

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2014120778

**DECISION**

On December 12, 2014, Parent on behalf of Student filed a request for a due process hearing with the Office of Administrative Hearings, naming San Francisco Unified School District.<sup>1</sup> On January 29, 2015, Student moved to amend his complaint. OAH granted the motion, and Student's amended complaint was deemed filed on February 4, 2015. On February 18, 2015, OAH granted the parties' joint request for a continuance.

Administrative Law Judge Theresa Ravandi heard this matter in San Francisco, California, on May 6, 7, and 12, 2015.

Gail S. Hodes, Attorney at Law, appeared on behalf of Parent and Student. Parent attended each day of hearing until the early afternoon. Student was not present.

Damara Moore, Attorney at Law, represented San Francisco. Lisa Miller, San Francisco's Director of Special Education, attended each day of hearing.

At the conclusion of the hearing, the matter was continued at the parties' request to June 8, 2015, for the submission of written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

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<sup>1</sup> Student originally named two other school districts but subsequently settled and dismissed all claims against those districts.

## ISSUES

1. Did San Francisco fail in its child find obligation and deny Student a free appropriate public education by failing to refer him for a special education assessment between September 2014 and February 2015?
2. From September 2014 to April 9, 2015, did San Francisco deny Student a FAPE by failing to find him eligible for special education and related services?
3. From September 2014 to April 9, 2015, did San Francisco deny Student a FAPE by failing to offer him a special educational program designed to meet his unique and individual needs?
4. Did San Francisco deny Student a FAPE by violating Parent's procedural rights by failing to provide a full and complete copy of Student's educational records pursuant to Parent's request on December 2, 2014?

## SUMMARY OF DECISION

In this case, San Francisco was providing specialized academic instruction, behavior services, and supports to a student not yet found eligible for special education, outside of an individualized education program team meeting, and without the protections of an IEP. This Decision finds that San Francisco had sufficient information by October 22, 2014, to suspect that Student was a child with a disability such that it was required to assess Student for special education. The evidence established that San Francisco should have found Student eligible for special education by January 21, 2015, under the categories of, at least, other health impairment and emotional disturbance. San Francisco's failure to timely refer Student for assessment and timely convene an IEP team meeting denied Parent her right to meaningfully participate in the assessment, eligibility, and IEP development process, resulting in a denial of FAPE from October 22, 2014, through April 9, 2015. Student did not establish a denial of FAPE stemming from San Francisco's alleged failure to provide a copy of his educational records.

## FACTUAL FINDINGS

1. Student was seven years old and attending first grade at Leonard R. Flynn Elementary School at the time of hearing. Less than a year before the hearing, in August of 2014, he returned to the care of Parent after spending more than one and a half years in the care of a relative and in foster care. Student began residing within San Francisco's district

boundaries in September 2014. On April 9, 2015, San Francisco found him eligible for special education pursuant to the categories of other health impairment, emotional disturbance, and specific learning disability. The appropriateness of the April 2015 IEP and underlying assessment were not at issue in this hearing and no findings or legal conclusions are made as to their procedural and substantive validity.

*Brief Overview and Basis for Student's Section 504 Plan*

2. During the 2012-2013 school year, Student struggled with emotional and behavioral regulation while attending transitional kindergarten in the West Contra Costa Unified School District. He went to live with a relative in approximately November 2012, moved to at least two different foster homes that school year, and missed close to three months of school. Parent acknowledged that Student's changes in caretakers contributed to his behavior difficulties. Student's dysregulation continued when he started kindergarten in the Antioch Unified School District for the 2013-2014 school year. He did not adapt to school, was unable to attend to and engage in learning, and missed more than seven weeks of school that year. His behaviors escalated and included cutting his hair and eyelashes, physical violence, property destruction, screaming, running away, sleeping in class, eating out of the trash can, stealing food, and laughing inappropriately. He would shout out unusual statements in class such as, "I am going to pee on you," and "I am going to kill you." As a result, Antioch placed Student on a shortened day.

3. Dr. Michelle Leao, of the San Francisco Department of Public Health, diagnosed Student with reactive attachment disorder and post-traumatic stress disorder in December 2013. Student was prescribed the psychotropic medications Risperdal and Ritalin. Antioch first assessed Student for special education eligibility in February 2014, but was unable to complete a full assessment due to his behavioral and emotional struggles. Based on this partial assessment, Antioch determined it had insufficient information to establish if Student had a specific learning disability. Antioch further ruled out an emotional disturbance, despite Student's inability to maintain in a general education setting and his teacher's behavior rating scales which revealed clinically significant concerns across most domains. Because Antioch did not do a complete assessment and failed to account for data that was inconsistent with its determination, Antioch's February 2014 findings regarding special education eligibility are given no weight in this Decision.

4. Student required a nonpublic school placement, so Antioch placed him at Tobinworld, a California certified non-public school, in March 2014. Student originally qualified for a "Section 504 plan" in March 2014 because of his mental health condition which impeded his ability to establish relationships at school and resulted in off-task

behaviors that prevented him from accessing instruction.<sup>2</sup> Under this 504 plan, Student received small class instruction at a nonpublic school with an on-site behaviorist and trained staff to manage his elopement, on-site mental health therapy, positive behavior supports, extended school year services, and transportation. In June 2014, following a functional behavior assessment, Antioch amended Student's Section 504 plan to include additional therapy services, a behavior goal focusing on peer relationships, and a behavior intervention plan.

5. With the structure and reward system of Tobinworld, Student's behaviors improved from March to September 2014, and he made academic progress. Antioch reassessed Student in July and August 2014, and convened a second IEP team meeting on September 19, 2014. Antioch attributed Student's poor academic performance and processing weaknesses to his limited school exposure and ruled out a specific learning disability. Antioch acknowledged that Student's reactive attachment disorder and post-traumatic stress disorder could account for his emotional and behavioral presentation. However, because it could not eliminate its "optional theory" that his unstable home life caused his behaviors, Antioch again concluded that Student did not have an emotional disturbance. This Decision affords no weight to this finding as it was not consistent with the evidence. Antioch recommended further assessment after implementation of Student's June 2014 behavioral plan. Student's June 2014 Section 504 plan accompanied him to San Francisco.

#### *Enrollment in San Francisco*

6. On September 22, 2014, Parent and Elisa Mollick, Student's juvenile court dependency attorney, met with staff at San Francisco's Educational Placement Center to personally enroll Student. His enrollment paperwork informed San Francisco that he had a health condition that affected his education; he had previously attended Tobinworld, a nonpublic school; and he had a Section 504 plan. Parent and Ms. Mollick advocated for a placement that would be able to meet Student's needs and implement his 504 plan.

7. From the enrollment meeting and follow-up email correspondence, by September 23, 2014, San Francisco knew the requirements of Student's Section 504 plan and had information regarding Student's needs. San Francisco was aware that Ms. Mollick, Parent, and Student's Department of Human Services' county social worker Chabrika Bowers, agreed that Student required a nonpublic school placement, and that they disagreed

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<sup>2</sup> A "Section 504 plan" is an educational program created pursuant to the federal anti-discrimination law commonly known as Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

with Antioch's refusal to provide Student with an IEP. Ms. Mollick provided San Francisco a copy of Student's most recent psycho-educational assessment. On September 24, 2014, San Francisco's counsel informed Ms. Mollick that San Francisco would review the prior assessment and consider whether it wanted to conduct its own eligibility assessment. If so, it would provide Parent with an assessment plan.

### *Unique Program at Flynn*

8. Upon enrollment, San Francisco recognized the uniqueness of Student's situation given his robust Section 504 plan which included a nonpublic school placement with intensive services and supports. Matthew McCue, San Francisco's Supervisor of Special Education Services, decided that Student would attend Flynn based on his behaviors and mental health needs as reflected in his 504 plan.<sup>3</sup> Flynn was not Student's neighborhood school, but it was a school site that specialized in meeting the needs of students with social-emotional, mental health, and behavior issues. Prior to San Francisco's implementation of transportation, Student and Parent had to take two city buses and travel over one hour and forty minutes to get to his new school.<sup>4</sup> Not unexpectedly, Student frequently arrived late.

9. San Francisco determined it could implement Student's 504 plan at Flynn due to the supports of the "Success, Opportunity, Achievement, and Resiliency Academy," commonly known as SOAR. SOAR Academy was housed on the Flynn campus and consisted of two small special education classes for students with social-emotional and behavior regulation needs. SOAR had a number of positive behavior supports and services including an on-site behaviorist. San Francisco called it an "academy" because those students enrolled in SOAR were expected to graduate back to a general education classroom. SOAR staff were trained in behavior intervention, the use of positive behavior supports, differentiating instruction, and implementing accommodations.

10. Pursuant to district policy, only students with an IEP were eligible for placement in SOAR Academy. San Francisco placed Student in a general education classroom at Flynn, but he received supports from the SOAR program and staff. These supports included small group specialized academic instruction in math and language arts; a behaviorally trained aide; a positive behavior intervention support program with daily behavior data tracking in 30 minute intervals, the privilege of the "honors room," and the consequence of the "re-boot room;" and weekly mental health services on campus, first from

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<sup>3</sup> Mr. McCue received a master's degree in special education in 2006, and cleared his special education credential in 2012. He has been employed by San Francisco since August 2007, first as a special education teacher and department head, and then as a special education content specialist prior to his current position as supervisor in July 2014.

<sup>4</sup> Failure to implement Student's Section 504 plan in terms of transportation was not at issue in this proceeding and is outside OAH's jurisdiction.

a county provider and then from a school counselor. Special education teacher Andrew Menegat personally trained Student's paraprofessional aide and met weekly with his team of aides to discuss any challenges.<sup>5</sup>

11. A key SOAR support was the behavior reinforcement system whereby Student earned points for respectful, responsible, and safe behaviors. If he earned 80 percent of the total possible daily behavior points, he earned SOAR's "honors room" with access to preferred activities. Conversely, unsafe behaviors earned Student time in SOAR's "re-boot room" where staff assisted him in de-escalating. After demonstrating self-control and the ability to work independently, Student engaged in the final re-boot stage of restorative practices which included reviewing his problematic behavior and developing a plan to safely rejoin the class.

12. On September 29, 2014, Student started school at Flynn in Jacqueline Hernandez' general education first grade class.<sup>6</sup> She taught 15 students with the support of one class aide. Ms. Hernandez differentiated instruction to meet the individual needs of each student and provided small group guided reading instruction which Student participated in twice a week. In addition to the SOAR supports, Ms. Hernandez taught the "Second Step" social-emotional curriculum. This curriculum used social scenarios demonstrating positive interaction, provided strategies for appropriate interaction, and emphasized self-regulation through self-awareness. For instance, Student learned how to relax and take a deep breath with belly breathing. The curriculum was imbedded in each class period and reinforced throughout the day. Ms. Hernandez also incorporated the class management strategies of frequent praise, five positive remarks for every one correction, and repeating expectations. In class, students could earn a free choice activity for demonstrating positive behavior, and school-wide, Flynn students who were "caught being good" could earn extra rewards.

13. To ensure that Student's extensive 504 plan was implemented appropriately, San Francisco assigned Mr. Menegat to be Student's special education case manager. Although a few other students without IEP's received SOAR supports, Student was the only student without an IEP who was assigned a special education teacher as case manager. Beginning his first day of school at Flynn through the time of hearing, Student received specialized academic math instruction in his regular classroom with a special education

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<sup>5</sup> Mr. Menegat obtained a preliminary teaching credential in 2013, and earned a master's degree in 2014. He has worked for San Francisco since August 2009, first as a paraprofessional at Flynn and then as a special education teacher since August 2012. He serves on numerous school leadership committees, including Response to Intervention.

<sup>6</sup> Ms. Hernandez obtained a multiple subject teaching credential in 2003. Since that time she has taught kindergarten through second grade.

teacher twice a week for 30 minutes each session. Four times per week, Mr. Menegat provided Student small group specialized academic instruction in reading and language arts for 30 minutes each session in a special education classroom. Lee Hoffman, San Francisco's Lead School Psychologist, established that Student's general education placement was appropriate for Student because of the SOAR supports and specialized instruction he received.<sup>7</sup> Although San Francisco had not found Student eligible for special education, San Francisco provided Student an educational placement and special education services, that, had he been eligible, would have provided him a substantive FAPE until April 9, 2015.

14. Within the first week of Student's enrollment, Mr. McCue met with Ms. Miller and school psychologist Albert Arca. All three agreed that Student's situation was unique and he required close monitoring. They also agreed not to immediately refer Student for a special education assessment based on Antioch's recent assessments which found Student ineligible, as well as his transitions to a new home, new city, and new school, and his adjustment to being reunified with Parent. San Francisco decided to monitor Student, allow him time to stabilize, collect behavior data at Flynn, and then determine at a future Section 504 team meeting whether an assessment for special education eligibility was warranted. Given Student's transitions, it was reasonable for San Francisco to not immediately refer Student for a special education assessment upon enrollment. However, San Francisco should have referred Student for an eligibility assessment by the time of its Section 504 review meeting in October 2014.

*October 22, 2014 Section 504 Team Meeting*

15. San Francisco convened a Section 504 team meeting on October 22, 2014, to review Student's needs, placement, and progress. In addition to Parent, Mr. Menegat, Ms. Hernandez, Ms. Mollick, Ms. Bowers, a school social worker, a school nurse, a content specialist, the assistant principal, and a county education liaison attended the meeting. Although a special education supervisor did not ordinarily attend a Section 504 team meeting, San Francisco acknowledged that Student's situation and his high level of need were special, and therefore Mr. McCue also attended the meeting. Mr. McCue admitted at hearing that San Francisco was expanding the use of Section 504 plans and often the lines between 504 services and special education services were blurred. As San Francisco's special education supervisor, he was involved to ensure that the team made appropriate determinations. Prior to this meeting, he reviewed Student's cumulative educational file.

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<sup>7</sup> Mr. Hoffman obtained a master's degree in educational psychology in 2009 and had completed his doctorate coursework at the time of hearing. He holds a mental health counseling certificate, a pupil personnel services credential, and a school neuropsychologist certificate. As lead psychologist since August 2014, he consulted with and trained 60 school psychologists. Mr. Hoffman has worked with children with behavior and mental health needs since 2004, and served as a school psychologist since 2010.

16. Student was maintaining well at Flynn with the SOAR supports and demonstrated some progress in reading and math. He earned honors room on 15 of his first 17 days of school. Even so, he displayed off-task behaviors, an inability to stay in his area, noncompliance, inappropriate language, and some physical aggression. Although he initially would lay in a fetal position on the floor and not engage in class, by October 22, 2014, he had made friends and was playing well with others. The team agreed the Section 504 plan was working, and Student had benefitted academically, socially, and behaviorally. For his first three weeks at Flynn, Student received specialized academic instruction, the support of a one-to-one aide and a special education case manager, weekly mental health services, and SOAR behavior supports. San Francisco determined that Student continued to qualify for these Section 504 services due to a mental impairment, including behavior issues, which significantly impeded his education and adversely impacted his ability to interact with peers and to self-regulate.

17. At the October 2014 meeting, San Francisco formally adopted a written Section 504 plan for Student that entailed numerous services to address his behavior, learning, and social interaction needs. Student's Section 504 plan called for "special education" staff to ensure the following: 1) placement in a smaller educational setting "which may include Special education [*sic*] while assessing [Student's] needs"; 2) implementation of Student's behavior intervention plan as appropriate in the smaller class setting "which might include Special Education pending further behavioral assessment"; and 3) in-program behavior support by an on-site board certified behavior analyst. San Francisco's Section 504 plan offered small group instruction per the classroom schedule and included transportation. Although not part of the written 504 plan, San Francisco continued Student's weekly specialized academic instruction in math and reading and language arts. The meeting notes specifically referred to the reading and language arts instruction as special education, noting the provision of "30 minutes 4x a week with Andrew – SPED services." To address Student's peer interaction needs, his 504 plan included a social-emotional curriculum. Student also continued to receive fulltime one-to-one aide services and weekly mental health services though these were not specified in the written plan. As stated above, this educational program remained appropriate and provided Student educational benefit but none of the protections of the Individuals with Disabilities Education Act.

18. During the October 22, 2014 meeting, Ms. Mollick and Ms. Bowers asked San Francisco to assess Student for special education eligibility. San Francisco members of the team saw no need to assess Student because: 1) he had been subjected to several assessments since February 2014 and found ineligible; 2) he needed more time to settle in and stabilize so that any future assessment would be a valid reflection of his functioning rather than of his multiple transitions; and 3) its Section 504 plan was working as shown by Student's progress. San Francisco should have referred Student for a special education assessment at this time.

19. Because San Francisco provided Student with special education instruction and related services, its proposed "wait and see approach" did not result in a clearer understanding of Student and his eligibility, but rather reflected the success of the

interventions. Although Mr. Hoffman opined it was reasonable to wait a period of three to four months to implement Student's behavior plan prior to considering assessment, San Francisco relied to its detriment on Antioch's prior determination that Student was not eligible for special education. In focusing on why Student should not be subjected to further testing, San Francisco overlooked the only relevant inquiry, namely, whether it had reason to suspect Student had a qualifying disability and a need for the special education it was providing.

20. San Francisco's decision to not refer Student for a special education assessment was made against the backdrop of its concerns with disproportionality and the over-identification of African American males as qualifying for special education.<sup>8</sup> The risk of over-identification is that students who do not have a qualifying disability and need for special education could, in some instances, be removed from the general education setting and denied the right to be educated with typical peers. Mr. Hoffman's testimony established that to prevent over-identification of disproportionately represented populations, of which Student was a member, San Francisco applied a heightened rigor in utilizing general education interventions before resorting to special education assessments. San Francisco's concerns about disproportionality did not abrogate its responsibilities under the IDEA given Student's intensity of needs and ongoing interventions.

21. Student's Section 504 team agreed to continue his services and to meet again in January 2015. Ms. Mollick and Ms. Bowers did not persist in their request for a special education assessment. Although San Francisco interpreted their silence as an agreement that it would not refer Student for assessment, the evidence did not establish that the non-district members of the team agreed that a special education assessment was not warranted. The meeting notes do not reflect a team agreement to defer an eligibility assessment. Further, the October 2014 Section 504 plan required San Francisco to assess Student's needs in his educational setting and conduct further behavior assessment. Although the evidence did not show that Parent formally requested a special education assessment in writing, she did inform San Francisco of Student's special needs and of her concerns. Given Parent information, Student's behaviors, information in his cumulative file, the level of special education interventions already in use, and his juvenile court professionals' requests for assessment, San Francisco should have referred Student for special education assessment at the October 22, 2014 Section 504 meeting.

#### *Request for Records*

22. On December 3, 2014, San Francisco received Parent's request for a "complete copy of Student's educational file." San Francisco complied with this records request within five business days, on December 8, 2014. However, it did not compile or send Student's daily, handwritten, behavior point sheets in response to this request. In a

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<sup>8</sup> Student is identified as African American on his April 9, 2015 IEP.

letter dated January 15, 2015, Student's attorney informed San Francisco that Parent had not received all behavior records, discipline logs, services logs, mental health logs, or records regarding performance. There was no evidence that San Francisco withheld any discipline records or service logs. San Francisco sent Student's class assignments home weekly and sent his behavior point sheets home daily. Mr. Menegat discussed these each week with Parent during Friday phone calls. Parent acknowledged receiving Student's behavior point sheets on a near daily basis, aside from days when the aide was absent. The point sheets followed Student throughout the day and passed through the hands of various staff. Mr. Menegat maintained his own file of Student's point sheets. In response to the January 15, 2015 supplemental records request, San Francisco gathered additional records including attendance logs, a report card which Parent had received at the Parent-Teacher conference in November 2014, in-class academic progress monitoring assignments and curriculum tests, and a spread sheet summarizing Student's daily behavior point sheets through January 21, 2015. San Francisco sent these records within five business days on January 22, 2015.

#### *San Francisco's Assessment Plan and Initial Assessment*

23. San Francisco treated Parent's December 12, 2014 due process complaint in this case as a request for a special education assessment. In response, on December 23, 2014, San Francisco provided Parent an assessment plan calling for Student to be assessed in the following areas: academic achievement, health, intellectual development, language/speech communication development, and social-emotional and adaptive behavior. San Francisco acknowledged, in a prior written notice accompanying the assessment plan, that Student's academic deficits, behavior, and social-emotional functioning negatively impacted his education such that San Francisco suspected he might have a disability that qualified him for special education. If Parent had not filed for a due process hearing, the evidence showed San Francisco would not have assessed Student during the 2014-2015 school year. Mr. Hoffman established he would have waited a full year prior to assessing Student given his progress pursuant to the Section 504 plan. Parent did not consent to the proposed assessment plan until February 9, 2015. She testified that she could not consent until San Francisco provided her with all of Student's educational records and her attorney reviewed these. This delay was reasonable as Parent had received additional records on January 22, 2015, in response to her supplemental records request.

24. Pursuant to the December 2014 assessment plan, Mr. Hoffman conducted psychological testing with Student throughout March 2015 and the first week of April 2015; Mr. Menegat assessed his academics; and Carl Martin assessed his speech and language needs. Student's behaviors once again impacted the assessment process which took a significantly longer period of time to complete than was typical. He required structure, a reinforcement system, and frequent breaks due to his self-regulation challenges and difficulty attending. Rewards and praise were not always successful in engaging Student.

25. San Francisco determined that Student's language development was age-appropriate. According to test data, Student demonstrated the ability to interpret and respond appropriately to social cues, but his self-regulatory and attention deficits inhibited his

consistent display of social skills. Mr. Hoffman concluded the following: 1) Student had processing deficits in attention and cognition, and a significant discrepancy between his ability and achievement in reading comprehension and fluency, and math reasoning skills; 2) Student struggled with attention and regulating his impulses; and 3) Student exhibited atypical behavior and executive functioning and adaptive skills deficits related to his diagnoses of reactive attachment disorder and post-traumatic stress disorder.

### *San Francisco's Initial IEP Team Meeting*

26. Student's IEP team convened on April 9, 2015, to review the results of the initial assessment. San Francisco found Student eligible for special education pursuant to the primary category of other health impairment due to symptoms stemming from his reactive attachment disorder and post-traumatic stress disorder, and symptoms consistent with attention deficit hyperactivity disorder, all of which adversely impacted his alertness and ability to attend to instruction. Student also met eligibility criteria for emotional disturbance given his displays of inappropriate types of behavior and feelings under normal circumstances which negatively impacted his engagement in group activities. Additionally, Student met the criteria for specific learning disability. At issue in this case is whether Student would have qualified for special education sooner, if San Francisco referred him for assessment on October 22, 2014, and timely held an IEP team meeting to determine eligibility pursuant to that assessment plan.

#### OTHER HEALTH IMPAIRMENT

27. During the 2013-2014 school year, prior to attending Tobinworld, Student showed limited alertness and vitality as evidenced by sleeping in class. San Francisco knew of Student's diagnoses of reactive attachment disorder and post-traumatic stress disorder, and that these diagnoses could account for this behavior, as acknowledged by Antioch. Further, San Francisco knew that Student was prescribed medication to help him to attend to learning. Even with the SOAR supports, Student displayed limited alertness and an impaired ability to attend to instruction. In March 2015, Ms. Hernandez rated Student as below average in the areas of attention and emotional regulation on the Comprehensive Executive Functioning Inventory.

28. Based on record review and his assessment of Student during March 2015, Mr. Hoffman credibly concluded in his evaluation report that Student's

“significant social-emotional and behavioral concerns in regards to regulating his impulses, attention, and atypical behavior, as well as executive functioning and adaptive skills ... are related to his current diagnoses of reactive attachment disorder, post-traumatic stress disorder, and his struggles with his impulsivity, hyperactivity, and attention.”

Student's diagnoses and attention deficit hyperactivity symptomology resulted in inattentiveness, impulsivity, and challenging interactions with peers and adults, diminished his alertness to instruction, and adversely affected his education. The evidence showed that Student's overall classroom functioning remained consistent from October 22, 2014, the date San Francisco should have referred him for assessment, through April 9, 2015, the date of eligibility. The data supporting Student's eligibility was consistent with evidence of Student's functioning and diagnoses from October 22, 2014, forward and shows that Student would have qualified under this category sooner, if San Francisco had assessed him earlier in the year.

#### EMOTIONAL DISTURBANCE

29. Since September 2012, as noted by West Contra Costa, Student had exhibited inappropriate types of feelings and behaviors under normal circumstances including elopement, physical aggression, and property destruction. These behaviors predated his move to relative and foster care. By September 2013, Student's atypical behaviors intensified and included self-harm, threats to hurt others, eating out of the garbage can, inappropriate laughter, and "melt downs." That his behaviors intensified over time shows that his behavior stemmed from chronic internal dysregulation as opposed to an environmental factor. In February 2014, Student's teacher rated him as having clinically significant behaviors across all composites. By March 2014, Student's behaviors and self-regulation deficits prevented him from accessing the curriculum in a general education setting, and Antioch placed him in a nonpublic school where he remained until his move to San Francisco. In June and August 2014, his nonpublic school teachers continued to rate Student as having clinically significant behaviors in numerous areas including aggression, depression, and atypicality (tendency toward gross mood swings, or thoughts or behaviors considered "odd"), which elevated Student's behavior symptoms index, a measure of his overall emotional and behavior functioning, to the clinically significant range.

30. Even at Flynn with SOAR supports, Student exhibited concerning behaviors. Between October 22, 2014, and January 21, 2015, Student failed to earn at least 80 percent of the daily points for pro-social behaviors on 14 of the 48 days, and he required de-escalation in the reboot process on 9 days. Student's behaviors which earned the reboot room included elopement and physical aggression towards staff and peers such as hitting, biting, kicking, slamming a peer's head, and stabbing staff with a pencil. That Student earned honors room on 33 of these 48 days did not indicate an absence of challenging behaviors. Inexplicably, Student earned honors room even on days when he demonstrated the following behaviors: inappropriate language, disturbing others, deliberate disobedience, yelling, spitting, and teasing.

31. Ms. Hernandez' testimony that Student presented as a typical first grader was not given much weight as it conflicted with the rating scales she completed in March 2015 for his initial assessment. On the Behavior Assessment System for Children, Second Edition, Ms. Hernandez rated Student as having clinically significant behaviors indicating a high level of maladjustment in need of formal treatment in the areas of hyperactivity, behavioral

symptoms, and atypicality. She rated Student's behaviors as being in the "at-risk" range in the areas of aggression, school problems, attention, withdrawal, study skills, social skills, adaptability, functional communication, and overall adaptive skills.

32. Mr. Hoffman's April 2015 psycho-educational report established that Student exhibited inappropriate types of behavior or feelings under normal circumstances over a long period of time and to a marked degree which adversely impacted his education. Student's diagnoses, symptomology, and presentation in March and April 2015, were essentially unchanged from October 2014 through January 2015. Though he made progress, his challenging behaviors continued. As such, San Francisco's determination that Student qualified for special education services pursuant to the category of emotional disturbance at the IEP team meeting on April 9, 2015, shows that if San Francisco assessed Student earlier, it similarly would have found him eligible.

#### STUDENT'S PROGRESS AT FLYNN

33. Parent was pleased with Student's program at Flynn. Although he remained below grade level, she agreed Student progressed academically and behaviorally. In terms of his social-emotional functioning and behavior, from his first day of class on September 29, 2014, through April 9, 2015, Student earned honors room 73 times and necessitated the re-boot process 12 times. Although he still exhibited disruptive behaviors even on days when he earned honors room, the frequency and duration of the behaviors showed he was making educational progress. The SOAR behavior supports were effective and, on average, Student demonstrated safe, respectful, and responsible behaviors 81 percent of the time. He became a vital part of the class, initiating social interactions, making friends, assisting peers, and participating in group activities. Student progressed from being shut down to being able to express his feelings and develop relationships with his teachers.

34. Student made measurable academic gains at Flynn by the time of his initial IEP team meeting in April 2015. In mathematics, Student started the year with a lack of number sense and would guess to solve equations. He learned math strategies, and independently recalled and applied these strategies successfully. Over time, Student solved more equations and scored higher on his math tests. Student progressed from counting lines to solve math problems, to representing numbers in different ways, demonstrating his understanding of the relations between numbers, and working through word problems.

35. Student started first grade at Flynn unable to read at level A, an early kindergarten reading level. By the time of his April 2015 IEP team meeting, Student progressed to reading independently at level D, an early first grade level, and his instructional reading level was level E. He showed strong comprehension. Student demonstrated a year's worth of growth in reading during his first six months at Flynn. In writing, Student progressed from copying meaningless letter strings, to expressing what he had read in his own written words. He improved in his spacing of letters and words, and

appropriate use of capitalization, and was able to write complete sentences by April 2015. Student was able to independently produce one to two sentences with correct punctuation about a book he had read.

36. Student entered first grade at Flynn without the expected grade level skills. Therefore, despite academic progress, he remained below grade level in April 2015. The goal of first grade is to prepare students to succeed in second grade. Ms. Hernandez persuasively established that, while it was not realistic for Student to demonstrate two years' worth of growth over the course of one year, it was reasonable to expect at least one year's worth of growth. While Student had not yet mastered the beginning second grade standards at the time of hearing, he was on target to demonstrate at least one year's worth of growth in all academic areas by the end of his first grade year.

#### APRIL 9, 2015 IEP OFFER

37. At the April 9, 2015 IEP team meeting, San Francisco identified Student as having needs in all areas of academics, as well as social skills, behavior, social-emotional functioning, and mental health. San Francisco's initial IEP offered Student the same placement and specialized instruction, and virtually the same related services he had been receiving under the Section 504 plan. This supports the finding that San Francisco had provided Student with special education and related services under his Section 504 plan, without the procedural rights afforded to special education students. The April 2015 IEP continued Student's placement in a general education class with accommodations for 90 percent of the time, with specialized academic instruction in math twice a week for 30 minutes a session in the general education classroom, and specialized academic instruction in reading and language arts four times per week, 30 minutes a session, in a separate special education classroom. This IEP also continued Student's weekly counseling, with the addition of 60 minutes per month of counseling consult services and 60 minutes of parent counseling per month, and reduced his hours of one-to-one aide support. Parent signed consent to this IEP on April 13, 2015.

#### *Student's Independent Education Evaluation, April 2015*

38. Student participated in an independent educational evaluation with Dr. Melanie Johnson in April 2015.<sup>9</sup> Dr. Johnson reviewed Student's past assessments, and observed and tested him at his home on April 1, and 2, 2015. She administered a limited number of psychological and academic tests. Dr. Johnson observed Student in class for approximately one hour on April 29, 2015, but she did not talk to Flynn staff to discuss his

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<sup>9</sup> Dr. Johnson earned a doctorate degree in clinical psychology in 1998. She has been in private practice since 2003, during which time she has completed at least 1500 neuropsychological and developmental assessments of children and consulted with various school districts.

academic and behavioral progress. She read and relied on San Francisco's initial assessment in completing her report and recommendations on April 25, 2015. Dr. Johnson agreed that Student met special education eligibility criteria for other health impairment, emotional disturbance, and specific learning disability at the time of the IEP team meeting on April 9, 2015.

39. At the time of her evaluation, Student continued to take the medications Risperdal and Ritalin to help regulate his impulsivity, emotional and behavioral outbursts, and attention span. Even so, throughout testing, Student worked impulsively, responded randomly, and required many more breaks than other students his age. His capacity for sustained effort and engagement, even with a preferred activity, was limited compared to same-aged peers. Student struggled to physically and emotionally regulate himself as demonstrated by his inability to sit still and manage his frustration. Dr. Johnson established that his diagnoses of reactive attachment disorder and post-traumatic stress disorder remained appropriate and resulted in impaired attention, impulse control, and working memory; poor frustration tolerance; and a quick reaction to perceived threats. Student also met the criteria for attention deficit hyperactivity disorder given his extreme physical dysregulation, high activity level, and distractibility.

40. Congruent with San Francisco's testing, Dr. Johnson established that Student's ability to read and respond appropriately to social cues varied due to his emotional dysregulation and attention deficits. His deficits in attention, self-regulation, and working memory compromised his capacity to draw on his receptive and expressive skills. Student scored below grade level on all academic tests and demonstrated significant deficits in phonological processing, working memory, and retrieval skills.

41. Since 2012, Student displayed chronic self-regulation deficits in class and clinically significant behaviors even in a nonpublic school setting. Dr. Johnson was convincing on cross-examination that regardless of Student's multiple transitions, earlier testing would have revealed his overall profile of chronic social, emotional, and behavioral dysregulation as the primary cause of his educational struggles. Given the consistency between his past and current assessments, if San Francisco had assessed Student earlier pursuant to an October 22, 2014 assessment plan, he would have similarly presented as a child with a qualifying disability in need of special education services. Dr. Johnson did not fault San Francisco for failing to immediately assess Student given his stabilization but, in her opinion, San Francisco should have considered assessment within six weeks of enrollment. This is approximately consistent with the date of the Section 504 meeting on October 22, 2014.

42. In general, Dr. Johnson's report and her testimony were given considerable weight. However, Dr. Johnson's testimony that Student required a smaller educational setting with double the amount of specialized academic instruction was not persuasive in light of his progress. Dr. Johnson's recommendation that Student receive occupational

therapy consultation services to address his self-regulatory deficits was not credited, as it was not individualized and did not consider the strategies and services being used to address this area of need. San Francisco identified self-regulation as an area of need for Student and had numerous services in place since the start of the year to address this need. Mr. Hoffman more persuasively established that Student's behavior reinforcement system, counseling services, and the embedded social-emotional curriculum which incorporated whole body listening, effectively targeted Student's self-regulation needs.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework*<sup>10</sup>

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>11</sup> Ed. Code, § 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: 1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

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

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<sup>10</sup> Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

<sup>11</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint, in this case Student, has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; See 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

#### *Issue One: San Francisco’s Child Find Duty to Refer Student for Assessment*

5. Student contends that San Francisco violated its child find responsibilities when it failed to refer him for a special education assessment upon his enrollment in September 2014. Student asserts that San Francisco had reason to suspect that he had a qualifying disability and required special education based on the following: 1) his history of emotional and behavioral dysregulation and academic deficits; 2) his prior Section 504 plan and need for a nonpublic school placement; 3) San Francisco’s provision of special education services; and 4) Parent’s request for assessment prior to or during the October 22, 2014 Section 504 meeting.

6. San Francisco contends that it had no duty to refer Student for additional assessment because: 1) his prior district had recently assessed him and found that he did not qualify for special education; 2) he was experiencing numerous transitions including a change in caretaker, home, and school which would impact assessment results; and 3) he was progressing under his 504 plan. San Francisco argues it was entitled to first provide Student accommodations and modifications in the general education setting; it did so; and Student succeeded. San Francisco contends that Parent never requested an assessment aside from filing for due process in December 2014, whereupon it timely offered an assessment plan.

## CHILD FIND RESPONSIBILITIES

7. School districts have an affirmative, ongoing duty to actively and systematically seek out, identify, locate, and evaluate all children with disabilities residing within their boundaries who may be in need of special education and related services. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, §§ 56171, 56300 et seq.) This ongoing duty to seek and serve children with disabilities is referred to as “child find.” California law specifically incorporates child find in Education Code section 56301, subdivisions (a) and (b). “The purpose of the child-find evaluation is to provide access to special education.” (*Fitzgerald v. Camdenton R-III School Dist.* (8th Cir. 2006) 439 F.3d 773, 776.) This duty extends to all children “suspected” of having a qualifying disability and a need for special education. (34 C.F.R. § 300.311 (c)(1); *N.G. v. Dist. of Columbia* (D.D.C. 2008) 556 F. Supp.2d 11, 26 (*N.G.*.) This duty also extends to highly mobile children. (34 C.F.R. § 300.111(c)(2).) Such children, often part of the foster care system, are arguably in a constant state of transition. The IDEA cannot be read as excluding students in chronic transition from the benefits and protections of special education. Further, that a student made adequate educational progress is not a valid reason not to assess if there is reason to believe that student may qualify for and require special education. (34 C.F.R. § 300.111(c)(1); *Department of Educ., State of Hawaii v. Cari Rae S.*, (D. Hawaii 2001) 158 F.Supp.2d 1190, 1196-1197 (*Cari Rae.*.)

8. Once a child is identified as potentially needing specialized instruction and services, the district must conduct an initial evaluation to confirm the child’s eligibility for special education. (20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.301; Ed. Code, § 56302.1.) A school district shall make reasonable efforts to obtain informed consent from the parent before conducting an initial assessment. (20 U.S.C. § 1414(a)(1)(D); Ed. Code, § 56321, subd. (c)(1).) Before any action is taken to place a student with a disability in a program of special education, an evaluation of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) As soon as a student is identified as a “potential candidate” for special education, the district is required to follow the mandates of the IDEA and complete a full initial evaluation. (*N.G., supra*, 556 F.Supp. 2d 11, 26-27.) The court in *N.G.* found that the district’s child find duties were implicated once it knew that the student had been diagnosed with two potentially qualifying conditions, that these conditions adversely impacted her education, and that the parent and student’s doctor explicitly requested school assistance. (*Id.* at 29-30.)

9. “There is nothing in either the language or the legislative history of the [IDEA and Section 504] that suggests that it is the school district's suspicion or belief alone that activates the procedural safeguards.” (*Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, 801.) In an unpublished opinion, the Sixth Circuit agreed that, “A request for assessment is implied when a parent informs a school that a child may have special needs.” (*Robertson County School System v. King* (6th Cir. Oct. 15, 1996, No. 95-5526) 1996 WL 593605 at p. 4.) Even so, a district’s child find duty is not dependent on any request by the parent for special education testing. (20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a); Ed. Code, § 56301; *Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518 (*Reid.*.)

## PROCEDURAL VIOLATIONS

10. A violation of child find is a procedural violation of the IDEA. (*Cari Rae, supra*, 158 F.Supp.2d 1190, 1196; *D.A. v. Houston Independent School Dist.* (5th Cir.2010) 629 F.3d 450, 453 [calling the child find requirement a procedural regulation]; *D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 249-250 (*D.K.*); *Board of Educ. of Fayette County, Ky. v. L.M.* (6th Cir. 2007) 478 F.3d 307, 313 (*L.M.*).

11. An assessment may be initiated by the request of any one of a number of people or agencies, including a parent or state agency. (20 U.S.C. § 1414(a)(1)(B); See Ed. Code, § 56029 [referral for assessment means a written request by a parent, teacher or other service provider].) In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code, § 56302.5). The school district must provide the child’s parent with a proposed assessment plan along with notice of the parent’s rights within 15 days of the referral for assessment, not counting vacations in excess of 5 school days. (Ed. Code, § 56321, subd. (a).) The parent shall have at least 15 days to respond to the request for assessment. (Ed. Code, § 56321, subd. (c)(4).) The key question is at what point in time was San Francisco required to refer Student for assessment.

## TESTS FOR DETERMINING CHILD FIND VIOLATIONS

12. The Ninth Circuit Court of Appeals has not yet articulated a test for determining when a district’s child find obligation is triggered. In a recent unpublished opinion, the Ninth Circuit advised that the oft-cited test espoused by the federal district court of Hawaii has not been adopted by two sister circuits. (*G.M. v. Saddleback Valley Unified School Dist.*, (9th Cir. July 18, 2014, No. 12-56627) 583 Fed.Appx. 702, 703, fn. 1.) In 2001, the Hawaii federal district court held, “[T]he child-find duty is triggered when the [district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.” (*Cari Rae, supra*, 158 F.Supp.2d 1190, 1194 [citations omitted].) In *Cari Rae*, the district had reason to suspect a high school junior had a qualifying disability after numerous “warning signs” during her ninth and tenth grade years including failing grades, excessive absences, and behavior referrals. Under this test, the appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Id.* at p. 1195.) The *Cari Rae* court cited the Third Circuit’s holding that child find requires districts to identify and evaluate children “within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.” (*Ibid.*, citing *W.B. v. Matula* (3rd Cir. 1995) 67 F.3d 484, 501, abrogated on other grounds by *A.W. v. Jersey City Public Schools* (3rd Cir. 2007) 486 F.3d 791.)

13. The Sixth and Third Circuits have since promulgated child find tests that differ significantly from the *Cari Rae* standard. The Third Circuit, while continuing to allow districts who are on notice of a student’s potential eligibility a “reasonable period of time” to identify and evaluate, adopted a higher threshold noting that child find does not require “a formal evaluation of every struggling student.” (*D.K., supra*, 696 F.3d 233, 249.) The *D.K.* test does not require districts to “rush to judgment or immediately evaluate every student

exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment.” (*Id.* at 252.) The Sixth Circuit established a more stringent test, holding that the individual claiming a child find violation must demonstrate “that school officials overlooked clear signs of disability and were negligent in failing to order testing or that there was no rational justification for not deciding to evaluate.” (*L.M., supra*, 478 F.3d 307, 313 [citation omitted].)

14. In analyzing a child find violation, the actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

#### *SAN FRANCISCO’S OBLIGATION TO REFER FOR ASSESSMENT*

15. Upon enrollment, San Francisco knew of Student’s mental health diagnoses and behavioral issues and that these had impeded his learning and resulted in a nonpublic school placement in Antioch. Parent’s act of informing San Francisco of Student’s special needs and of his extensive 504 plan gave San Francisco further reason to suspect that Student had a disability and a need for special education. Student’s dependency attorney, county social worker, and Parent requested that San Francisco provide Student a specialized education program at a nonpublic school because of his needs. This, too, gave rise to San Francisco’s child find duty. Under the *Cari Rae* test, San Francisco had reason to suspect Student may have a disability and need for special education upon enrollment. However, under this test, San Francisco was allowed a reasonable period of time to initiate a referral from when it first suspected Student had a disability and need for services. Even Student’s expert concluded that while San Francisco should have assessed sooner, it was reasonable to wait up to six weeks if Student did not exhibit any concerning behaviors.

16. Under the *D.K.* test, San Francisco’s child find duties were not immediately triggered at enrollment as there was no track record that Student was struggling to such an extent that he required special education as opposed to needing time to acclimate. Under the *L.M.* test, San Francisco was on notice that Student may have a qualifying disability based on his 504 plan. However, San Francisco was not negligent in failing to immediately refer for assessment and had a rational reason to wait, for at least a short while, to obtain data at his new school placement. Student did not establish a child find violation immediately upon his enrollment under any of these child find tests. To conclude otherwise would require districts to immediately refer every student on a Section 504 plan for a special education assessment upon enrollment. Student did not provide any legal authority for such a proposition.

*A SECTION 504 PLAN DID NOT DISCHARGE SAN FRANCISCO'S IDEA DUTIES*

17. Parent's consent to the October 2014 Section 504 plan, and acceptance of the use of alternative strategies, did not relieve San Francisco of the obligation to comply with the child find provisions of the IDEA. (*N.G.*, *supra*, 556 F. Supp.2d 11, 29-30, citing *Scott v. District of Columbia* (D.D.C. Mar. 31, 2006, No. Civ.A. 03-1672 DAR) 2006 WL 1102839 at p.9; *Yankton School Dist. v. Schramm* (8th Cir. 1996) 93 F.3d 1369, 1375-1376 [Once a student is determined eligible for special education under the IDEA, the district cannot fully meet its obligations with the provision of a Section 504 plan].) A section 504 plan is not an adequate substitute for an IEP. (*Muller v. Committee on Special Educ.* (2d Cir.1998) 145 F.3d 95, 105; *Moser v. Bret Harte Union Sch. Dist.* (E.D.Cal.2005) 366 F.Supp.2d 944, 971; *W.H. v. Clovis Unified School Dist.* (E.D.Cal. June 8, 2009, No. CV F 08-0374 LJO DLB) 2009 WL 1605356, 24 (*W.H. v. Clovis*.)

18. At the Section 504 meeting on October 22, 2014, San Francisco recommended that the team adopt a "wait and see" approach and defer an initial assessment to obtain more data given Flynn's progress monitoring methods and because of Student's progress. Given its determination to continue to provide Student with specialized instruction and related services, and Ms. Mollick's and Ms. Bower's requests for a special education assessment during this Section 504 meeting, San Francisco should have referred Student for an eligibility assessment. Even if the evidence had established that Parent agreed that San Francisco should not assess Student for special education at the Section 504 meeting in October 2014, any such agreement would not negate San Francisco's independent, affirmative child find obligation to refer Student for an eligibility assessment. That Parent agreed to the Section 504 plan, and to meet again in three months, did not discharge San Francisco's affirmative, independent duty to refer Student for an initial assessment.

19. At the Section 504 meeting on October 22, 2014, San Francisco acknowledged that Student had a condition which adversely impacted his education, and chose to continue his extensive 504 plan which called for a small class setting, small group instruction with "possible special education", behavior support from an on-site behaviorist, and a social-emotional curriculum. In addition, San Francisco decided to continue to supplement this written plan with weekly specialized academic instruction in math and language arts with credentialed special education teachers, fulltime one-to-one aide support, and weekly mental health services. Under *Cari Rae*, San Francisco not only had reason to suspect a disability, it was treating Student as though he were eligible for special education by providing specialized instruction and related services. Under these circumstances, it was no longer reasonable to delay an eligibility assessment. Under the *D.K.* test, there was no indication that Student was struggling to such an extent that he required assessment precisely because he *was* receiving effective special education interventions. By October 22, 2014, San Francisco ignored clear signs that Student had a qualifying disability. Under the *L.M.* test, there was no rational basis to not evaluate Student's eligibility for the special education and

related services that San Francisco had been providing him under the guise of a Section 504 plan. Based on these facts, under even the most stringent child find test, San Francisco impermissibly deferred assessment at the October 22, 2014 Section 504 meeting.

20. Once San Francisco decided to provide Student with special education, even in the absence of a formal eligibility determination, it could not meet its obligations to ensure the procedural protections and parental participation required by the IDEA by providing Student with a Section 504 plan. As of October 22, 2014, based on its determination that Student had a mental impairment and behavior issues that significantly impeded his education, and given its decision to continue to provide specialized academic instruction and related services, San Francisco had ample reason to suspect that Student might have a qualifying disability and need for the special education it was providing. This triggered its duty to refer Student for an eligibility assessment and also started a legal timeline which required San Francisco to offer Parent an assessment plan within 15 days, by November 6, 2014. San Francisco's failure to timely refer Student for assessment constituted a procedural violation.

#### SAN FRANCISCO'S REASONS TO DEFER ASSESSMENT

21. San Francisco raised several arguments in defense of its decision to delay assessment at the October 2014 Section 504 meeting. Namely, San Francisco contended that Student should not be subjected to another assessment in light of his recent assessments in Antioch and given Student's state of transition which would skew assessment results. Further, San Francisco argued that it was simply providing general education services and Student was benefitting from these. San Francisco's arguments were not supported by the evidence or the law.

#### *MULTIPLE ASSESSMENTS AND TRANSITIONS*

22. The Third Circuit held, "A poorly designed and ineffective round of testing does not satisfy a school's child find obligations." (*D.K., supra*, 696 F.3d 233, 250 referencing *G.D. v. Wissahickon School Dist.*, (E.D.Pa.2011) 832 F.Supp.2d 455, 465-467 (*G.D.*) [finding a reevaluation of a student with significant behaviors inadequate because it overemphasized the student's academic proficiency and only superficially assessed behavior].) However, when a district has conducted a comprehensive evaluation and found a student ineligible for special education, that district is entitled to monitor the student's progress before considering further evaluation. (*Id.* at pp. 251-252.) "The IDEA does not require a reevaluation every time a student posts a poor grade." (*Ibid.*, quoting *Ridley School Dist. v. M.R.* (3rd Cir. 2012) 680 F.3d 260, 272-273 [district was not required to re-assess student three months after its initial assessment determined she did not qualify].)

23. Child find is not a shared responsibility between a student's former and current school district. Therefore, that Antioch conducted a recent assessment and found Student ineligible did not entitle San Francisco to rely on that prior determination as a substitute for fulfilling its own affirmative obligation to identify, locate, and evaluate. San Francisco's

decision to not assess Student because he had been subjected to numerous assessments since February 2014 overlooked its independent duty to determine initial eligibility for a student who transfers in from another district. Further, evaluations broadly encompass “the procedures used . . . to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” (34 C.F.R. § 300.15.) San Francisco could have referred Student for an initial assessment that consisted of observation, record review, interviews, and rating scales, rather than formal testing measures to meet its concern with over-testing.

24. San Francisco’s position that it was not advisable to assess Student earlier in the school year because he was in a state of transition was not persuasive. Giving credence to this position would abrogate San Francisco’s child find duty to highly mobile students, in contravention of the IDEA mandates. Further, in deciding to wait to assess out of concern about the impact of environmental factors, San Francisco conflated the eligibility determination process with its duty to refer for assessment. Districts are mandated to consider whether environmental conditions are the primary factor driving eligibility. (See 20 U.S.C. § 1414(b)(5); Ed. Code, § 56026, subd. (e).) Environmental changes do not necessarily override the duty to refer for assessment and often constitute additional grounds to assess.

25. The relationship between the duty to assess a student for special education eligibility, the duty to provide special education services, and the duty to utilize general education resources was summarized in *Los Angeles Unified School District v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 819-820 [internal citations omitted],

“To prevent districts from “over-identifying” students as disabled, Congress mandated that states develop effective teaching strategies and positive behavioral interventions . . . to assist students in the general education classroom without an automatic default to special education.”

(*Ibid.*) While districts must assess students suspected of having a disability to see if they qualify for special education, “a student shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized.” (*Ibid.*, citing Ed. Code, § 56303.)

26. San Francisco acknowledged that because it had identified a disproportionate number of African American males as eligible for special education, it applies an extra level of rigor in utilizing general education interventions and modifications prior to referring these students for an assessment. Nonetheless, a school district’s pursuit of general education interventions in accord with state policy may not be used to unreasonably delay the special education assessment process. (*Johnson v. Upland Unified School District* (9th Cir. Jan. 8, 2002, No. CV-98-09501-AHM) 2002 WL 22345 at p. 1; (*Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig* (9th Cir.1992) 976 F.2d 487, 491-492 (*Hacienda*) [An unreasonable delay in identifying and evaluating children with disabilities may result in a legal violation].) Further, a district may not delay its assessment of a student with a

suspected disability on the basis that it is utilizing a response to intervention approach to accommodate the student in the regular education program. (*Memorandum to State Directors of Special Education*, Office of Special Education Programs<sup>12</sup> (OSEP 2011) 56 IDELR 50.) Just as a “hasty referral for special education can be damaging to a child,” (*L.M., supra*, 478 F.3d 307, 313), so too can the provision of special education, without ensuring parental participation and the protections of an IEP, harm the child and denigrate the importance of the procedural safeguards. The evidence did not support San Francisco’s contention that it was simply utilizing general education resources to support Student.

#### *GENERAL EDUCATION INTERVENTIONS v. SPECIAL EDUCATION*

27. Special education is defined as “specially designed instruction.” (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Applying this definition, the federal district court for the Central District of California in *D.R. v. Antelope Valley Union High School Dist.* (C.D.Cal. 2010) 746 F. Supp.2d 1132 (*D.R.*), found that the provision of extra time, extra books, and special seating constituted modifications rather than special education. (See *Ashli C. v. State of Hawaii* (D. Hawaii, Jan. 23, 2007, No. 05-00429 HG-KSC) 2007 WL 247761, 10-11 [unpub.][differentiated instruction such as one-on-one work with the teacher, extra time, preferential seating, and oral test instructions were not special education and available to all].)

28. The fact that a child receives educational benefit in a general education setting does not automatically negate his need for a special education program. (*Letter to Pawlisch* (OSEP 1996) 24 IDELR 959.) If modifications are considered “specially designed instruction” because they constitute individualized instruction planned for a particular student, they may constitute special education, where educational performance would be negatively affected in their absence. (*Ibid.*) These determinations must be made on a case-by-case basis. (*Ibid.*) Just because the specialized instruction a student with a disability requires is already part of the general curriculum, considered best practices, or offered to all students with or without disabilities does not mean that such instruction does not constitute special education or that a qualified student does not need an IEP which incorporates the specialized instruction. (*Letter to Chambers* (OSEP 2012) 59 IDELR 170.)

29. San Francisco did not simply modify the general educational setting to accommodate Student. Once it provided Student specially designed instruction, it moved beyond the use of general education resources. San Francisco provided Student with special education in the form of weekly specialized academic instruction in math, as well as reading and language arts, by two credentialed special education teachers. San Francisco also

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<sup>12</sup> The Office of Special Education Programs is a division of the United States Department of Education charged with administrating the IDEA and developing its regulations.

provided related behavior support services, a fulltime one-to-one aide, and weekly access to mental health services to ensure Student's ability to access his instruction. That Student was not placed in SOAR Academy, a special education program, but simply had access to and received numerous SOAR supports and services, was a distinction without a difference. The provision of special education did not discharge San Francisco's duty to refer Student for assessment. Having provided special education instruction and related services, San Francisco was required to consider the impact of these specialized services on Student's functioning when considering its obligation to refer him for an eligibility assessment.

#### *IMPACT OF SPECIALIZED SERVICES*

30. A student's success cannot be viewed in a vacuum. Districts must consider the impact of provided supports. Otherwise, "disabled students who are making progress in an appropriate program could be automatically disqualified from receiving the very services enabling their success." (*N.G. supra*, 556 F.Supp.2d 11, 35 [finding adverse educational impact and need for special education where student did well because of a highly structured environment, small classes, close relationships with teachers, high level of supervision, access to psychological services, and medication management].) Considering a student's behavior with the provision of supports and services brings with it the risk that "the overlay of these interventions and accommodations [will] obscure [s]tudent's very real psychological problems existing under the surface." (*L.J. v. Pittsburg Unified School District* (N.D.Cal. May 14, 2014, No. 13-cv-03854-JSC) 2014 WL 1947115 p.12 (*L.J.*.)

31. San Francisco's determination at the October 2014 Section 504 meeting that Student should not be referred for assessment because he was making progress was based on his functioning with the provision of specialized academic instruction and related behavioral services and supports. San Francisco deferred assessment while providing special education services to Student. Therefore, San Francisco's progress monitoring data on Student's academic and behavioral performance measured the success of its delivered services rather than Student's need for special education. That Student was making progress was not a rational basis under the *L.M.* test for not assessing him, without first determining why he was progressing. Student progressed at Flynn because San Francisco provided him with the special education and related services he required; his progress did not relieve San Francisco of its duty to refer Student for a formal eligibility assessment.

32. In summary, San Francisco was required to refer Student for an initial assessment following the October 22, 2014 Section 504 meeting, and failed to do so. This resulted in a procedural violation. While one can appreciate the measures San Francisco took to address Student's needs, it is troubling that it provided special education services, reviewed the provision of those services, and then determined, based upon the effectiveness of its services, that it was not required to follow the procedures mandated by the IDEA. Congress established significant procedural safeguards, the importance of which cannot be gainsaid. (*Rowley, supra*, 458 U.S. 176, 205.) These procedures ensure Parent's participatory rights and those protections afforded to students who are eligible to receive such services.

## CONSEQUENCES OF PROCEDURAL VIOLATIONS

33. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist., No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*) [“...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE.”]; *Doug. C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*.)

34. The Ninth Circuit has held that a district's procedural violation “cannot qualify an otherwise ineligible student for IDEA relief” and constituted harmless error where a student was substantively ineligible for IDEA relief. (*R.B. v. Napa Valley Unified Sch. Dist.*, (9th Cir. 2007) 496 F.3d 932, 942; See *D.G. v. Flour Bluff Independent School District* (5th Cir. June 1, 2012, No. 11-40727) 2012 WL 1992302, p.7 [“IDEA does not penalize school districts for not timely evaluating students who do not need special education.”].)

35. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304; *Doug. C., supra*, 720 F.3d 1038, 1043[“Parental participation ... is critical to the organization of the IDEA.”].) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting, and is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.322(a), 300.501(c); Ed. Code, §§ 56341.5, subd. (a), 56342.5.)

36. In light of Student's subsequent eligibility for special education, any denial of Parent's right to meaningfully participate in the decision making process constitutes a denial of FAPE. Here, Parent had no opportunity to participate in the IEP formulation process, including the assessment process, prior to being provided an assessment plan in December 2014, because San Francisco declined to refer Student prior to that time. San Francisco's “proposed ‘wait and see’ approach ignores that a child's parents are essential members of the IEP team and are entitled to fully participate in the IEP process.” (*Simmons v. Pittsburg Unified School District* (N.D.Cal. June 11, 2014, Case No. 4:13-cv-04446-KAW ) 2014 WL 2738214, p. 9, citing *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*)[“Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.”].)

37. San Francisco's failure to timely refer Student for assessment by October 22, 2014, constituted a procedural violation which denied Student a FAPE by preventing Parent from participating in the decision making process. Within 15 days of this date, by November 6, 2014, San Francisco was required to provide Parent an assessment plan. San Francisco's argument, that because Parent waited approximately six weeks to provide consent to the December 2014 assessment plan, she would have similarly withheld consent to an earlier assessment plan, is pure conjecture. Parent wanted Student to have the benefits and protections of an IEP. That she withheld consent to the December 2014 assessment plan, during the course of litigation, does not mean she would have withheld consent in October 2014. Further, any presumed response did not change San Francisco's obligations. "[Parent's] response would in no way alter the District's legal obligations to [student] under the IDEA." (*Jana K. v. Annville-Cleona School Dist.* (M.D.Pa.2014) 39 F.Supp.3d 584, 604 (*Jana K.*)) San Francisco cured this procedural violation on December 23, 2014, when it provided Parent an assessment plan. Therefore, San Francisco's failure to timely refer Student for assessment denied him a FAPE from October 22, 2014, through December 23, 2014.

*Issue Two: Student's Eligibility from January 21, 2015, until April 9, 2015, and Denial of FAPE*

38. Student contends that if San Francisco timely assessed him upon enrollment, it would have found him eligible for special education services as a student with an emotional disturbance, a specific learning disability, and other health impairment sooner than it did in April 2015. San Francisco contends that an earlier assessment of Student would have measured his response to multiple transitions rather than establish a qualifying disability, and environmental factors would have ruled out eligibility. San Francisco further asserts that any disability Student had did not adversely affect his education, and he did not require specialized services as he was benefitting from his general education accommodations.

39. A district is not authorized to provide special education services without completing an initial assessment and without a determination by the IEP team that a student is eligible for such services. (20 U.S.C § 1414(a)(1)(A); Ed. Code, § 56320.) Parental consent for an initial assessment does not constitute consent for placement for receipt of special education and related services. (20 U.S.C. § 1414(a)(1)(D)(i).) Once the parent signs consent to the assessment, the school district is required to complete the assessment and hold an IEP team meeting to review the results within 60 days of receiving consent exclusive of school vacations in excess of five schooldays and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f)(1), 56302.1, subd. (a), and 56344, subd. (a).)

40. San Francisco was required to provide Parent an assessment plan by November 6, 2014. Assuming Parent provided immediate consent, and taking into account days of winter break, San Francisco was required to convene Student's initial eligibility IEP team meeting on or before January 21, 2015.

41. A student is eligible for special education and related services if he is a “child with a disability” such as an emotional disturbance, other health impairment, or specific learning disability and, as a result thereof, needs special education and related services that cannot be provided with modification of the regular school program. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.8(a)(1); Ed. Code, § 56026, subs. (a) & (b) [uses term “individual with exception needs”].) A student shall not be determined to be a child with a disability if the prevailing factor for the determination is a lack of appropriate instruction in reading or mathematics or if the student does not otherwise meet the eligibility criteria under federal and California law. (20 U.S.C. § 1414(b)(5); 34 C.F.R. § 300.306(b); Ed. Code, § 56329, subd. (a)(2).) California further specifies that a student whose educational needs are primarily the result of a temporary physical disability, social maladjustment, or environmental, cultural, or economic factors, is not an individual with exceptional needs. (Ed. Code, § 56026, subd. (e).)

42. In deciding whether a student needs special education, courts apply the *Rowley* standard to determine if the student can receive educational benefit with modifications to the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107(*Hood*) [decided under former Ed. Code, § 56337].) More recently, in the unpublished case of *C.M. v. Department of Educ., State of Hawaii* (9th Cir. Mar. 1, 2012, No. 10-16240) 2012 WL 662197, p.1), the Ninth Circuit used the *Rowley* standard to determine that a student did not need special education as she was able to benefit from her general education classes. The Ninth Circuit agreed that student’s Section 504 modifications such as the READ 180 program, a pre-algebra course, and math lab were not “specialized instruction” under the IDEA. (*Id.* at p. 2.)

43. San Francisco’s reliance on *Hood* in support of its position that Student did not require special education prior to its April 2015 eligibility determination is misplaced. The *Hood* case is legally and factually distinct in that it found that the student’s severe discrepancy could be “correctable” in the general education classroom, under a now defunct statutory provision, with accommodations such as preferential seating, visuals, and prompts. Even so, here, San Francisco went far beyond the provision of accommodations in the regular class.

44. It is the duty of the IEP team to determine whether a student is eligible for special education and related services. (20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. §§ 300.305(a)(1) & (2); 300.306(a)(1); Ed. Code, § 56026, subd. (a).) Further, an ALJ has the authority to determine whether a student is eligible for special education and related services under the IDEA. (*Hacienda, supra*, 976 F.2d 487, 492-493.) A student may qualify for special education benefits under more than one of the eligibility categories. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2014) 758 F.3d 1162, 1175-1176.)

45. Student met eligibility criteria for at least other health impairment and emotional disturbance by January 21, 2015, as discussed in full below. Given this determination of eligibility, and the fact that Student did not prove he suffered educational

harm from San Francisco's failure to timely determine his eligibility as determined below, it is unnecessary to conclude if he would have also qualified under the category of specific learning disability.

#### OTHER HEALTH IMPAIRMENT

46. A student meets eligibility criteria pursuant to the category of other health impairment if he has limited strength, vitality or alertness, due to chronic or acute health problems which adversely affects his educational performance. (Cal.Code Regs., tit. 5, § 3030, subd. (b)(9).) Attention deficit hyperactivity disorder may be a qualifying health condition for other health impairment, but all the requirements of the definition above still must be met. (Ed. Code, § 56339, subsd. (a), (b).) Special education eligibility criteria also require that the student is unable to access the curriculum without special education instruction and services. (20 U.S.C. § 1401(3)(A)(ii); Ed. Code § 56026, subd. (b).)

47. According to the federal court for the Northern District of California, a “[s]tudent’s past behaviors with no accommodations ... are relevant in determining eligibility at the time of the IEP meetings because they show what student’s behavior would likely involve if no accommodations were in place.” (*L.J.*, *supra*, 2014 WL 1947115, p. 13.) Therefore, Student’s behaviors prior to his placement at the nonpublic school and at Flynn, are relevant in determining eligibility at the time San Francisco should have held his initial IEP team meeting in January 2015. This information reveals what Student’s behavior would likely have involved if no specialized instruction or services were provided.

48. Without the structure of the nonpublic school and supports of the 504 plan, and without the SOAR supports and specialized instruction at Flynn, Student’s self-regulatory challenges would have continued to result in limited vitality and alertness to learning. Prior to his placement in the nonpublic school in March 2014, Student exhibited limited alertness as shown by sleeping in class and the inability to attend to instruction. These behaviors prevented him from accessing the curriculum. In December 2013, Student was diagnosed with reactive attachment disorder and post-traumatic stress disorder. These disorders impeded his ability to attend to learning and establish and maintain socially appropriate relationships at school.

49. Student’s progress at Flynn reflected the success of the delivered special education instruction and related services, rather than Student’s ability to succeed in the general education setting. Determining that Student’s education was not adversely impacted, because he was performing adequately with the provision of specialized instruction and related services, would result in excluding him from being deemed eligible for the very supports he required to access his education. Even with SOAR supports and specialized instruction at Flynn, Student’s diagnosed health conditions of reactive attachment disorder and post-traumatic stress disorder and his symptomology of attention deficit hyperactivity disorder resulted in limited alertness to instruction. He struggled to stay still, remain on task, and attend to learning. His behavior and presentation met the criteria for other health impairment by January 2015.

*AFTER ACQUIRED EVIDENCE*

50. While San Francisco's actions "cannot be judged exclusively in hindsight," (*Adams, supra*, 195 F.3d 1141, 1149), the Ninth Circuit has observed that after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1006 [later obtained evidence, such as assessments, may supplement the record if the evidence is relevant, non-cumulative, and otherwise admissible].) The Ninth Circuit held that, in reviewing a district's actions, courts may look to evidence not known to the decision makers at the time as "additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." (*Ibid*). Similarly, in upholding a child find violation and determination of eligibility pursuant to emotional disturbance, the *Jana K.* court concluded,

"These types of proceedings are necessitated upon the finding that the school district failed to timely discover a subsequently diagnosed disability. While hindsight can seldom be used in law to impute to a party something it should have known, here it is precisely the device used to adequately assess the student's needs and the school district's obligations at the relevant time."

(*Jana K., supra*, 39 F.Supp.3d 584, 601-602.)

51. Given the legal conclusions above, in order to determine Student's eligibility for special education as of January 2015, it is appropriate to not only look back in time, but to also look ahead and consider Student's functioning in March and April 2015 and the results of both San Francisco's and Dr. Johnson's evaluations. Student would not have presented in an earlier assessment as having fewer needs or a higher level of functioning. His chronic self-regulatory deficits could not credibly be attributed to a normal reaction to multiple transitions such that he would not have been found eligible at an earlier time. Based on its April 2015 psycho-educational assessment and Dr. Johnson's evaluation, had San Francisco assessed Student three to four months earlier, it would have identified him as a child eligible for and in need of special education and services.

52. At Student's initial IEP team meeting on April 9, 2015, San Francisco found him eligible pursuant to the categories of other health impairment, emotional disturbance, and specific learning disability. Despite benefitting from the behavior interventions, nothing significantly changed in terms of Student's underlying, chronic emotional and physical regulatory challenges stemming from his diagnoses, from the start of his school year at Flynn through March and April 2015 when San Francisco and Dr. Johnson conducted their assessments. The April 2015 IEP team eligibility finding sheds light on the reasonableness of determining that if San Francisco had timely referred Student for assessment, it would have found him eligible as a child with an other health impairment by January 21, 2015. San

Francisco's failure to convene an IEP team meeting by January 21, 2015, resulted in a procedural violation which prevented Parent from timely participating in the development of Student's education program and denied Student a FAPE.

#### EMOTIONAL DISTURBANCE

53. A child's impairment constitutes an emotional disturbance when he exhibits one or more of the following characteristics over a long period of time, and to a marked degree, which adversely affects his educational performance:

- (a) an inability to learn which cannot be explained by intellectual, sensory, or health factors;
- (b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) inappropriate types of behavior or feelings under normal circumstances;
- (d) a general pervasive mood of unhappiness or depression; or
- (e) a tendency to develop physical symptoms or fears associated with personal or school problems.

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(4).)

54. The law does not define what constitutes a "long period of time" required for emotional disturbance eligibility. An advice letter from the United States Department of Education states that a generally accepted definition of "a long period of time" is a range of time from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period. (*Letter to Anonymous* (OSEP 1989) 213 IDELR 247.) This letter also states that the qualifier "to a marked degree" generally refers to the frequency, duration, or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and/or school and community norms. (*Ibid.*)

55. Since September 2012, Student displayed chronic physical and emotional dysregulation in class. While his home disruptions may have contributed to his behavioral difficulties, his unusual behaviors predated his move to relative and foster care. Student's inappropriate behaviors intensified during the 2013-2014 school year and included physical aggression, self-harm, eating out of the trash, screaming, and laughing inappropriately. These behaviors prevented him from accessing the curriculum. In February, June, and August 2014, Student's teachers consistently rated his behaviors in the clinically significant range, indicating serious maladjustment requiring formal treatment, across several domains including aggression, depression, atypicality and behavior symptoms which measures overall behavioral and emotional functioning.

56. Even with SOAR supports and specialized instruction at Flynn, Student continued to exhibit inappropriate types of behaviors under normal classroom circumstances such as physical aggression, spitting, yelling, inappropriate language, and elopement. From September 29, 2014, through January 21, 2015, Student required the intervention of the re-boot process nine times, primarily due to unsafe and physically aggressive behaviors towards peers and staff. By January 21, 2015, Student met the eligibility criteria for emotional disturbance due at least to his inappropriate behaviors. Student's emotional disturbance adversely impacted his education by January 2015.

57. From the start of his school year at Flynn through March and April 2015, Student's overall chronic emotional and physical regulatory challenges remained unchanged. Therefore, San Francisco's initial psycho-educational assessment and Student's independent educational evaluation both support a finding of emotional disturbance by January 21, 2015. Further, the April 9, 2015 IEP team eligibility finding supports a determination that Student would have qualified as emotional disturbed by January 21, 2015, if San Francisco had timely assessed him and convened an earlier IEP team meeting. San Francisco's failure to timely convene an IEP team meeting constitutes a procedural violation. This violation denied Parent her participatory rights as San Francisco did not convene an IEP team meeting until April 9, 2015. Thus, San Francisco's delay in convening an IEP team meeting denied Student a FAPE. While Student was entitled to the protections, placement, and services afforded by an IEP by January 21, 2015, he did not prove he suffered educational deprivation.

*Issue Three: Did San Francisco's Failure to Timely Offer an IEP Deny Student a FAPE?*

58. This Decision previously determined that San Francisco's failures to refer Student for assessment by October 21, 2014, and develop an IEP by January 21, 2015, were procedural violations which deprived Parent of the right to timely participate in the assessment and IEP development process. When San Francisco failed to make Student eligible for special education by January 21, 2015, it also failed to develop an IEP for Student; this constitutes a third procedural violation for the same time period. For the reasons stated above, San Francisco's failure to develop an IEP for Student from January 21, 2015, through April 9, 2015, denied Parent the right to participate in the decision making process and resulted in a denial of FAPE. The remedy for San Francisco's procedural violations is addressed in a separate section below.

59. However, Student also contends that San Francisco's failure to develop an IEP deprived him of educational benefit because he would have made greater academic and behavioral progress with an IEP. Student asserts that if San Francisco had timely identified his present levels of performance and his areas of need, and developed measurable goals, it would have developed an IEP that offered more intensive academic instruction and supports, including occupational therapy services. San Francisco contends that from day one Student received a tailored educational program that addressed all of his areas of need. Further, San

Francisco argues that the April 2015 IEP, in providing Student with virtually the same education program, demonstrates that an earlier finding of eligibility would not have resulted in any substantive change in placement or services.

#### EDUCATIONAL BENEFIT

60. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. 176, 202.) A student derives benefit when he improves in some areas even though he fails to improve in others. (See *Fort Zumwalt School Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P.* (3rd Cir. 1995) 62 F.3d 520, 530.) A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 131; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569.) However, a district may not discharge its duty under the IDEA by providing a program that "produces some minimal academic advancement no matter how trivial." (*Amanda J., supra*, 267 F.3d 877, 890 citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.)

61. San Francisco identified Student's academic, behavioral, and social-emotional needs including his chronic self-regulation deficits. It determined his levels of performance through progress monitoring and curriculum-based assessments. San Francisco provided targeted behavior services including a reward system, a de-escalation process, and one-to-one aide support; a small class setting; a social-emotional curriculum formally taught and embedded throughout the school day; and weekly mental health services. Further, it provided Student with small group reading instruction within his class, and twice weekly specially designed math instruction, and specialized reading and language arts instruction four times a week, each with credentialed special education teachers. Student was assigned a special education case manager who ensured that all services were appropriately implemented and delivered, and that staff were properly trained. This systematic delivery of special education services is distinguishable from the *Jana K.* case where the court noted,

"The informal, unsupervised, and patchwork supports that the District offered were uncoordinated and intermittent, and largely depended on [student] taking the initiative to take advantage of them. Indeed, these supports lacked the accountability, measurable goals, and progress monitoring that an IEP would have provided."

(*Jana K., supra*, 39 F.Supp.3d 584, 604.)

62. Although the law on educational benefit measures the appropriateness of services delivered pursuant to an IEP, this case presents the unique question of whether Student received educational benefit from services delivered without an IEP. The evidence showed that Student received educational benefit from at least October 22, 2014, until April 9, 2015. Student did not meet his burden to show that the violation of not developing an IEP

resulted in a deprivation of educational benefit. Student's ability to self-regulate improved. On average, Student demonstrated safe, respectful, and responsible behaviors 81 percent of the time through April 2015. Student progressed from not being able or willing to engage in class to being a vital participant who made friends and formed trusted relationships with adults. Academically, Student was on target to make a year's worth of progress across all core subjects. In reading he had already made a year's worth of progress within his first six months at Flynn. In writing he advanced from producing meaningless strings of letters to writing two sentences with correct punctuation about a book he had read. In math he similarly progressed from having no number sense to solving equations by learning, independently recalling, and applying math strategies.

63. Although Student contended he would have made greater progress if he received services pursuant to an IEP, he did not refute his educational gains. The test is not whether he would have performed better with more services, but whether he received educational benefit. Throughout his placement at Flynn, Student received meaningful educational benefit. He did not prove that he required a more restrictive environment, a greater amount of specialized academic instruction, or occupational therapy consult services to access his program and receive educational benefit. San Francisco identified his self-regulation needs and effectively addressed these with a small class setting, one-to-one aide support, mental health services, and rewards-based behavior services. Under the unique circumstances of this case, San Francisco's delay in offering a formal special education program through an IEP, did not deprive Student of educational benefit.

64. In summary, San Francisco's failures to timely refer Student for assessment following the October 22, 2014 Section 504 meeting, and to make Student eligible for special education and to develop an IEP by January 21, 2015, constitute procedural violations. All three violations deprived Parent of the right to participate in the decision making process and resulted in a denial of FAPE. However, none of the procedural violations resulted in a deprivation of educational benefit.

#### *Issue Four: Educational Records*

65. Student contends San Francisco failed to timely provide him with a complete copy of his educational records, including daily behavior logs, such that Parent was not able to consider and consent to the December 2014 assessment plan. San Francisco contends that it timely provided Student with his cumulative file upon request and timely responded to a supplemental request. San Francisco argues that behavior point charts do not constitute educational records, but even so, these were routinely provided to Parent on a daily basis, and a summary of the behavior logs was provided to counsel.

66. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) Each participating agency must permit

parents to inspect and review any education records relating to their child that are collected, maintained, or used by the agency under this part. (34 C.F.R. §300.613(a).) The agency must comply with a request without unnecessary delay. (*Ibid.*) Federal regulations require that educational records be provided within 45 days of request, while California law affords parents the right to receive copies of all school records within 5 business days of the request. (*Ibid.*; Ed. Code, § 56504.) The right to inspect and review education records includes the right to receive an explanation and interpretation of the records; the right to receive copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative inspect and review the records. (34 C.F.R. §300.613(b).)

67. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611(b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3 & 300.611(b).) The United States Supreme Court defined the word “maintained” in this context by its ordinary meaning of “preserve” or “retain.” Records are maintained when the agency keeps the records in one place such as “a filing cabinet in a records room or on a permanent secure database” with a single record of access. (*Owasso Independent School Dist., No. I-011 v. Falvo*, (2002) 534 U.S. 426, 433-34 [122 S.Ct. 934, 151 L.Ed.2d 896] (*Owasso*); *S.A. v. Tulare County Office of Educ.* (N.D.Cal. Sept. 24, 2009, No. CV F 08-1215 LJP GSA) 2009 WL 3126322, pp. 5-7 *affd.* *S.A. v. Tulare County Office of Educ.* (N.D. Cal. October 6, 2009) 2009 WL 3296653 [school e-mails concerning a student that were not placed in his permanent file were not educational records as they were not maintained by the school district pursuant to *Owasso*].) Similarly, education records do not include “records of instructional, supervisory, and administrative personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

68. The Supreme Court further clarified that some records, such as a student’s “homework” or “class work” are not educational records. (*Owasso, supra*, 534 U.S. 426, 435.) Likewise, a student’s writing sample, daily work, pretests, and personal staff notes are not educational records. (*K.C. v. Fulton County Sch. Dist.* (N.D. Ga. June 30, 2006, No. 1:03-CV-3501-TWT) 2006 WL 1868348, p. 10.)

69. On December 8, 2014, San Francisco timely responded to Parent’s December 3, 2014 request for a complete copy of Student’s educational file. San Francisco was not required to provide copies of Student’s daily behavior point sheets as these are not educational records maintained by San Francisco with a central point of access. Rather, Mr. Menegat retained a copy of Student’s point sheets in his own files. Even so, these point sheets went home daily, and Mr. Menegat discussed them weekly with Parent. Student did not establish that San Francisco withheld any records subject to disclosure. On January 22, 2015, San Francisco timely provided Parent a summary of Student’s behavior logs and his class work assignments in response to a supplemental records request on January 15, 2015,

even though these are not within the definition of educational records. Student did not establish that San Francisco failed to timely produce requested educational records. Therefore, there was no procedural violation in this regard and no denial of FAPE.

## REMEDIES

1. Student prevailed as to Issues 1, 2 and 3. As a remedy, he requests compensatory education in the form of academic tutoring and occupational therapy consult services. Student also requests an order for staff training. San Francisco asserts that Student is not entitled to compensatory education as he made measurable academic and behavioral progress and received educational benefit. San Francisco contends that it fully complied with its special education duties and its staff members do not require training.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370, 374 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Puyallup, supra*, 31 F.3d 1489, 1497.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at 1496.) An award to compensate for past violations must rely on an individualized assessment, and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid, supra*, 401 F.3d 516, 524.)

3. Compensatory education is intended to make up for prior deficiencies in a student’s program. “Unlike compensatory education ... an IEP ‘carries no guarantee of undoing damage done by prior violations,’ and that plan alone cannot take the place of adequate compensatory education.” (*Boose v. District of Columbia* (D.D.C. May 8, 2015, No. 14-7086) 2015 WL 3371818, pp.1-2 citing *Reid, supra*, 401 F.3d 516, 522-23 [subsequent evaluation and provision of IEP did not render request for compensatory education moot].)

4. “Entitlement to [compensatory education] does not flow directly from districts’ failure to locate, identify and evaluate a potentially eligible student but rather from the deprivation of an appropriate education to a student who is or was in fact disabled under the IDEA.” (*G.D., supra*, 832 F.Supp.2d 455, 467-468 citing *P.P. v. West Chester Area School Dist.* (3rd Cir. 2009) 585 F.3d 727, 738 [holding that delay in evaluating a child could not, by itself, support a compensatory education claim without demonstration that the child had been deprived of an appropriate education].)

5. Student's reliance on *Doug C.*, for the position that he is automatically entitled to compensatory education because San Francisco denied him a FAPE, is misplaced. The analysis does not end with establishing a denial of FAPE. To be entitled to an award of compensatory education, Student was required to prove that he suffered educational harm. Student did not establish that San Francisco's failure to timely offer an appropriate IEP resulted in a deprivation of educational benefit which entitled him to compensatory education. Student made measurable academic, social-emotional, and behavioral gains. Further, it is logical to conclude that San Francisco would have offered the same placement, and the same type and amount of specialized academic instruction and related services in January 2015, as it offered in April 2015. The April 2015 IEP offered the same placement and the services Student had been receiving since September 29, 2014, with the exception of a reduction in aide services and the addition of monthly Parent counseling and counseling consult services. If the services San Francisco provided to Student had been delivered pursuant to an IEP, they would have constituted a FAPE during the statutory period. Student did not prove that he suffered an educational loss which entitles him to compensatory education.

6. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training is an appropriate remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific student involved, or to remedy procedural violations that may benefit other students. (*Ibid.*; *Student v. Reed Union School District*, (Cal. SEA 2008) 52 IDELR 240 [Cal.Ofc.Admin.Hrngs. Case No. 2008080580] [requiring training on predetermination and parental participation in IEP's].)

7. Here, without first referring Student for a special education assessment, timely making Student eligible and developing an IEP, San Francisco provided Student with special education instruction and services outside of the IEP team process, even though Student met eligibility criteria. In doing so, San Francisco thwarted the purpose of the IDEA, denied Parent her participatory rights, and failed to safeguard the protections the law affords to Student and to Parent. An award of staff training is appropriate to ensure that San Francisco's special education and general education staff are aware of their child find duties, and their obligation to formally assess a student prior to the provision of specialized instruction and related services, and the importance of parental participation.

## ORDER

1. Within 90 days of this Decision, San Francisco shall ensure that all of its special education and general education teachers, case managers, and school psychologists working at or supervising staff at Flynn receive four hours of training on the following: 1) child find duties and when to refer students for an eligibility assessment, particularly those

receiving Section 504 services; and 2) the importance of parental participation. This training shall be provided by a credentialed special education administrator, with at least five years of special education administration experience, who is not employed by San Francisco. San Francisco shall provide Student with a copy of the training agenda, the presenter's curriculum vita, and the sign-in roster within 30 days of completion of this training.

2. Student's additional requests for relief are denied.

#### PREVAILING PARTY

Pursuant to California 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. Student prevailed as to Issues 1, 2 and 3. San Francisco prevailed as to Issue 4.

#### RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 20, 2015

/s/

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THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings