), (a)(1)(B).) The initial evaluation must consist of procedures to determine whether a child is a child with a qualifying disability and to determine the educational needs of the child. (20 U.S.C. § 1414(a)(1)(c).) In conducting the evaluation, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent that may assist in determining whether the

child is a child with a disability and the contents of an individualized education program. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(c)(6) (2006); Ed. Code, § 56320.) The district may not use any single assessment as the sole criteria for determining eligibility and must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. (20 U.S.C. § 1414(b)(2)&(c); Ed. Code, § 56320.)

15. In order to assess or reassess a student, a school district must provide proper notice to the student and her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and provide notice that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) District must give the parents and/or the student 15 days to review, sign and return the proposed assessments plan. (Ed. Code, § 56321, subd. (a).) For purposes of evaluating a child for special education eligibility, the District must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).)

16. 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 School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.)

17. In conducting assessments, a school district shall ensure that: (1) assessment materials used to assess a child under this section are selected and administered so as not to be discriminatory on a racial or cultural basis; (2) are provided and administered in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless it is not feasible to do so; (3) are used for purposes for which the assessments or measures are valid and reliable; (4) are administered by trained and knowledgeable personnel; and (5) are administered in accordance with instructions provided by the producer of such assessments. (20 U.S.C. §1414(b)(2)(C); Ed. Code, § 56322.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).) A psychological assessment of a student must be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the student being assessed. (Ed. Code, § 56324, subd. (a).) The determination of what tests

are required is made based on information known at the time. (*See Vasherese v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.)

18. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2) (2006).)

19. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

20. Here, District established that its March 12, 2010 psychoeducational assessment was appropriate. The evidence showed that Dizon was a highly qualified school psychologist who held the appropriate credentials. In addition, he had completed all coursework for a doctorate in education. Dizon used a variety of tools to assess Student including observation, interview, standardized testing, rating scales and review of available records. These measures were used to evaluate Student’s cognitive abilities, achievement levels, psychomotor development and social emotional status. Dizon administered the testing in English, Student’s primary language, and according to the test administration instructions. In addition, Dizon selected and administered the assessment so as not to be racially, culturally or sexually discriminatory. The evidence showed that Dizon was knowledgeable and gathered relevant functional, developmental, and academic information about Student. Dizon completed a comprehensive written report of his findings and conclusions.

21. Although Dizon did not interview teachers from Sunrise because they were not available by the time he arrived, he focused on his observation and direct assessment of Student, as well as the information from Student’s teachers through ratings scales which were incorporated into his assessment. The evidence further showed that Dizon did not observe Student in the Sunrise classroom because her classroom behavior was not at issue,

but instead focused on a one-on-one interview with Student and the use of direct assessment tools. Most importantly, Student did not meet her burden of proof on this point, whereas District did, because Student's own expert acknowledged at hearing that a classroom observation was not required for an assessment to be appropriate. Consistent with her own expert's opinion, Student's Mother had sufficient confidence in District's assessment that she presented it to a third party, Crean, as an accurate reflection of Student's abilities and for consideration in admission to Crean's learning success program. Crean's school psychologist, Castrillon, found the assessment sufficiently comprehensive to use it in designing accommodations for Student.

22. In sum, Student failed to meet her burden of proving that she was denied a FAPE because the District's psychoeducational assessment was inappropriate. In contrast, District demonstrated that its assessment was appropriate under IDEA in all respects. Thus, Student did not make a threshold showing of a procedural violation. Accordingly, this decision need not address whether, as a result of an inappropriate assessment, Mother's opportunity to participate in the decision-making process regarding the provision of FAPE was impeded, or whether an inappropriate assessment caused Student a deprivation of educational benefit. Because the District's assessment was appropriate, Student was not denied a FAPE and is not entitled to an IEE at public expense. (Factual Findings 1-64 and Legal Conclusions 1-22.)

*Issue 3: Was the March 26, 2010 IEP appropriate?*

23. Student contends that she was denied a FAPE because the March 26, 2010 IEP failed to include Sunrise representatives, failed to include baselines of performance, did not offer appropriate supports including counseling, individual, group and family therapy and failed to offer a placement on a small campus, with a small class size in a new school. District contends that the Sunrise representatives were not essential members of the IEP team. District further contends that Sunrise did not provide any baseline data for the IEP team to use in drafting goals, nevertheless the IEP contained appropriate baselines of performance derived from the assessment data. District also contends that Mother rejected its offer to refer Student to OCHCA for a mental health assessment and that District offered Student a placement in the least restrictive environment based upon the information available to the IEP team.

24. As set forth in Legal Conclusion 3 above, the IDEA and companion state law, provide that students with disabilities have the right to a FAPE.

25. As set forth in Legal Conclusion 16, above, in matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *see also W.G. v. Board of Trustees of Target Range School District No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.)

26. Procedural errors that lead to a deprivation of educational benefits, such as failure to have the proper composition of the IEP team during the IEP process, are analyzed by determining whether: 1) a procedural violation occurred and 2) whether the procedural violation resulted in a deprivation of educational benefits to the student. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 653 (concurring opn. of Gould, J.)) Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents' right to participate in the IEP process, resulting in compensatory education award]; *Target Range*, supra, 960 F.2d at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during a time when no procedurally proper IEP was held].)

27. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher of the pupil, (4) a representative of the local education agency (LEA), (5) an individual who can interpret the instructional implications of the assessment results, (6) at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate, and (7) the individual with exceptional needs. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subds. (b)(1-7).) A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

28. A parent may waive the participation of a regular IEP team member even if that member's area of curriculum or related services is being modified or discussed at the meeting. However, both of the following must occur: (1) the parent and the local educational agency consent to the excusal after conferring with the IEP team member and (2) the member submits in writing to the parent and the individualized education program team, input into the development of the individualized education program prior to the IEP meeting. The parent's consent must be in writing. (20 U.S.C. § 1414 (d)(1)(C); Ed. Code, § 56341, subds. (g) & (h).)

29. Education Code section 56341.1 also requires the IEP team to consider, among other matters, the strengths of the pupil and the results of the initial assessment or most recent assessment of the pupil. The IEP must include a written statement of present levels of academic achievement and functional performance, a statement of the manner in which the disability affects involvement and progress in the general education curriculum and a

statement of measurable annual goals, related services, supplementary aids and services, program modifications or supports that will be provided to enable the pupil to advance appropriately toward attaining the annual goals. (20 U.S.C. §1414(d); Ed. Code, § 56345.) The IEP team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B), (d)(3)(A), (d)(4)(A)(ii)(III); 34 C.F.R. §§ 300.305(a)(i), 300.324(a)(1)(ii), (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(1), (d)(3) & (e).)

30. In *Board of Education of Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034; 73 L.Ed. 2d 690] (*Rowley*), the Supreme Court held that the basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Rowley, supra*, at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the *Rowley* standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2d Cir.) 142 F.3d 119, 130.)

31. A student derives benefit under *Rowley* when he improves in some areas even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P.*, 62 F.3d 520, 530.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.) A showing of progress does not require that a D student become a C student and thus rise in relation to his peers. Progress may be found even when a student’s scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Educ.* (D.Del. 2001) 162 F.Supp.2d 316, 328.)

32. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Rowley, supra*, at 200, 202-204.) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is “a snapshot, not a retrospective.” (*Ibid.*, citing *Fuhrmann, supra*, at p.1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

33. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a)(2006); Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.) Special classes, separate schooling, or removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (34 C.F.R. §300.114 (2006).)

34. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decisions are made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment (LRE); 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modification in the general education curriculum. (34 C.F.R. § 300.116 (2006).)

35. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a) (2006).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. V. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., Supra*, 874 F. 2d at p. 1050.)

36. A residential placement is inappropriate if the pupil's needs can reasonably be met through any combination of nonresidential services, preventing the need for out of home

care. (Gov. Code § 7572.5 (b)(1).) Residential placement is proper only when residential care is necessary for the child to benefit from educational services. (Gov. Code § 7572.5 (b)(2).) The fact that a student exhibits emotional or behavioral difficulties outside of school will not, in and of itself, demonstrate a need for a RTC placement. (*Ashland School District v. Parents of RJ* (9th Cir. 2009) 588 F. 3d 1004, 1010 [holding that a district did not have to pay for a student’s placement in a RTC when the placement stemmed from her “risky” and “defiant” behaviors at home.]

37. In pertinent part, California Code of Regulations, title 2, section 60100, subdivision (h) provides that:

Residential placements for a pupil with a disability who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil’s needs and only when the requirements of subsections (d) and (e) have been met. Out-of-state placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3). For educational purposes, the pupil shall receive services from a privately operated, non-medical, non-detention school certified by the California Department of Education.

38. The IDEA allows states the flexibility to provide related services required in IEPs through interagency agreements between the state educational agency and other public agencies. (See 20 U.S.C. § 1412(a)(12).) At the time of the IEP, in order to maximize the utilization of state and federal resources, mental health assessments for purposes of developing an offer of FAPE were the joint responsibility of the State Secretary of Public Instruction and the State Secretary of Health and Welfare. (Gov. Code, §§ 7570; 7572, subds. (a) & (c), 7576, subd. (a) [community mental health services provide the mental health services required in order to provide a FAPE].)

39. “Mental health assessment” means “a service designed to provide formal, documented evaluation or analysis of the nature of the pupil’s emotional or behavioral disorder” that is conducted by qualified mental health professionals in conformity with Education Code sections 56320 through 56329 [detailing the numerous procedural safeguards associated with assessments]. (Cal. Code Regs., tit. 2, § 60020, subd. (g) and (g).)

40. A local education agency, the IEP team, or parent may initiate a mental health referral for assessment of a pupil's social and emotional status for any child who has been determined eligible for special education and "who is suspected of needing mental health services." (Gov. Code, § 7576.) This referral is appropriate where the child has emotional or behavioral characteristics that:

- (A) Are observed by qualified educational staff in educational and other settings, as appropriate;
- (B) Impede the pupil from benefitting from educational services;

(C) Are significant as indicated by their rate of occurrence and intensity; and

(D) Are associated with a condition that cannot be described solely as a social maladjustment or temporary adjustment problem, and cannot be resolved by short-term counseling.

(Gov. Code, §7576, subd.(b)(3).)

41. 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).)

42. A local educational agency may be responsible for reimbursement for the costs of a unilateral, parental RTC placement when it has failed to provide a student with a FAPE. (Ed. Code §56175; see also 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148(c); *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) The reimbursement may be reduced when, at the most recent IEP meeting, the parent did not advise the school district that she disagreed with the IEP, state her concerns and advise of her intention to enroll the child in a private school at public expense, the parent did not give 10 days prior written notice of the intent to enroll the child in a private school at public expense, the parent refused to make the child available for assessment or otherwise acted unreasonably. (Ed. Code §56176; 34 C.F.R. § 300.148 (2006).)

#### *Analysis of Issue 3(a)*

43. Here, Student's contention in Issue 3(a), that she was denied a FAPE because representatives from Sunrise were not present at the March 26, 2010 IEP, fails. As set forth in Legal Conclusion 26 above, the essential members of an IEP team are (1) parents; (2) one regular education teacher; (3) one special education teacher of the pupil; (4) a representative of the local education agency (LEA); and (5) an individual who can interpret the instructional implications of the assessment results. Parents and District have the discretion to invite the student and any other individuals who have knowledge or special expertise regarding the student. Although Sunrise staff members might have been able to provide some useful information, they were not available to participate in the IEP meeting by telephone or in person. Sunrise staff were not among the statutorily designated essential members of the IEP team. As such attendance by Sunrise staff was discretionary and not mandatory. The IEP team gathered information about Student from Dizon's assessment which included information gathered at Sunrise from Student and her teachers. Mother was free to request an additional IEP meeting that would have been convenient for the Sunrise representatives to attend. Given the above, Sunrise's lack of attendance at the IEP meeting did not constitute a procedural violation of the IDEA and therefore cannot and does not establish a denial of FAPE. (Factual Findings 1-64 and Legal Conclusions 1-43.)

*Analysis of Issue 3(b)*

44. Student's second contention in Issue 3(b), that District denied her a FAPE by failing to include baselines of performance in the March 26, 2010 IEP, is also without merit. As set forth in Legal Conclusion 28, the IEP must include a written statement of present levels of academic achievement and functional performance. The March 26, 2010 IEP included present levels of performance also known as baselines of performance, based upon the assessment data provided by Dizon. District staff attempted to obtain additional baseline information from Student's teachers at Sunrise, but did not receive any information that was helpful in developing the required statement. As set forth in Legal Conclusion 20 above, Dizon prepared an appropriate psychoeducational assessment of Student. The assessment provided relevant and useful information for the IEP team's use. Dizon's assessment data from the WJ Achievement-III was used to prepare the statement of present levels of performance for the March 26, 2010 IEP. Accordingly, the March 26, 2010 IEP contained a statement of present levels of performance and baseline information and therefore did not violate the IDEA or deny Student a FAPE. (Factual Findings 1-64 and Legal Conclusions 1-44.)

*Analysis of Issue 3(c)*

45. Student failed to prove her third contention in Issue 3(c), that District denied her a FAPE by not providing appropriate educational supports in the form of counseling, individual, group and family therapy. The March 26, 2010 IEP team determined Student's unique needs and developed goals for each area of need. As set forth in Legal Conclusion 40, a local education agency, the IEP team, or parent may initiate a mental health referral for assessment of a pupil's social and emotional status for any child who has been determined eligible for special education and "who is suspected of needing mental health services." (Gov. Code, § 7576.) As set forth in Legal Conclusion 39, "Mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals. The referral is the initial step in obtaining counseling, therapy and medication management services offered by OCHCA. At the time of the IEP, OCHCA was responsible for providing mental health services to District's special education students. Student's expert psychologist Mitchel Perlman agreed with the IEP team's decision to refer Student to OCHCA for a mental health assessment. Yet, Mother refused to consent to the OCHCA referral and assessment. Mother's refusal to allow the mental health assessment made it impossible for District to have offered the individual, group, and family therapy, Student now contends were required to provide her a FAPE. More importantly, at no time did Student share any information with District that she had obtained from private sources such as the Sunrise discharge summary or Perlman's assessment. Although Student's expert Perlman was concerned that the IEP offer did not contain counseling, even he acknowledged that District has appropriately sought to refer Student to OCHCA to obtain such services. Finally, although not part of the "snapshot" for determining whether District's offer was appropriate at the time, Student herself presented evidence that she receives no such services from Crean, her private, religious school of choice, and that Crean's school psychologist

does not believe such services are necessary. Accordingly, Student failed to meet her burden of proving that she was denied a FAPE because the March 26, 2010 IEP did not contain an offer for counseling, individual and group family therapy. (Factual Findings 1-64 and Legal Conclusions 1-45.)

*Analysis of Issue 3(d)*

46. Student's final contention in Issue 3(d), that District denied Student a FAPE by providing her with inappropriate educational placement, also fails. Student asserts that she required a placement on a small campus, with a small class size removed from her prior peer group in order to receive a FAPE. As set forth in Legal Conclusion 30-35 above, the IDEA and California law provide that a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. As the Ninth Circuit stated in *Rachel H.*, in determining the least restrictive environment for a particular student, the IEP team must consider the educational benefits of placement full-time in a regular class, the non-academic benefits of such placement, the effect of student on the teacher and children in regular class, and the costs of mainstreaming the student.

47. Student's educational needs were identified by the IEP team and goals were drafted in each identified area of need. As set forth in Legal Conclusion 34 and 35 above, Student must be educated in the LRE. Here, it is clear that District offered Student a placement in the LRE. The goals drafted for Student could be implemented in an RSP setting on a general education campus and in general education classes. An RSP class is a smaller setting with a lower student-to-teacher ratio than a typical general education class and would provide Student with the extra attention she needed to catch up on her school work and develop study skills. It is presumed that students will be educated in a general education classroom in the neighborhood school unless the contents of the IEP dictate otherwise. Here, Student had always been educated in a general education classroom and presented no significant disciplinary problems. Student's main barrier to academic success was homework completion and organization. District offered Student a placement at Trabucco Hills, with small-class specialized instruction for three periods of the day in RSP. Student was to participate in RSP for math, language arts and a study skills class to help her organize and complete her work. An RSP history class was to be added for the 2010-2011 school year. Student was to remain in general education for other classes.

48. Applying the *Rachel H.* factors enunciated by the Ninth Circuit here, District's offer of FAPE provided Student with, specialized instruction in a smaller setting in core academics and study skills that the IEP team determined were needed and comported with her IEP. Student retained the benefits of a general education placement by participating in general education classes with same aged peers on a comprehensive general education campus for the majority of the school day. Student was not disruptive in class, having only a few minor disciplinary offenses and did not have a negative effect on other students or the teachers. In the one incident in which Student cursed at a teacher, District acknowledged a

personality conflict between Student and teacher and moved Student to another physical education class as an intervention. Costs of mainstreaming were not at issue. (Factual Findings 1-64 and Legal Conclusions 1-48.)

49. Student contends that placement at Sunrise RTC was essential for her to receive a FAPE. The law is clear that residential placement is an extraordinary measure reserved for those instances in which other less restrictive placements and interventions are not appropriate. As set forth in Legal Conclusion 36 above, an RTC is available only if a student's needs cannot reasonably be met through any combination of nonresidential services. (Gov. Code § 7572.5 (b)(1).) Residential placement is proper only when residential care is necessary for the child to benefit from educational services. (Gov. Code § 7572.5 (b)(2).) The fact that, as here, Student exhibited emotional or behavioral difficulties outside of school would not have, in and of itself, demonstrated a need for an RTC placement. Here, the focus of Student's treatment at the RTC was on behaviors outside of school and her relationship with her parents. Student was placed at the RTC because Mother was overwhelmed and frustrated with her behavior and refusal to follow family rules. Ultimately, Mother was triggered to send Student to Sunrise immediately after the police contact with Student rather than a concern for Student's educational needs.

50. Further, Mother was selective in what information she provided to the IEP team. Nevertheless, the IEP team was able to craft a comprehensive offer of FAPE to Student based on the accurate information it had at the time, including a referral to OCHCA for additional intensive mental health services. There is nothing in Student's IEP or in this record that suggests a restrictive placement such as an RTC was needed for Student to receive an educational benefit as of the date of the IEP team meeting. The anxiety and depression issues that Mother was concerned about were to be addressed by the referral to OCHCA. In addition, the small classes and peer group issues were addressed by the RSP classes offered by District. To the extent Student contends that a private, religious school like Crean should have been offered at the March 26, 2011 IEP, this contention fails as well. Under no circumstances could District have offered a religious school placement in an IEP, and Student presented no evidence of what, if any type of placement other than Sunrise, Student thinks should have been offered. (Ed. Code §§ 56365, 56366.)

51. In sum, District's placement offer in the March 26, 2011 IEP addressed Student's unique needs, and was reasonably calculated to provide Student an educational benefit in the least restrictive environment. Student was not denied a FAPE on this ground. (Factual Findings 1-64 and Legal Conclusions 1-51.)

52. Because Student failed to meet her burden of demonstrating that she was denied a FAPE, Student is not entitled to reimbursement of any kind, and the ALJ need not address whether reimbursement should be awarded through the date of hearing. (See 20 U.S.C. § 1412 (a)(10)(C)(ii); 34 C.F.R. § 300.148(c) (2006); *see also School Committee of Burlington v. Department of Ed., supra*, 471 U.S. at p. 369 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].) (Factual Findings 1-65 and Legal Conclusions 1-52.)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

July 19, 2011

\_\_\_\_\_  
/s/  
GLYNDA B. GOMEZ  
Administrative Law Judge  
Office of Administrative Hearings