Case No. 12-56627

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G.M. AND R.M.,

PLAINTIFFS-APPELLANTS

V.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT

DEFENDANT-APPELLEE

On Appeal from the United States District Court
Central District of California
Civil Action No. CV 11-01449 DOC (MLGx)

APPELLANTS' OPENING BRIEF

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I.

STATEMENT OF JURISDICTION

This is an appeal from a Decision of the United States District Court for the Central District of California which erroneously affirmed an administrative decision and awarded attorneys fees against a parent and her counsel. The district court had jurisdiction pursuant to 20 U.S.C. § 1415(i)(2)-(3) and 28 U.S.C. § 1331. The Decision is appealable and jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1291 in that it was a final decision of the lower court. The Decision was filed on August 1, 2012 and the Final Judgment was filed on August 6, 2012. The Notice of Appeal was filed on September 4, 2012. The Notice of Appeal was timely filed pursuant to 28 U.S.C. § 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(A). The Notice of Appeal also indicated that any award of attorneys fees would also be appealed. Via Order dated November 26, 2012, the District Court awarded attorneys fees to the Defendant-Appellee against Plaintiffs-Appellants and their counsel.

II.

STATEMENT OF ISSUES PRESENTED

Whether the District Court misapplied the law when it affirmed the administrative decision and held that Saddleback Valley Unified School District

("District") did not violate its child find obligation or deny R.M. ("Student") a Free Appropriate Public Education ("FAPE").

Whether the lower court misapplied the law and abused its discretion in awarding attorneys fees to the District.

III.

STATEMENT OF THE CASE

This case is brought pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA")[1] (20 U.S.C. § 1400 *et. seq*.) and concerns a child with disabilities as defined in California law. As described more fully in the Statement of Facts below, the District was made aware that Student, through her psychologist, struggled in school and had a "major depressive disorder." The District took no action to evaluate this disability. Even after G.M. ("Mother"), Student's Mother, requested assessment, the District did not assess. The IDEA creates an affirmative "child find" obligation and the District failed to assess and provide services to Student pursuant to that obligation. As a result, Mother had to secure private placement.

Later, Student was assessed and found to be eligible by the District. However, the District did not provide an appropriate educational program tailored

[1] Effective July 2005, the IDEA was reauthorized as the Individuals with Disabilities Education Improvement Act ("IDEIA"). For consistency with earlier case law, the IDEIA will be referred to simply as the IDEA.

to her unique needs. The offered placement and services were not reasonably calculated to provide Student with an educational benefit and Mother was therefore forced to keep Student at the private placement.

Finally, at trial, the District Court erroneously found that Mother's claims were frivolous. On that and other bases, the District Court made an award of attorneys fees against Mother in favor of the District.

IV.

STATEMENT OF FACTS

A. **The District Was on Notice of a Suspected Disability But Did Not Assess**

At the beginning of Student's ninth grade year (the 2009/2010 school year), Student had not yet been found eligible for special education services. Beginning as far back as 2005, Student began to fall into a depression after the death of a close friend. (Excerpts of Record [hereinafter "ER"], p. G.M., Vol. II, p. 179:11-23).[2] Her mental health further deteriorated after the separation of her parents in 2007. (ER, Vol. II, G.M., p. 180:9-18). Mother became increasingly concerned and eventually obtained therapy for Student through Kaiser Permanente where she was diagnosed with Depression on or about December 17, 2008. (ER, Vol. V, p. 1139). Her mental condition, sometimes treated as Dysthymia, sometimes as

[2] The Excerpts of Record are continuously bate stamped across five volumes. Citations will be to the continuously bate stamped numbers. Further, citations to testimony at the administrative hearing will be introduced by the name of the witness.

Depression, continued to worsen as the 2009/2010 school year began. (ER, Vol. V, pp. 1138, 1139, 1147, 1151, 1155, 1156). In September 2009 Student entered high school as a Freshman within the District.

Via e-mail dated October 13, 2009, Student's treating therapist, Dr. Adam Pollock, contacted Christa Schulz, the High School Counselor at Student's school. (ER, Vol. V, p. 1134). Ms. Schulz admitted that she did not read the e-mail until October 15, 2009 when it was called to her attention by Mother (ER, Vol. IV, Schulz, p. 762:12-17). That e-mail specifically informed the District that Student had a "major depressive disorder," along with relational and substance abuse issues. (ER, Vol. V, p. 1134). It continued and indicated that these deficits had, "negatively impact[ed] [Student's] ability to concentrate and focus on school-work." (*Id.*).

In response to this information, the District took absolutely no action to assess for special education eligibility. Ms. Schulz responded to Dr. Pollock via e-mail and indicated that the District would not even allow make-up work at that time because it was too early in the school year. (ER, Vol. IV, Schulz, p. 764:2-23; Vol. V, p. 1113). The District did not propose an assessment for special education eligibility, or otherwise attempt to determine the nature of Student's "major depressive disorder" and its impact on her education. (ER, Vol. IV, Schulz, pp. 778:25-779:8). As revealed at trial, Ms. Schulz did not even forward the message

to Stephanie Andersson, the school psychologist. (ER, Vol. IV, Andersson, pp. 807:24-808:7).

No action was taken until November 23, 2009 when Mother sent correspondence directly to Ms. Schulz and Ms. Andersson. (ER, Vol. V, p. 1133). That letter specifically requested "an assessment for Special Education on the basis of emotional disturbance." (*Id.*). In response to this request, the District did not create an assessment plan, nor did it initiate any proceedings to directly test Student for a possible disability. Instead, the District scheduled an informal Student Study Team ("SST") meeting which included only Mother and Ms. Andersson. (ER, Vol. IV, Andersson, p. 791:1-3, 796:2-4).

That SST meeting took place on December 7, 2009. (ER, Vol. V, p. 1132). At that meeting, Mother informed Ms. Andersson about Student's Depression and medication. (ER, Vol. II, G.M., pp. 195:23-196:8; Vol. V, p. 1132 (noting the anti-depressant medication, Prozac)). In response, the SST merely proposed a "planner check" for Student as well as a potential change in classroom schedule. (ER, Vol. V, p. 1132). At the time of the SST, Student was failing four of six classes. (*Id.*). The District was manifestly aware of Student's depression and of the impact on her academics. Despite this information, even at the time of the SST, the District refused to conduct any initial assessment for special education and so indicated on the SST form. (*Id.*).

As Student's academics and behaviors deteriorated, Mother was left with no choice but to secure an appropriate non-public school for Student. (ER, Vol. III, G.M., p. 638:12-14). The District was given notice of the intent to privately place (and Mother's intent to seek reimbursement) on December 21, 2009. (ER, Vol. V, pp. 1130-31). Student then began instruction at Sunrise Residential Treatment Center ("Sunrise") on December 30, 2009. (ER, Vol. II, G.M., p. 199:6-8).

After receiving the notice, the District first erroneously stated it was untimely. (ER, Vol. V, p. 1129). In fact, notice was timely. 34 C.F.R. § 300.148. Then, on January 12, 2010, the District convened a meeting and for the first time offered to assess Student for special education eligibility. (ER, Vol. V, pp. 1122-23). Mother immediately signed the assessment plan the same day. (ER, Vol. V, p. 1123). Those assessments were completed and reviewed at an Individualized Education Program ("IEP") meeting on March 26, 2010. (ER, Vol. V, pp. 1075-98). Until that date, the District had not offered any special education or related services of any kind to Student.

B. The District's Offer of Special Education Did Not Meet Student's Unique Needs

At the March 26, 2010 IEP meeting, the District finally concluded that Student was eligible for special education and related services under the IDEA. (ER, Vol. V, p. 1076). Student was found eligible both as a child with an "Other

Health Impairment" and as a child with an "Emotional Disturbance." (*Id.*). The District then made an offer of placement and services through the IEP. (ER, Vol. V, p. 1093). However, the placement and services in the IEP were not reasonably calculated to provide Student with an educational benefit.

The IEP itself recognized that Student had unique needs in a number of areas including "in the areas of Aggression[,] Atypicality, [and] Somatization." (ER, Vol. V, p. 1077). Despite these recognized areas of need, the IEP does not provide any goals to address them. (ER, Vol. V, pp. 1081-82). Additionally, the District's own testing recognized a "very elevated" score in Defiance/Aggression and clinically significant Hyperactivity. (ER, Vol. V, pp. 1113-14, 1117). Though the District recognized these needs, the IEP is silent on these issues and does not include goals or services geared toward their remediation. (ER, Vol. V, pp. 1081, 1092).

Instead, a review of the IEP reveals that fully 75% of Student's goals (nine of twelve) related to academic subjects. (ER, Vol. V, pp. 1081-89; see also, pp. 1036-37; Vol. III, Perlman, p. 457:18-23). Thus, these goals made no attempt to address the depression or unique needs that impacted her academics. The remaining three goals did not address any of Student's unique needs that resulted from her disability. (ER, Vol. III, Perlman, pp. 457:24-458:9; Vol. V, pp. 1036-37).

Additionally, the offer of related services was highly inappropriate for Student. In order to address her significant social and emotional needs, the District proposed three periods per day of a Resource Specialist Program ("RSP"). (ER, Vol. V, p. 1093). RSP is a special class used by children both in general and special education. It is typically a smaller classroom that focuses on a particular core academic subject. It does not address depression, dysthimia, defiance, aggression, atpicality, somatization, or any of Student's other areas of need.

The District's offer also included an immediate return from Sunrise to a public school without any transition plan or other services to ensure that Student could make the extreme change successfully. (*Id.*). As discussed in detail *infra*, the switch from the highly supportive Sunrise setting to a public school environment without any supports for transition would have failed. Other than RSP, no further services were offered at the March 2010 IEP meeting.

At hearing, the District argued that it also made a referral to the Orange County Health Care Agency ("OCHCA") for mental health services. (ER, Vol. IV, Dizon, p. 880:17-21). However, this fact was disputed. Mother testified that, prior to September 22, 2010 she had not received any such referral. (ER, Vol. III, G.M., p. 589:11-19). This is further evidenced by Student's request for all school records made pursuant to Cal. Educ. Code § 56504. In response to that production, no referral for OCHCA services was included. (ER, Vol. V, p. 1074). After a referral

was not found in the records, Student expressly requested one. (ER, Vol. V. p. 1074). Therefore, it appears that no referral to OCHCA was made.

However, even if a referral was made, the District's offer did not propose maintaining her placement at Sunrise until appropriate mental health services could be ascertained and provided. Instead, the District proposed an immediate return to a public high school campus – without mental health services – until some unidentified time in the future when those necessary services might be added.

Mother disagreed with the District's offer, did not sign the March 2010 IEP document, and continued Student's placement at Sunrise. Mr. Brad Simpson, the Case Manager at Sunrise, testified that a return to Student's public school in March of 2010 – as the District proposed – would have been inappropriate. (ER, Vol. II, Simpson, p. 245:13-19; *see also*, pp. 303:5-304:6). At that time, Student had yet to make her most significant progress. In fact, Student did not "graduate" from the Sunrise program and return to a local school until October 2010. (ER, Vol. II, Simpson, p. 245:11-12; Vol. V, p. 1073). Both Mr. Simpson and Dr. Mitchel Perlman, an independent neuropsychologist who evaluated Student, agreed that any return to the public school in March of 2010 would have been reasonably calculated to fail. (ER, Vol. III, Perlman, p. 446:13-21; pp. 447:24-448:7).

Student made appropriate progress at Sunrise until her discharge in October 2010. (ER, Vol. II, Simpson, pp. 253:22-254:13). Thereafter, Student was enrolled

in Crean Lutheran School ("Crean"), a local private school. (ER, Vol. II, G.M., p. 215:16-19). While at Crean, she continued to make appropriate progress and successfully achieved positive and passing grades in all subjects. (ER, Vol. II, G.M., p. 220:6-7; Vol. V, p. 993).

The IEP team reconvened on February 11, 2011 but no changes to the District's offer of placement were made at that time. (ER, Vol. V, p. 1004-13). Because of continued disagreements and the District's threat of additional litigation, Mother revoked her consent to special education on August 2, 2011.

C. The Lower Court Erroneously Awarded Attorneys Fees

Subsequent to the entry of final judgment, the lower court issued an Order Granting in Part District's Motion for Attorney's Fees but Reducing Total Fees on November 26, 2012. (ER, Vol. I, p. 1-13). However, as more fully described in the argument below, the lower court misapplied facts, law, equity, and precedent in reaching the conclusion that attorneys fees should be awarded to the District in this matter.

V.

STANDARD OF REVIEW

The Ninth Circuit reviews mixed questions of fact and law *de novo* unless the question is primarily factual. *Gregory K. v. Longview Sch. Dist.,* 811 F.2d 1307, 1310 (9th Cir. 1987). "[W]hether the school district's proposed IEP was a

'free appropriate public education' as required by the [IDEA] is a mixed question that we review *de novo*." *Id*. at 1310.

Additionally, pure questions of law are also reviewed *de novo*. *Id*. Questions of fact are reviewed for clear error. *Id*. The question of whether the undisputed facts triggered the District's child find obligation is a pure question of law. Whether the District's IEP provided a FAPE is a mixed question of law and fact. Whether the District Court erred in granting attorneys fees is also a mixed question of fact and law.

Further, within IDEA claims, the record is generally well developed by the time of appeal. Therefore, the Ninth Circuit is within its discretion to not only correct the lower court's legal errors, but also to render a substantive decision. *See*, *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1051 (9th Cir. 2012).

VI.

SUMMARY OF ARGUMENTS

The District has a responsibility to identify and assess children it suspects of having a disability. The failure to fulfill "child find" obligations gives rise to a cause of action for parents and students. Child find is triggered when the District has notice of a <u>suspicion</u> of a disability and the potential impact on a child's education. There need not be an official request for assessment.

Here, the District was made aware of Student's "major depressive disorder" by her treating therapist on October 13, 2009. He requested assistance with school work. The District thus was aware of: (1) a diagnosed disability; and (2) the impact on her education. The District took no action to assess. When mother expressly requested formal assessment in November 2009, the District again delayed any assessment. The District simply failed its child find obligation. Had it assessed, a special education program would have been provided. Indeed, when the District finally did evaluate Student, it found her eligible for special education. Because the District failed to assess, Mother was forced to place Student at a non-public school.

After Student's placement at Sunrise, the District at last agreed to assess her. An IEP meeting was held on March 26, 2010 where the District acknowledged that Student was a child with unique needs and eligible under the IDEA. However, after identifying needs in aggression, atypicality, hyperactivity, and somatization, the District did not provide any goals or services designed to meet these unique needs. In fact, the District's offer was to place her into substantially the same program she had been in when she was failing all classes. It cannot be said that such an offer was reasonably calculated to provide an educational benefit to Student.

Finally, as the facts demonstrate, Student and her Mother sought only to vindicate their rights under the IDEA. Their claims were not frivolous and, though the parties adopted a litigious stance, Mother never acted in bad faith or with an improper purpose. "Neither the IDEA nor its implementing regulations conditions [any] duty expressly imposed on a state or local educational agency upon parental cooperation or acquiescence in the agency's preferred course of action." *Anchorage*, 689 F.3d at 1051.

VII.

ARGUMENT

A. The District Failed its Obligation to Assess Student for Special Education Eligibility

The IDEA requires each State to have an affirmative obligation to locate and provide services to children with disabilities. 20 U.S.C. § 1412(a)(3). In California, that obligation is delegated to the local school district. Cal. Educ. Code § 56300. Specifically, a school district, including the District here, must identify, locate, and assess all children with disabilities by a practical method. Cal. Educ. Code § 56301. Child find claims are valid causes of action under the IDEA. *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181 (9th Cir. 2010).

Courts have provided further guidance on when the "child find" obligation is triggered and a school district must assess a child for IDEA eligibility. A district's

child find obligation toward a specific child is triggered when: (1) there is reason to suspect a disability; and (2) reason to suspect that special education services may be needed to address that disability. *Dep't of Educ. v. Rae*, 158 F. Supp. 2d 1190, 1194 (D. Hawaii 2001). As explained in *Rae*, the threshold for suspecting that a child has a disability is relatively low. *Id.* at 1195. The appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies. *Id.* Thus, any reasonable suspicion should give rise to the District's responsibility to assess a child for special education services.

In recent years, many school districts have attempted to utilize Response to Intervention ("RTI") techniques when dealing with struggling pupils. RTI, though nowhere codified in special education law, proposes that a school implement less restrictive accommodations and then move to more intensive interventions. However, the Office of Special Education Programs ("OSEP") has recently released a memorandum which explicitly instructs school districts that, "the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation." *Memorandum to: State Directors of Special Education*, 111 LRP 4677 (OSEP 2011).[3] Therefore, any reliance on RTI or other "wait-and-see" approaches is unlawful and contrary to the IDEA's requirements.

[3] A Request for Judicial Notice of this Memorandum is submitted concurrently with this Opening Brief.

Like the Office of Administrative Hearings ("OAH") before it, the lower Court generally cited the law correctly. (ER, Vol. I, p. 24). In fact, it specifically noted that child find obligations are triggered when a school district has "reason to suspect" a disability. Yet, in applying the uncontested facts, the lower Court reached a wholly unsupported conclusion.

In fact, it appears that the lower Court may have overlooked or misunderstood key pieces of evidence. In its decision, that Court included a footnote which stated, "Because Student never addresses the issue of whether Student even qualifies as a student with a disability or what that disability is, the Court simply assumes without deciding that she has a qualifying disability." (ER, Vol. I, p. 25 n.3). But this is directly contradicted by the IEP document wherein all parties (including the District) agreed that she was eligible as a child with emotional disturbance and a child with an other health impairment. (ER, Vol. V, p. 1077). As recounted more fully *infra*, this misunderstanding likely contributed to the Court's erroneously dim view of Student's claims.

1. <u>The District was Notified of Student's Disability on October 13, 2009</u>

The evidence is uncontested that the District had multiple notifications of Student's disability and refused to offer any special education assessment. Starting with the October 13, 2009 e-mail, the District was on notice that: (1) student had a disability; and (2) that such was hampering her school work. (ER, Vol. V, p. 1134).

Dr. Pollock expressly referenced Student's "major depressive disorder," among other difficulties, expressed concern about its impact on her schooling, and requested make-up work to address that impact. (*Id.*). Given this information from her treating physician, the District had reason to at least suspect a disability and reason to believe that special services might be needed.

Applying the *Rae* standard here, it is immediately apparent that the District had sufficient reason to suspect a disability based on the October 13, 2009 communication from Student's physician. *See*, *Rae*, 158 F. Supp. 2d at 1194. Indeed, the District had more than mere "suspicion" that Student might have a disability. Dr. Pollock's e-mail specifically informed the District of Student's "major depressive disorder." Thus, the District did not merely "suspect" a disability, but was made abundantly and authoritatively aware of it. Further, given Student's low grades, Dr. Pollock's linking of the disability to poor performance, and the request for educational assistance, the District also had reason to suspect the disability impacted her education. Under *Rae*, and the requirement for child find generally, the District should have referred Student for assessment. It did not.

Part of this failure to take action was explained (though not excused) by Ms. Schulz's testimony at hearing. Ms. Schulz indicated that special education was not needed because there were still, "plenty of points" to be had during the semester. (ER, Vol. IV, Schulz, p. 764:9-13). A district's child find responsibility is not

dependent on how much of the semester remains in a given school year. This evidences a misunderstanding of the District's obligations and explains the resulting unlawful failure to refer Student for assessment.

In the Court below and at the administrative trial, the District argued that because Dr. Pollock did not specifically request a special education assessment under the IDEA, the October 2009 e-mail was insufficient to trigger the District's child find obligations. This reasoning was erroneously adopted by the Administrative Law Judge (ER, Vol. I, p. 54 ¶ 9) and the Court below (ER, Vol. I, p. 27:1-10). There is no talismanic language necessary to refer a child for special education services, nor should there be. Indeed, the individuals most likely to make such a request are lay parents who are unlikely to know the "magic words" proposed by the District and suggested by the lower tribunals. Therefore, the lower decisions requiring such language are in error.

The Court below held that the e-mail did not trigger child find because "notice of a student's mood disorder … does not, in and of itself, trigger the district's duty to conduct an assessment." (ER, Vol. I, p. 27:8-9). However, this completely ignores all supporting evidence. The October 2009 e-mail was not merely notice of a mood disorder, but also specifically requested school interventions as a result. While those interventions were not couched in the language of the IDEA, it would greatly exalt form over function to create

talismanic invocations (potentially unknown to parents and service providers) in order to secure an evaluation.

However, the lower Court then isolated other facts out of context. The Court noted Student's academic struggles (ultimately failing every class) by saying, "[t]he three months during which Student attended District were not sufficient for District to distinguish between symptoms of Student's disability and normal student behavior." (ER, Vol. I, p. 29:6-8). Again, this completely ignores the October 2009 e-mail from Student's treating physician specifically identifying a "major depressive disorder" and the November 2009 communication from Mother asking for special education testing. Parents and treating physicians informed the District that this was not part of "normal student behavior." The lower Court was aware of both requests and the impact on Student's education and yet still refused to hold the District accountable for failing to refer for special education testing.

The Court also unlawfully conflated the requirement that the District suspect a disability, with a finding that the child is actually eligible – the very misstep cautioned against by *Rae*. *Rae*, 158 F. Supp. 2d at 1195. The lower Court explained that there must be reason to suspect symptoms "over a long period of time and to a marked degree." (ER, Vol. I, p. 28:19) (emphasis removed). It then held that, "the three months during which Student attended District was per se insufficient to

observe symptoms 'over a long period of time and to a marked degree.'" (ER, Vol. I, p. 28:25-26) (emphasis removed).

The language about a "long period of time and to a marked degree" comes directly from the eligibility standard. *See*, Cal. Code Regs., tit. 5, § 3030(i). Indeed, the lower Court was aware of this and cited it as such. (ER, Vol. I, p. 25:16-20). However, the lower Court then supplemented the relatively low requirement to "suspect a disability" with the higher (and unsupported) standard to suspect it "over a long period of time and to a marked degree."

This is simply a misapplication of law.[4] Under this reasoning, a district need not assess a child until the evidence that they are eligible is already present. If this were the standard, then why does the IDEA include an evaluation process? In truth, only a suspicion of a disability is needed and the potential impact on schooling – both elements present here. Indeed, the purpose of the evaluation process is to determine eligibility. The lower Court's ruling would require that eligibility be essentially established before a child can even be assessed for eligibility. This formulation puts the cart before the horse.

[4] Consider a child who attends First through Fifth grades in one district. Then moves with her family to a new state and a new school district. At the new school district she is "per se" ineligible because the district hasn't seen her "over a long period of time" whereas in the old district, presumably this would not be an issue. The lower Court's formulation makes a child's referral for special education dependent on matters (such as moving) wholly irrelevant to whether the child has a disability.

Even further demonstrating the inappropriateness of the lower Court's formulation, had the District assessed Student when a disability was first suspected, it would have found eligibility for special education – including symptoms over a "long period of time." An assessment would have discovered that the symptoms began as early as 2005. (ER, p. G.M., Vol. II, p. 179:11-23). Indeed, when the District finally did assess and review the results at the March 2010 IEP, Student was found eligible by the District.

2. Mother made an Express Request for Assessment in November 2009

Mother wrote a letter dated November 23, 2009 which expressed her concerns and specifically requested testing for special education eligibility. (ER, Vol. V, p. 1133). That letter was submitted to both Ms. Schulz and Ms. Andersson. Despite receipt of that letter, acknowledged by both Ms. Schulz and Ms. Andersson (ER, Vol. IV, Schulz, p. 767:7-21; Andersson, p. 787:6-9), no assessments were conducted nor any referral for special education eligibility initiated.

Further demonstrating her misunderstanding of the District's child find responsibilities, Ms. Schulz indicated that she was surprised at the request for special education because she "didn't think [Student] had a learning disability." (ER, Vol. IV, Schulz, pp. 767:22-768:2). A learning disability is not the sole qualification for special education. In fact, the California Code of Regulations lists

no fewer than ten eligibility categories – only one of which is a specific learning disability. Cal. Code Regulations, tit. 5, § 3030.

Indeed, the November 2009 letter specifically requests eligibility under the category of "emotional disturbance" (*Id*. at § 3030(i)) and nowhere mentions any suspicion of a specific learning disability. (ER, Vol. V, p. 1133). On cross-examination, Ms. Schulz persisted in this unlawfully narrow interpretation of child find. When attempting to explain the District's obligations under that requirement, she indicated that she should find children that have "a learning disability." (ER, Vol. IV, Schulz, pp. 777:23-778:4). Based on that misunderstanding, Ms. Schulz testified that she would not normally refer a child with Student's "issues" for eligibility. (ER, Vol. IV, Schulz, p. 779:10-12). In fact, when asked whether there had been any information about an emotional disturbance prior to Mother's November 2009 letter, Ms. Schulz admitted that the October e-mail from Dr. Pollock provided that information. (ER, Vol. IV, Schulz, pp. 780:24-781:3)

Ms. Andersson testified that she had not received the e-mail referencing Student's "major depressive disorder" from Ms. Schulz until after Student had already been placed at Sunrise. (ER, Vol. IV, Andersson, pp. 807:19-808:7). However, despite the request in the November 2009 letter, Ms. Andersson indicated that she did not refer Student for special education because it was "important" not to disrupt Student's classes. (ER, Vol. IV, Andersson, p. 796:2-

13). These were the same classes that she was then failing (ER, Vol. V, p. 1132); the same classes that would require special education and related services to pass. This is possibly the least legitimate basis on which to deny assessment for special education eligibility. Further, nothing in the law allows a school district to violate the child find obligation in order to avoid unspecified disruption to a child's classes.

During the hearing, Ms. Andersson admitted that she did not immediately request Student's file from her doctors (despite having permission to do so) because she wanted to see if other interventions would first be successful. (ER, Vol. IV, Andersson, pp. 812:21-813:20). This "wait-and-see" approach violates the child find requirement – at least as understood by OSEP. *Memorandum*, 111 LRP 4677 (OSEP 2011). The District had a legitimate suspicion that Student had a disability that impacted her education. Further, the District was now presented with a specific request for special education testing. Yet, the District still refused to refer the child for an assessment.

On December 7, 2009, Ms. Andersson met with Student's mother as part of a "Student Study Team." In fact, the entire "team" consisted of merely Ms. Andersson and Mother. During that meeting, the District offered to "look into" a change in class schedule and to initiate a "binder check" for Student. (ER, Vol. V, p. 1132). Even for a lay person, it is immediately obvious that such minor

accommodations would not address the deficits from Student's "major depressive disorder." What the District failed to do at the SST was assess for special education eligibility. In fact, the SST document clearly indicates that Student would not be assessed. (*Id*.).

Although Mother signed the SST form, she did so only to demonstrate her attendance at the meeting – not to indicate any withdrawal of her request for special education testing. (ER, Vol. II, G.M., p. 197:18-19). In any event, the SST represents an unlawful RTI – an extra hurdle put in Mother's way before her daughter could be assessed for special education.

The District had much more information than necessary to trigger its child find obligations. The District had multiple communications from Student's doctor and mother. In each, the District was informed of significant disabilities and the potential impact on Student's education. The District was further aware of Student's failing grades and therefore knew the impact the suspected disability was having. (ER, Vol. V, p. 1132). Despite all of this information, the District never moved forward with an assessment in the Fall of 2009. Instead, the District completely abandoned its child find responsibility and thereby denied Student her protections under the IDEA. The District only offered to assess Student after she had been placed at private expense at Sunrise. As such, the District should have

been found liable for the denial of FAPE from October 13, 2009 until the IEP meeting was finally held on March 26, 2010.

Strangely, the lower Court asserted that "Student's argument is made in one paragraph and without citation to authority." (ER, Vol. I, p. 27 n.6). This is especially puzzling because a review of Student's opening brief in the action below reveals that the argument was made over the course of three pages and included citations to *Rae* and the *Memorandum* from OSEP. (ER, Vol. II, pp. 84:11-87:2). The lower Court's understanding otherwise is simply error.

In analyzing the child find question, the lower Court broke sharply from the intent and purpose of the IDEA. Speaking of the child find duty, the Court held, "A parent's *request* for an assessment does not satisfy that element per se." (ER, Vol. I, p. 27:6) (emphasis in original).

The lower Court was specifically directed to Cal. Educ. Code § 56029 which defines what does and does not constitute a "referral for assessment." A referral for assessment, "means any written request for assessment to identify an individual with exceptional needs made by any of the following: (a) a parent or guardian of the individual…" The statutory language could not be more clear. A parent's request for assessment is, in fact, the statutory definition of a referral for assessment. Despite this, the lower Court refused to honor the parental request.

The lower Court held that the plain text did not apply because § 56029, "provides a *definition*, not a child find *duty*." (ER, Vol. I, pp. 27:16-28:8) (emphasis in original). This distinction is entirely immaterial. The child find duty has already been well-established. *See, e.g.*, *Addison*. In fact, the definition does not relate specifically to when child find is triggered. Instead, it moves on to the next step: when referral for evaluation should occur.[5] And a parental request for assessment undoubtedly is intended to initiate a "referral for assessment" and start the process. The lower Court's ruling simply disregards statutory language, intent, common practice, and common sense.

The lower Court also resorts to an unthinkable policy argument. It held that, "Schools should not be burdened with conducting expensive and invasive assessments at the *whims of parents*; rather, schools should conduct such assessments when doing so is warranted by *the facts known to the school*." (ER, Vol. I, p. 28:6-10) (emphasis in original). This formulation, which seeks to exalt school experience over parental concern, is exactly the opposite of the purposes behind the IDEA. Indeed, the express purposes enunciated by Congress are centered on the rights of the child and not protections for school districts. 20 U.S.C. § 1400(d).

[5] The child find obligation holds that when a school district official has reason to suspect a disability, the district must refer the child for special education. That referral occurs when, "a teacher or other service provider" makes the request. Cal. Educ. Code § 56029(b).

The purpose of the IDEA (and its predecessor statute) has been to strip schools of their traditional unilateral authority. *Honig v. Doe*, 484 U.S. 305, 321 (1988) (discussing several sections which combine to remove school district authority). Not only does the IDEA remove the District's authority, but it increases parental involvement. Parents are a necessary party to any IEP Team meeting. 20 U.S.C. § 1414(d)(1)(B)(i). Parents have the right to review special education documents and participate in any meeting involving their child. 34 C.F.R. § 300.501. Indeed, if a parent is prevented from meaningful participation, the IDEA is violated and a FAPE has been denied to the child. *R.B. v. Napa Valley Unified Sch. Dist*., 496 F.3d 932, 938 (9th Cir. 2007) *citing Park v. Anaheim Union Sch. Dist*., 464 F.3d 1025, 1031 (9th Cir. 2006). The IDEA considers the opinions of parents of supreme importance. Thus, when a parent has concerns about her child and specifically requests an assessment, the policy should favor assessment.

Further, the lower Court's formulation shows shocking bias. The Court juxtaposed the "whims of the parent" with the "facts known to the school." (ER, Vol. I, p. 28:8-10). A parent knows their child better than any school official. In all likelihood, a parent is not requesting an assessment on a "whim," but instead based on facts known to the parent which may not be immediately apparent to the school. To characterize a request for special education assessment – a request no parent hopes to make – as a parental "whim" is insulting. This is especially true in

this case where, once assessed, the District agreed Student was a child with a disability and in need of special services. Clearly, Mother's request here was not made on a "whim."

B. The District Denied Student a FAPE by Failing to Create an IEP Tailored to Her Unique Needs

A school district must provide the child with a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1412(a)(1). When making a finding of whether an IEP offer would provide an "appropriate" education, the courts have recognized that no easy definition of "appropriate" appears from the IDEA. For guidance, courts have turned to *Rowley* which interpreted the IDEA's predecessor statute and stated that an offer of FAPE meets the legal requirement when it, "provide[s] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). This Circuit has since reaffirmed that standard and required that a child receive educational benefit through the IEP. *J.L. v. Mercer Island Sch. Dist*., 592 F.3d 938 (9th Cir. 2010).

When judging whether an IEP is appropriate, this Circuit has adopted the "snapshot rule." "We do not judge an [IEP] in hindsight; rather, we look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the child]

with a meaningful benefit." *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) *citing Furhmann v. East Hanover Bd. of Educ*., 993 F.2d 1031, 1041 (3d Cir. 1993) (*quoting*, "an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted."). Thus, if the IEP was not "reasonably calculated" to provide the child with an educational benefit, given what was then known, the district has denied the child a FAPE.

1. The IEP Proposed by the District did not Meet Student's Identified Unique Needs

After Student had been removed to Sunrise, the District finally agreed to assess her on January 12, 2010; Student's mother signed the assessment plan the same day. (ER, Vol. V, pp. 1122-23). The results of those assessments were reviewed in an IEP meeting on March 26, 2010. At that meeting, the District found Student eligible under emotional disturbance and other health impairment. *See*, Cal. Code of Regulations, tit. 5, § 3030(f). Thus, had this testing been conducted when the District was first aware of the suspected disability, Student would have been found eligible several months earlier and interventions could have been provided.

In order to reach the minimum threshold of appropriateness, an IEP must include measurable annual goals designed to "meet the child's needs that result

from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability." 20 U.S.C. § 1414(d)(1)(A)(i)(II). In other words, there must be goals in all areas of unique need.

As recounted above, the District's assessments and the IEP document itself revealed numerous areas of unique need. Those areas included Aggression, Atypicality, Somatization, and Hyperactivity. (ER, Vol. V, p. 1071). However, the IEP includes absolutely no goals to address any of these areas. An IEP must meet all areas of need, including social and emotional needs. Failure to meet social and emotional needs, even if the child is otherwise progressing academically, is still a denial of FAPE. *Cranston Sch. Dist. v. Q.D.*, 51 IDELR 411 (D.R.I. 2008).[6]

If the District and the IEP team recognized these areas of need, and simultaneously recognized that they would impact Student's ability in the classroom, it stands to reason that any IEP reasonably calculated to confer an educational benefit would create goals to address these areas. The IEP developed by the District omitted goals in these areas. Dr. Perlman also testified to the lack of adequate goals in Student's social/emotional needs. (ER, Vol. III, pp. 456:14-458:13; Vol. V, pp. 1081-89; pp. 1036-37). The District simply failed to create an individualized program.

[6] A Request for Judicial Notice of this case is filed concurrently with this Brief.

In evaluating a program, the question is whether, at the time of the IEP, the program created was "reasonably calculated to confer [a child] with a meaningful benefit." *Adams*, 195 F.3d at 1149. Here, the District was aware of unique needs and then did not create a program that addressed them. Thus, it cannot be said that the March 26, 2010 IEP was "reasonably calculated" to provide a benefit to Student.

Further, the offer of related services (considered separately from the proposed goals) was highly inappropriate for Student. For instance, the District offered absolutely no transition plan to ease Student from Sunrise back into the proposed public school placement. (ER, Vol. V, pp. 1074-98). Mr. Simpson testified to the numerous services that Student was receiving in March of 2010 – including twenty-four hour supervision, counseling, and behavior management. (ER, Vol. II, pp. 241:15-243:24). As Dr. Perlman testified, to go from this level of supportive services back into a public school setting would be a major shift. Without a transition plan to assist Student, it was reasonably foreseeable that the abrupt change contemplated by the District would result in failure and regression. (ER, Vol. III, Perlman, pp. 446:13-449:7).

In fact, by the time Student had made sufficient progress to "graduate" from the Sunrise program and attend a local school (progress she had not yet made at the time of the March IEP), Sunrise still crafted a transition plan which included home

visits of increasing length, coordination between Sunrise and staff at the new school, and the involvement of her therapists at Kaiser. (ER, Vol. II, Simpson, pp. 259:8-261:6). Even with these supports, Student still experienced mild set backs which required a response from Sunrise and alterations in the transition plan. (ER, Vol. II, Simpson, pp. 251:21-252:2). Clearly then, offering only an immediate return to public school without any transition plan whatsoever was not reasonably calculated to provide Student with an educational benefit. *See, e.g.*, *Student v. Dep't of Educ.*, 111 LRP 8447 (Hawaii OAH, Jan. 24, 2011) (finding the lack of a transition plan to constitute a denial of FAPE even where services were otherwise appropriate).[7]

Further, even assuming these prior failures could be overlooked, the services themselves were not calculated to provide an educational benefit. The offer of RSP provided academic support to Student. (ER, Vol. IV, Dizon, pp. 879:20-880:4). However, Student's disability was not related to a learning disability, processing delay, or other impairment that could be adequately addressed solely by academic intervention. (ER, Vol. III, Perlman, p. 422:9-13; Vol. V, p. 1076). Thus, the District's services and interventions were targeted to an area that was only tangentially related to Student's unique needs. Mr. Simpson opined that Student's biggest deficit area was her mood disorder. (ER, Vol. II, Simpson, pp.

[7] A Request for Judicial Notice of this decision is filed concurrently with the Opening Brief.

246:25-244:21). Yet, the District's March 2010 offer of placement provides absolutely no services to address this area of unique need.[8] At the time of the IEP, Sunrise was providing frequent counseling, supervision, therapy, and academic supports. (ER, Vol. II, Simpson, pp. 241:17-242:5). The District's offer essentially strips away everything except for minimal academic assistance. It cannot be said that doing so would be reasonably calculated to provide Student with an educational benefit. If anything, the most likely scenario would be academic and emotional regression. (ER, Vol. III, Perlman, p. 447:2-11).

Curiously, the lower Court did not address this argument (made in the Court below) in its Decision at all. (ER, Vol. I, p. 31:5-24). This is a substantive challenge going to the IEP – the vehicle upon which much of the IDEA is implemented. The law requires that the IEP be individually tailored to the Student's unique needs. Here, the evidence demonstrates that it was not. The lower Court did not address this error.

2. A Referral to Another Agency Is Not the Same as Providing Service

At the administrative hearing, the District argued that any emotional needs would have been met through services provided by OCHCA. Mother testified that, prior to September 22, 2010 she had not received any such referral. (ER, Vol. III,

[8] Although a dispute exists as to whether Student was referred to another agency for mental health evaluation, the fact remains that the District's offer is devoid of any services and offers an immediate return to public school without such support.

G.M., pp. 584:12-587:6). This is further evidenced by Student's request for all school records made pursuant to Cal. Educ. Code § 56504. In response to that production, no referral for OCHCA services was included. (ER, Vol. V, p. 1074). Indeed, after a referral was not found in the Student records, Student expressly requested one. (ER, Vol. V. p. 1074). This tends to show that a referral was not made at the IEP meeting.

However, even putting the factual dispute aside and assuming *arguendo* that such a referral was made, it does not meet the District's obligations. The District must craft an IEP that meets all areas of Students needs. The District may not simply abdicate in favor of another agency. *N.B. v. Hellgate Elementary Sch. Dist*., 541 F.3d 1202 (9th Cir. 2008). In *Hellgate*, the child was referred to a county Child Development Center ("CDC") for autism testing. The child there obtained the CDC testing. Still, this Circuit held that the school district in *Hellgate* violated the IDEA. The burden is on the district to "ensure" that the child is assessed. *Id*. at 1208-09. This Circuit concluded, "Hellgate did not fulfill its statutory obligations by simply referring C.B.'s parents to the CDC." *Id*. at 1209.

Thus, even if the District did refer Student to OCHCA, this would not have met the statutory obligation to "ensure" that Student was assessed. Had a referral been made at the March 26, 2010 IEP meeting, it would have been months before OCHCA responded, an additional IEP meeting convened, and new services

potentially offered. All during the interim, the District proposed that Student immediately return to her local public school without mental health supports or even mental health testing.

If the District wished to explore available services from other agencies (which is not unlawful), it could and should have done so by inviting OCHCA to the March IEP meeting. *See*, Cal. Educ. Code § 56331(b). Because Mother had identified a "serious emotional disturbance" as the likely eligibility category (ER, Vol. V, p. 1132), a discussion of mental health needs and services was very likely. In the alternative, the District could have maintained Student's placement until all assessments – including mental health assessments – had been conducted. Instead, it recommended an immediate return despite the failure to ensure mental health testing.

What remains evident is that the District crafted an IEP on March 26, 2010 that failed to meet all areas of unique need. Indeed, there were mental health and social/emotional needs that were not met in the IEP because the District either ignored those goal areas or failed to ensure mental health assessment in advance of the IEP meeting.

The lower Court held that, "Public schools' role in society is to provide education; they are not mental institutions and are not designed to cure patients." (ER, Vol. I, p. 31:2-3). This represents a fundamental misunderstanding of the

IDEA and its implementation under state law. Any IEP must have goals to meet all educational needs. 20 U.S.C. § 1414(d)(1)(A)(i)(II). And the IEP must include services to meet all goals. *Id*. at § 1414(d)(1)(A)(i)(IV). Educational needs include social and emotional needs – including counseling. *See, e.g.*, *Mark H. v. Lemahieu*, 513 F.3d 922, 925 n.1 (9th Cir. 2008). Under California law, mental health services are specifically available. Cal. Educ. Code § 56139; § 56331; Cal. Code Regs., tit. 5, § 3051.10. This apparent misunderstanding by the lower Court of the role of school districts adversely impacted its decision and is reversible error.

C. The District Court Erred in Giving Deference to the Administrative Decision

"Under the IDEA, federal courts accord considerably less deference to state administrative proceedings than they do in most instances of 'judicial review of … agency actions, in which courts generally are … held to a highly deferential standard of review." *Anchorage*, 689 F.3d at 1053. When a party challenges the outcome of an IDEA due process hearing, the reviewing court receives the administrative record, hears any additional evidence, and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B).

By imposing a preponderance of the evidence standard of review, "the IDEA allows a district court to conduct a more searching review than is typical of agency

decisions." *K.S. v. Fremont Unified Sch. Dist.,* 545 F. Supp. 2d 995, 999 (N.D. Cal. 2008). However, courts must give "due weight" to the state administrative proceedings, *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 817 (9th Cir. 2007), and, at a minimum, "must consider the findings carefully," *Ojai Unified Sch. Dist. v. Jackson,* 4 F.3d 1467, 1474 (9th Cir. 1993).

Importantly, District courts should review the hearing officer's conclusions *de novo*. *Ashland Sch. Dist. v. E.H.*, 587 F.3d 1175, 1182 (9th Cir. 2009). It is left to the discretion of the reviewing court to determine how much weight is "due" in any given case, and the court "is free to accept or reject the findings in part or in whole." *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 890 (9th Cir. 1995).

The additional discretion given to the federal courts in reviewing an IDEA agency decision was unexercised by the Court below. This was error because OAH's decision should not have been afforded any deference.

1. OAH's Decision was not Thorough and Careful in its Factual Analysis

OAH included facts that were clearly erroneous. As just one example, OAH found that Mother placed Student at Sunrise, "because of her growing concerns about Student's drug use, her failure to come home for days at a time, and defiance when she was at home." (ER, Vol. I, p. 41, ¶ 27). However, OAH completely ignores the primary cause of the Sunrise placement: Student was completely failing

in school – in part because of the behaviors stemming from her disability. Mother's testimony on this subject was clear. (ER, Vol. II, G.M., p. 327:12-18).

Further, OAH erroneously asserted that, "[Mother] acknowledged that District's offer of placement and services addressed Student's academic issues." (ER, Vol. I, p. 47, ¶ 47). At no time did Mother state that the IEP met Student's academic needs. Instead, she pointed out only that the IEP was focused on school work – not that it met her academic or other unique needs. (ER, Vol. II, G.M., p. 206:19-25; *see also*, pp. 196:4-197:4).

OAH also mischaracterized the testimony of Mr. Brad Simpson, the clinical director at Sunrise and Student's treating therapist there. OAH wrote that Mr. Simpson, "opined that Student was not ready to return home at the time of the March 26, 2010 IEP meeting *because she had not finished the program*." (ER, Vol. I, p. 47, ¶ 48 (emphasis added)). In fact, Mr. Simpson testified that Student's unique needs prevented even a home visit. This assertion was based on Student's needs and not because she had not completed a program of predetermined length. (ER, Vol. II, Simpson, pp. 303:5-304:6).

Indeed, there was extensive testimony about Student's eventual return to a local school and, based on her behaviors at that time, Student exited the Sunrise program later than initially expected. (ER, Vol. II, Simpson, p. 252:3-9). Thus, for OAH to assign the disagreement with the March IEP to an arbitrary program

schedule is wholly unfounded. Although these errors were presented to the District Court, that Court's Decision ignored these evidences of lack of care by OAH.

2. OAH's Decision Misapplied the Law

On the child find issue, OAH correctly cited the legal requirements. OAH noted that "The threshold for suspecting that a child has a disability is relatively low." (ER, Vol. I, p. 53, ¶ 4). Further, OAH listed several "signs that trigger the child find duty" including: "behavior and discipline problems; … concerns expressed by parents and teachers; signs of substance abuse; a medical diagnosis of recognized disability; … and a request for evaluation by the parents." (*Id. citing Addison*, 598 F. 3d at 1182-83 and numerous other authorities).

A review of the evidence demonstrates that each category was met in the instant case. The October 2009 letter from Dr. Pollock alone included information related to "signs of substance abuse" and "a medical diagnoses of recognized disability." (ER, Vol. V, p. 1134). Testimony at the hearing revealed that Mother had expressed concern to the District, in relation to the e-mail, on October 15, 2009. (ER, Vol. II, G.M., p. 189:12-20). Student's teachers emphasized a lack of motivation in class – pointing to behaviors related to Dysthimia. (ER, Vol. IV, Kimble, p. 825:1-4; Petty, pp. 835:25-836:1). With so many triggers apparent as of the October 2009 e-mail, it should follow that the District was on notice of a potential disability and should have assessed.

OAH, however, inexplicably disagreed. Instead, OAH insisted that the District had "no reason" to suspect a disability. (ER, Vol. I, p. 54, ¶ 9). This was because in October 2009, "Neither Pollock nor Mother requested that Student be assessed for special education." (*Id.*). As OAH had just recounted, a specific request for special education assessment is not required. Yet, because the October 2009 e-mail did not include that talismanic language, OAH held the District therefore had "no reason" to suspect a disability. This is a *per se* misapplication of the law, even as cited by OAH.

The Decision stated that, "it was reasonable to conclude that Student, like others, was having adjustment problems to ninth grade that could be addressed general education." (ER, Vol. I, p. 54, ¶ 10). However, OAH does not explain how a "major depressive disorder" is an "adjustment problem" or how it could be addressed by the general education curriculum. That finding is absurd on its face and without explanation.

OAH further held that, "the District cannot be faulted for not immediately assessing Student when Mother did not participate in providing further information to the District." (ER, Vol. I, p. 54, ¶ 10). Once again, the District already had all the information necessary – including a diagnosis of a major depressive disorder – to suspect a disability and therefore refer for an initial evaluation. And, as this Circuit has noted, the District's obligations under the IDEA are not dependent on

parental cooperation. *Anchorage*, 689 F.3d at 1051. The District would still be obligated to at least offer to assess Student. Even so, it is unclear what additional information OAH would have required from Mother or why the failure to produce such information resulted in a complete removal of the District's child find obligation.

Following that e-mail, Mother sent further correspondence expressly requesting an evaluation for special education eligibility. (ER, Vol. V, p. 112). Despite meeting the majority of the "triggers" that OAH identified, and now requesting an evaluation specifically – the missing element from the October e-mail – OAH nevertheless found that, "[the] District had no reason to believe that Student had a disability, nor did it have reason to suspect that Student might need special education services to address that disability." (ER, Vol. I, p. 55, ¶ 12). The Decision never explains how multiple expressions of concern from parents and physicians, a medical diagnosis, poor school performance, and an explicit request for assessment results in the District having "no reason" to even suspect a disability. OAH simply did not accurately apply the facts to the law.

Another example of the ALJ's failure to understand the law is demonstrated in the discussion of the Least Restrictive Environment ("LRE") for the Student. (ER, Vol. I, p. 65, ¶ 47). Student should have been educated at Sunrise in March of 2010 because of the severity of her disability and its impact on her education.

OAH, however, asserted that, "It is presumed that students will be educated in a general education classroom in the neighborhood school *unless the contents of the IEP dictate otherwise*." (*Id.*) (emphasis added). However, there was testimony to indicate that the IEP should have placed Student at Sunrise, but did not do so. (ER, Vol. II, Simpson, pp. 239:3-240:22; Vol. III, Perlman, pp. 459:11-460:4). For OAH, however, the IEP document was controlling. Under OAH's reasoning, since the IEP document generated by the District did not specify anything outside of her home school, the home school placement must therefore be appropriate.

Essentially, OAH abdicated its responsibility as the neutral arbiter and instead assigned the District full authority to decide placement. If that were the case, there would be no need for due process hearings. *See*, *K.S. v. Fremont Unified Sch. Dist*., 545 F. Supp. 2d 995 (N.D. Cal. 2011) *citing Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467(9th Cir. 1993) ("giving deference only to school personnel based on their personal experience with a student and their perspective of the record would eliminate the need for a due process hearing."). OAH did not exercise independent judgment and, therefore, its decision should not have been afforded deference.

3. OAH Inappropriately Credited District Witnesses

OAH gave undue deference to District witnesses and applied far harsher standards to witnesses for the Student. For instance, OAH found that Ms. Schulz

"credibly testified that she was familiar with the District's 'child find' obligations…" (ER, Vol. I, p. 38, ¶ 13). However, as indicated *supra*, Ms. Schulz repeatedly indicated her belief that child find was related to "learning disabilities." (ER, Vol. IV, Schulz, pp. 767:22-768:2; pp. 777:23-778:4). Thus, the facts demonstrated that Ms. Schulz did not understand child find, or understood it only in an unlawfully narrowed way. Ms. Schulz's opinions on the child find obligation were hardly worthy of credit.

In contrast, OAH specifically withheld credibility from Student's witness, Dr. Perlman. The Decision noted that the report "does not appear to be an objective assessment of Student." (ER, Vol. I, p. 51, ¶ 62). OAH also held that his report, "focused on strategies to discredit the District assessor and weaknesses in the IEP." (*Id.*).[9] However, this same standard was not applied to the District. Numerous District witnesses attempted to discredit Dr. Perlman, but OAH did not consider these statements as acting against the District's witnesses' credibility. (ER, Vol. IV, Dizon, pp. 883:24-884:4; Vol. V, DePass, p. 973:2-10).

Further, OAH did not explain how Dr. Perlman's criticism of the District's March 2010 IEP, in any way, warranted a negative inference about his testimony. Once again, OAH gave credit to District documents, and witnesses who agreed

[9] It should be noted that Dr. Perlman, in pointing out the flawed nature of the IEP, is essentially being penalized simply for disagreeing with the District. The very penalty cautioned against in *Ojai*.

with those documents, but irrationally denied weight to evidence demonstrating the inappropriateness of the IEP. This lopsided standard has previously been found unlawful. *See*, *e.g.*, *Fremont*, 545 F. Supp. 2d 995.

OAH, without citation to any witness, flatly stated that the RSP classes in the March IEP, "would provide Student with the extra attention she needed to catch up on her school work and develop study skills." (ER, Vol. I, p. 46, ¶ 46). In fact, this was directly contradicted by the testimony of Dr. Perlman who expressly stated that Student required more than a mere three periods per day of RSP services. (ER, Vol. III, Perlman, pp. 459:11-460:4). Moreover, given the significant social/emotional needs that lead to her eligibility (including, aggression, defiance, atypicality, and somatization), it is unclear how there can be any rational basis to believe that this mild academic assistance would address Student's unique needs. OAH does not provide any such justification.

Based on the numerous legal errors, the misapplication of the law, and the disparate standards of credibility, OAH's decision merited little deference. It was an abuse of discretion for the lower Court to provide such deference. Indeed, the lower Court's conclusion that the OAH decision is "a paragon of logic, well-researched authority, and objectivity" is wholly without foundation. (ER, Vol. I, p. 24:1-2).

D. The Lower Court Erred in Soliciting and Granting Attorneys Fees to the District

After announcing its decision, the lower Court then invited a Motion for Attorneys Fees from the District. (ER, Vol. I, p. 32:11-18).[10] The lower Court stated that, "This is not a case where a student's potential need for special education services was apparent for months … where a student was physically unable to communicate with her teachers … nor … where the parent provides the school with a student's medical history documenting years of a qualified disability." (ER, Vol. I, p. 32:2-5). This pronouncement by the lower Court is puzzling because, as noted at length *supra*, none of those instances are required for Student to have been denied a Free Appropriate Public Education ("FAPE"). The lower Court apparently understood IDEA claims to be valid in only the most egregious circumstances.

The lower Court further announced a puzzling aura of sanctity around local educational agencies. Rather than receiving additional responsibilities and obligations under the IDEA, the Court stated that, "America's public schools, unlike for-profit and religious schools, are institutions devoted to the noble principle that every child is entitled to an education, regardless of their parent's income or ideology. Public schools are not piggy banks that parents may raid to

[10] Importantly, there was no finding of frivolousness by OAH at the administrative Hearing. (ER, Vol. I, pp. 34-67).

fund their children's attendance at for-profit or religions schools that the parents prefer." (ER, Vol. I, p. 32:13-14).

Both the regulations (34 C.F.R. § 300.148(c)) and the Supreme Court have made it clear that, if the district does not provide a FAPE to a child, then the District is responsible to reimburse parents for privately obtained services – even through non-public or religious schools. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). As with other elements of the decision, this formulation represents a fundamental misunderstanding of the purposes of the IDEA or the obligations of a school district.

More concerning, the instant matter was not the first time the Honorable David O. Carter had used this language. In *C.W. v. Capistrano Unified School District*, 2012 WL 3217696 (C.D. Cal. 2012).[11], Judge Carter used nearly identical language to castigate a parent seeking redress under the IDEA. It would appear that Judge Carter has been operating under a fundamental misunderstanding about the rights and responsibilities inherent in the IDEA even prior to the instant matter.

1. Legal Standard for an Award of Fees under the IDEA

The IDEA includes a fee shifting statute that allows a prevailing district to seek attorneys fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III). However, in order for a district to be eligible for an attorney fee award, it must demonstrate that the parent

[11] A Request for Judicial Notice of this case is filed concurrently with this brief.

brought an action that is "frivolous, unreasonable, or without foundation" or if brought "for any improper purpose such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." *Id*.

This Circuit recently had the opportunity to clarify and apply the attorney fees standard as it pertains to public agency requests. *R.P. v. Prescott Unified Sch. Dist*., 631 F.3d 1117, 1124-28 (9th Cir. 2011). In *Prescott*, the plaintiffs there asked for compensatory education.[12] Because such relief is available under the IDEA, that claim was not deemed frivolous. *Id*. at 1125. In fact, this was true even though the plaintiffs there had failed to identify the requested compensatory education with any specificity. *Id*. at 1125-26.

This Circuit also reiterated its ruling that "a district court [should] resist … engag[ing] in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id*. at 1126 *citing EEOC v. Bruno's Restaurant*, 13 F.3d 285 (9th Cir. 1993) (alterations in original); *see also*, *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421-22 (1978). The District must do more than just defeat Plaintiffs' arguments. They must also show that the

[12] Compensatory education is an equitable remedy that seeks to make up for educational services the child should have received in the first place and aims to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. *R.P. v. Prescott Unified Sch. Dist*., 631 F.3d 1117, 1125 (9th Cir. 2011) (internal quotations and modifications omitted) *citing Reid v. District of Columbia*, 401 F.3d 516 D.C. Cir. 2005).

complaint was frivolous and without merit. "[T]he fact that the arguments were not successful doesn't make them frivolous." *Prescott*, 631 F.3d at 1126.

This Circuit has further cautioned against an attorney fee award against Plaintiffs or their attorneys due to the potential chilling effect on prosecutions under the IDEA – a civil rights statute. "Lawyers would be improperly discouraged from taking on potentially meritorious IDEA cases if they risked being saddled with [attorney's fee awards] for bringing a suit where they have a plausible, though ultimately unsuccessful, argument…" *Id*. Such an award would not be consistent with the IDEA's objectives. *Id*. Therefore, "so long as the plaintiffs present evidence that, if believed by the fact-finder, would entitle them to relief, the case is per se not frivolous and will not support an award of attorney's fees." *Id*. As described *supra*, ample evidence and argument was presented in the case at bar to sustain a *prima facie* case.

Further, in discussing the "improper purpose" fee designation, this Circuit has held that "As a matter of law, a non-frivolous claim is never filed for an improper purpose." *Id*. Thus, if the claim is not frivolous under 20 U.S.C. § 1415(i)(3)(B)(i)(II), then it is by definition not submitted for an improper purpose under 20 U.S.C. § 1415(i)(3)(B)(i)(III).

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2. The District Court Misapprehended the Evidence

As noted above at length, Student has a *prima facie* case demonstrating both the failure of the District to abide by its child find duty, and its failure to provide appropriate services at the IEP meeting. Therefore, this case is *per se* non-frivolous. Still, the District Court's errors can be further seen from its Order awarding attorneys fees.

The lower Court held that the District's failure to follow its child find obligations was, "entirely of Mother's own making." (ER, Vol. I, p. 4). The Court then lists six categories of support for that proposition. Most of the lower Court's cited facts are in dispute, but what is not disputed is that each and every citation occurred after the March 26, 2010 IEP meeting. (ER, Vol. I, pp. 6-10). The child find claim arose on October 13, 2009 and lasted until Student was found eligible for services on March 26, 2010. The lower Court used later events – and party posture after litigation had been initiated – to hold that a claim in October of 2009 was completely frivolous.

This is especially egregious in light of the strong cooperation shown in October 2009 through March 2010. Student's physician sent an e-mail on October 13, 2009. (ER, Vol. V, p. 1134). Mother followed up on October 15, 2009. (ER, Vol. IV, Schulz, p. 762:12-17). Mother specifically requested special education testing on November 23, 2009. (ER, Vol. V p. 1133). Despite not offering testing,

Mother participated in the Student Study Team meeting on December 7, 2009. As soon as the District at last offered to assess Student on January 12, 2010, Mother signed the assessment plan the same day. (ER, Vol. V, p. 1123). There is no evidence that mother stonewalled the child find claim. Instead, it is undisputed that she repeatedly sought assessment from the District. The lower Court simply misunderstood the facts and, based on that misunderstanding, erroneously awarded fees to the District.

In finding the denial of FAPE claim frivolous, the Court focused on the holding that Mother's refusal to sign the mental health referral rendered her claim frivolous. (ER, Vol. I, p. 5). First, as noted *supra*, that fact was disputed. Mother testified that she wasn't provided with any referral (ER, Vol. III, G.M., p. 589:11-19), and Student made a request for educational records and the referral was not produced. (ER, Vol. V, p. 1074). Thus, this falls well within the holding of *Prescott*. Had the lower Court found that evidence persuasive, it could not be said that Mother "stonewalled" anything.

But, putting the factual dispute aside, the lower Court also ignored the argument that the March 26, 2010 IEP called for an immediate return to the school district while any referral was pending. (ER, Vol. V, p. 1093). Even if it is true that Mother "stonewalled" the referral (which Mother continues to dispute), the District's IEP would still be inappropriate. The IEP required Student to be placed

at a setting without supports – at least while any referral and assessment was underway.

The remaining items of purported obstruction likewise are irrelevant or factually incorrect. The lower Court indicated that Mother withheld letters from private providers about their treatment of Student. (ER, Vol. I, pp. 4-5). However, under the *Adams* snapshot rule, those letters are simply irrelevant. They do not indicate that Mother obstructed any part of the process.

The lower Court asserted that Mother refused to allow the District to assess in preparation for a February 2011 IEP meeting. (ER, Vol. I, p. 5). As noted *supra*, Mother immediately signed the January 12, 2010 assessment plan. Further, assessment the following year would also be irrelevant under the *Adams* standard since it would not have been known to the IEP team at the March 2010 meeting. Therefore, even if true (which Mother disputes), it would not represent obstruction on the claim of the appropriateness of the March 2010 IEP.

The lower Court asserted that Mother refused to attend IEP meetings. (ER, Vol. I, p. 5). However, the Court refers to IEP meetings that would have occurred subsequent to February 2011. Once again, even if true this is far beyond the circumstances relevant to this case – which concern events up to and including a March 2010 IEP meeting. None of this supposed "obstruction" had any bearing on the events which generated the claims at issue.

The lower Court asserted that Mother refused to advise the District when Student began attending Crean. (ER, Vol. I, p. 5). However, the ALJ's Decision, which the lower Court cited, showed that it was a delay of three days. Student began attending Crean on October 11, 2010 and the District was notified on October 14, 2010. (ER, Vol. I, pp. 48-49, ¶¶ 55-56). This three day delay could hardly be said to be obstructionist. Further, how the lower Court connected a three day delay with the whole case being frivolous is entirely unclear.

Finally, the lower Court believed that Mother refused to allow the District to communicate with Crean staff. (ER, Vol., p. 5). This is manifestly inaccurate. The District proposed an open-ended release of information. (ER, Vol. V, p. 1072). Given that the parties were currently in litigation, there were several letters back and forth between the parties to attempt to resolve the conflict and create a narrowly tailored release. (ER, Vol. V, pp. 994, 995-96, 997-98, 999-1000, 1001-02, 1003, 1014-15, 1016-17, 1018-19, 1020, 1021, 1022, 1071-72). When a resolution could not be provided, an appropriately tailored release was given. (ER, Vol. V, p. 994). Thus, the District had received a release to speak with Crean and the lower Court's conclusion that Mother was obstructionist is unfounded.

In addition, it bears repeating that the District has affirmative obligations under the IDEA. If a parent is uncooperative, the District must still prepare and offer an assessment plan, offer an appropriate IEP, and otherwise comply with the

law. *Anchorage*, 689 F.3d at 1051. Here, the facts demonstrate that Mother was not uncooperative and merely asserted her legal rights to secure an appropriate education for Student.

3. The Lower Court Found the Matter Frivolous Based on an Erroneous Reading of Facts, Law, and Argument

The lower Court fundamentally misunderstood the law and argument of the parties. For instance, the lower Court held that Mother was unreasonable on appeal because: (1) Mother "never addressed the issue of whether Student even qualifies as a student with a disability or what that disability is"; (2) the child find argument was made in one paragraph; (3) Student relied on Cal. Educ. Code § 56029 to define what constituted a "referral"; and (4) Student purportedly mischaracterized the record.

As discussed *supra*, there was no dispute as to Student's eligibility. Indeed, when Student was assessed and an IEP meeting convened, Student was found eligible for special education and related services. It is a wholly undisputed point. Further, Mother "addressed" this issue by pointing this fact out for the lower Court. (ER, Vol. II, p. 79:2-4). The lower Court ignored or overlooked it.

As noted *supra*, the child find argument spanned three pages and included citations to various authorities. Again, the lower Court either ignored or

overlooked this information. Certainly, Student and her attorneys should not be found frivolous simply because the Court misread their papers.

As for Cal. Educ. Code § 56029, that has also been discussed *supra*. That statute specifically defines what constitutes a referral. The Court, however, asserted that because it didn't create a duty, it must not be controlling. The lower Court overlooked that the duty had been established through other precedent including decisions by this Circuit.

Finally, the lower Court took issue with Student's attack on the Administrative Law Judge's Decision. Those items have also been addressed *supra*. Suffice it to say that, even if the lower Court disagreed with Student's reading of the administrative decision, such would not make an appeal frivolous or unwarranted.

4. Student's Action Could Only Be Frivolous under the Incorrect Legal Standard

In the lower Court, the District argued that Mother withdrew her request for special education assessment. Mother testified that she made no such withdrawal; her signature merely demonstrated her attendance at the SST. (ER, Vol. II, G.M., p. 197:18-19). Additionally, once the referral is made, an assessment plan must be presented. Cal. Educ. Code § 56029. The District is not allowed to convene an alternate meeting to talk a parent out of assessment.

Even so, the lower Court identified this as a factual dispute and held that, even if resolved in Mother's failure, she could not have prevailed. He held that because Student had been in the District for only three months, there was no possible justification for requesting an assessment. As has been discussed *supra*, the standard for eligibility and the standard for assessment are quite different. The lower Court conflated the two and, because of this misapprehension, understood that Student's claim must be frivolous because she hadn't been in the District long enough.

5. Judge Carter's Willingness to Award Fees to Public Agencies is at Odds with the Intent of the IDEA

Despite the high standard for awarding attorneys fees to a public agency, the Honorable Judge Carter has gone out of his way to solicit motions from public agencies on more than one occasion. Just as he did in the instant matter, Judge Carter solicited a motion for fees in an unrelated case.

In *Capistrano*, Judge Carter again solicited fees after finding against a parent. 2012 WL 3217696 at *7 (C.D. Cal. 2012). Judge Carter again compared that matter to gross violations of the IDEA to demonstrate that the *Capistrano* matter was immaterial or unimportant. *Id.* Judge Carter also indicated, in a near identically worded passage, that "public schools, unlike for-profit and religious schools, are institutions devoted to the noble principle" of free education. *Id*. And,

in *Capistrano*, Judge Carter also considered the cost of services for children with disabilities – a consideration entirely absent from the whole of the IDEA. *Id*.

This repeated pattern of soliciting fee motions for public agencies, asserting that only egregious violations deserve recompense, and encasing public schools in an aura of nobility demonstrates that Judge Carter may not have approached the attorneys fees issue with the restraint cautioned by this Circuit in *Prescott* or the Supreme Court in *Christiansburg*. Indeed, those very solicitations of attorneys fees motions will result in a chilling effect on families willing to prosecute their special education rights and on attorneys willing to take close cases. Therefore by failing to consider precedent, and by encouraging the antitheses of the IDEA's intentions, the lower Court abused its discretion.

VIII.

CONCLUSION

The lower Court erred when it held: (1) that the District did not violate its child find obligation from October 2009 through March 2010; (2) that the March 2010 IEP was sufficient to provide Student with a FAPE; and (3) the District should be awarded attorneys fees. As a result, the decision of the lower Court affirming the administrative decision must be reversed.

This Circuit should hold that the administrative decision was in error, that Student was denied a FAPE, that Mother should be reimbursed for the cost of

Sunrise and Crean (through August 2, 2011), and that the attorney fee award by the lower Court be overturned. Further, if Appellants are the prevailing party herein, they should be allowed to make a motion for attorneys fees consistent with the IDEA.

Because the record has been fully developed, Appellant asks that this Circuit render a final substantive ruling. *Anchorage Sch. Dist. v. M.P.* In the alternative, if this Circuit does not feel that the record is sufficiently developed, it should remand the matter to the lower Court for proceedings consistent with the above holding.

Dated: March 13, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

This case is not related to any other case.

Dated: March 13, 2013

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