NO. ___

# In The Supreme Court of The United States

COMPTON UNIFIED SCHOOL DISTRICT,

*Petitioner,*

v.

STARVENIA ADDISON and GLORIA ALLEN,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Barrett K. Green
*Counsel of Record*
Daniel J. Cravens
Daniel L. Gonzalez
LITTLER MENDELSON P.C.
2049 Century Park East, 5th Floor
Los Angeles, CA 90067.3107
310.553.0308
bgreen@littler.com
**Counsel for Petitioner**

LEGAL PRINTERS LLC, Washington DC ● 202-747-2400 ● legalprinters.com

## QUESTION PRESENTED

Whether the special education due process hearing procedures under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (2010), allow a parent to bring a claim of negligence against a school district, or whether due process hearing claims are limited to disputes regarding intentional decisions made by the school district.

## DISCLOSURE PURSUANT TO RULE 14(b)

Petitioner Compton Unified School District is a public agency. There are no non-governmental corporation parties to the proceeding. The case caption contains the names of all parties.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Compton Unified School District respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Ninth Circuit opinion is reported at *Compton Unified School District v. Addison*, 598 F.3d 1181 (9th Cir. 2010). (Appendix ("A.") 1-22.) The district court opinion is reported at *Compton Unified School District v. Addison,* 2007 U.S. Dist. LEXIS 29828 (C.D. Cal. Apr. 20, 2007). (A. 25-52.) The underlying opinion of the California Office of Administrative Hearings ("OAH"), *Student v. Compton Unified School District,* OAH No. N 2005110837 (decided April 26, 2006), that was the subject of these court proceedings is available at http://www.documents.dgs.ca.gov/oah/seho_decisions /2005110837.pdf. (A. 53-102.)

## JURISDICTION

The court of appeals entered its opinion on March 22, 2010. (A. 2.) The court of appeals denied rehearing and rehearing *en banc* on September 1, 2010. (A. 103-04.) This Court extended to January 7, 2011, the date by which a petition for writ of certiorari could be filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The primary statutes and regulations involved in the case are lengthy, and include primarily various provisions of 20 U.S.C. § 1415. Other pertinent provisions include 34 C.F.R. §§ 300.503 and 300.507, and California Education Code § 56501(a). Copies of the relevant statutes are in the Appendix.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

#### A. Basis For Federal Jurisdiction In The Court Of First Instance.

This case involves review of a special education due process hearing decision held in California pursuant to the IDEA.

The district court had jurisdiction under 20 U.S.C. § 1415(i)(2)(A) to review the underlying due process hearing decision issued by the California Office of Administrative Hearings.

#### B. Statutory Framework Regarding Special Education Due Process Hearings.

Disputes periodically arise between school districts and parents of disabled students regarding the proper special education services to be provided to the students.

Under the IDEA, a parent may file a due process hearing complaint in connection with such a dispute, and the complaint is adjudicated before an administrative tribunal with appeals to the courts.

The due process hearing procedures are one of the "procedural safeguards" mandated under 20 U.S.C. § 1415(a) as a condition when state and local education agencies[1] agree to accept federal funding.

20 U.S.C. § 1415(a) provides as follows:

> Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

Under 20 U.S.C. § 1415, school districts must provide "written prior notice" whenever the agency proposes or refuses to take action regarding a student's educational needs.

---

[1] A school district is a "local educational agency" under the IDEA. *See* 20 U.S.C. § 1401(19)(A). At times in this petition, Petitioner will use the term "school district" or "district" in lieu of the term "local educational agency" or "agency".

This written prior notice requirement is contained in 20 U.S.C. § 1415(b)(3), and provides as follows:

> (b) Types of procedures. The procedures required by this section [20 U.S.C. § 1415] shall include the following:
>
> * * *
>
> (3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency--
>
> (A) proposes to initiate or change; or
>
> (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

This same language is contained in the implementing federal regulation set out 34 C.F.R. § 300.503(a), which provides as follows:

> § 300.503 Prior notice by the public agency; content of notice.
>
> (a) Notice. Written notice that meets the requirements of paragraph (b) of

> this section must be given to the parents of a child with a disability a reasonable time before the public agency--
>
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
>
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

The contents of the written prior notice required under 20 U.S.C. § 1415(b)(3) are described in detail in subsection 1415(c)(1).

20 U.S.C. § 1415(c)(1) requires that the written prior notice delineate the specific action being proposed or refused by the school district, as well as an explanation of why the district proposes or refuses to take the action.

20 U.S.C. § 1415(c)(1) provides, in pertinent part, as follows:

> (c) Notification requirements.
>
> (1) Content of prior written notice. The notice required by subsection (b)(3) shall include--

> (A) a description of the action proposed or refused by the agency;
>
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action . . . .

Under 34 C.F.R. § 300.507, a parent or public agency may file a due process hearing on any of the matters described in subsections 300.503(a)(1) and (2), *i.e.,* where a school district proposes to do something that the parent opposes, or the school district refuses to do something that the parent proposes.

34 C.F.R. § 300.507(a) provides as follows:

> § 300.507 Filing a due process complaint.
>
> (a) General.
>
> (1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

In accordance with the requirements of the IDEA, California has enacted Education Code § 56501(a), which sets the scope of due process hearings.

California Education Code § 56501(a) provides, in pertinent part, as follows:

> The parent or guardian and the public agency involved may initiate the due process hearing procedures prescribed by this chapter under any of the following circumstances:
>
> (1) There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.
>
> (2) There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.
>
> (3) The parent or guardian refuses to consent to an assessment of the child.
>
> (4) There is a disagreement between a parent or guardian and a

> local educational agency regarding the availability of a program appropriate for the child, including the question of financial responsibility, as specified in Section 300.148 of Title 34 of the Code of Federal Regulations.

### C. Course Of Dealings Leading Up To Lower Court Opinions.

Starvenia Addison ("Student") is a former student of the Compton Unified School District ("District").

By letter dated September 27, 2004, Student's mother requested that an IEP (individualized education program) team meeting be held based on Student being "low on credits" and because student had been "struggling with her academics in the past few years," as follows:

> I am the parent of [Student], who is currently enrolled in the 11th grade at Dominguez. [Student] is low on credits and has been struggling with her academics in the past few years. I am requesting that an IEP meeting be held for my daughter as soon as possible. She has been having some problems at school I think that her program may need to be modified to address her individual needs.

> I am also requesting that a behavioral assessment be completed before the meeting and that I receive a copy of this assessment. I look forward to meeting with her counselor, teachers, and school psychologist.

(Brackets in original, A. 65-66.)

On November 30, 2004, the District provided an assessment plan to parent, and Student was assessed eight days later, on December 8, 2005. (A. 67-68.)

An IEP team meeting was held in January 2005, at which time the IEP team determined that Student had a learning disability. The District then commenced providing special education services. (A. 93-94.)

Ten months later, on November 28, 2005, Student's parent filed a due process hearing complaint against the District, alleging various violations of the IDEA. (A. 55.)

A hearing was held before an administrative law judge ("ALJ") from the California Office of Administrative Hearings ("OAH").

The ALJ identified four issues for hearing, including a claim that the District failed to

determine early enough that Student was eligible for special education services. (A. 55-56.)

With respect to Student's claim that the District failed to determine early enough that Student was eligible for special education services, the ALJ characterized Student's contention as follows:

> In this proceeding, Student alleges that the District did not meet its child-find obligations from November 28, 2002, until January 26, 2005, by failing to earlier identify her as eligible for special education as a student with an SLD or an emotional disturbance (ED).

(A. 56-57.)

The ALJ referred to this issue as the "child-find" issue.

Following the hearing, the ALJ issued a decision, concluding that the District prevailed in part on some of the issues and that Student prevailed in part on some of the issues. (A. 101.)

With respect to the child-find issue, the ALJ determined as follows:

> *Determination of Issues*
>
> Issue 1: The child-find issue is a cognizable claim. The District failed

its child-find obligations from the fall of 2003, through January 26, 2005, when it first determined Student was eligible for special education and related services. The District knew or had reason to suspect that Student was eligible for special education either as a student with a specific learning disability or under the category of emotional disturbance.

23. As a preliminary matter, the District argues that a school district's compliance with its child-find obligations is not within the subject-matter jurisdiction of special education due process hearings. Child-find obligations, set out in legal principles 4 and 5, above, are a precursor to a school district's responsibility to offer and provide a disabled student with a FAPE. Thus, contrary to the District's assertion, a school district's duty to identify a child who is in need of assessment to determine eligibility for special education services is a cognizable claim for this due process hearing and is fairly subsumed within California Education Code section 56501, subdivisions (a)(1) and (2). (*See Grant Miller v. San Mateo-Foster City Unified School*

*District*, 318 F. Supp. 2d 851 (N.D. Cal. 2004).

> 24. Based upon Findings 6-10 and 12 above, from November 28, 2002, through the end of the Student's ninth-grade school year in June 2003, the District did not know or have reason to suspect that Student required an assessment to determine special education eligibility. Thus, the District did not deny Student a FAPE for this time period.
>
> 25. . . . By the first reporting period in the fall of 2003, Mr. Ujamaa knew or should have suspected that Student required an assessment to determine special education eligibility. Teachers reported to Mr. Ujamaa detailing Student's continued and worsening academic performance and unusual and disturbing behavioral manifestations.

(A. 88-89.)

### D. District Court Opinion.

Under 20 U.S.C. § 1415(i)(2)(A), any party aggrieved by the findings in a due process hearing

may appeal the decision by filing an action in district court.

Student's parent did not appeal the portions of the ALJ decision that were in favor of the District. The District likewise only challenged the ALJ's decision on the so-called child-find negligence issue.

On April 20, 2007, the district court affirmed the ALJ's decision. (A. 25.)

### E. Court Of Appeals Opinion.

The District appealed the district court's decision on the child-find issue to the Ninth Circuit Court of Appeals.[2]

A divided panel of the court of appeals affirmed. Writing for the majority, Judge Harry Pregerson opined that the IDEA did not limit due process hearing claims in the manner proposed by the District, as follows:

> The jurisdictional requirements for an IDEA complaint are clearly set

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[2] The District likewise appealed the district court's award of attorneys' fees. The District does not seek a petition for writ of certiorari regarding the award of fees for work performed in the due process hearing or in the district court by the attorneys for Student except that, if the District's petition is granted and the court of appeals decision ultimately vacated, the District respectfully requests that the district court be directed to recalculate the award of fees in the first instance based on the change in Student's degree of success.

> out in 20 U.S.C. § 1415(b)(6)(A), apart from the notice provisions of 20 U.S.C. § 1415(b)(3). Section 1415(b)(6)(A) states that a party may present a complaint "with respect to *any matter* relating to the identification, evaluation, or educational placement of the child." (emphasis added). The notice requirements of 20 U.S.C. § 1415(b)(3) do not cabin this broad jurisdictional mandate. Addison's claim is cognizable under the IDEA.

*Compton Unified Sch. Dist.,* 598 F.3d at 1184 (footnotes omitted).

District Court Judge Raner Collins (sitting by designation) sided with Judge Pregerson on the issue.

Judge N. Randy Smith issued a dissenting decision, opining that the District's interpretation of the statute had to be correct, as follows:

> The IDEA, the CFRs, and the California Education Code all presuppose that there has been purposeful action with regard to a specific student, before any "refusal" occurred. . . . Interpreting refusal to include a school district's negligent failure to identify students with disabilities in a timely manner--as

the majority argues here--leads to an absurd result (even under the distressing facts before us) and leaves a host of questions in its wake.

The IDEA states implicitly, and the CFR and the California Education Code state explicitly, that written notice is to be given to a parent prior to the refusal. Public agencies are required to give prior written notice to the parents of the student (a) describing the refused action, (b) explaining why the agency refused the action, and (c) setting out the factors considered by the agency in making its refusal. We cannot read the IDEA to require an agency give prior written notice that it *will* be negligent: describing the decision concerning which it will be negligent, the reasons it has decided to be negligent, and the factors it considered in deciding to be negligent. It would make the prior written notice requirement absurd (unless CUSD's actions are described as something other than negligence; here, neither party claims that CUSD acted purposefully in its failure to evaluate Addison).

The term "refusal" obviously includes purposeful agency action in response to a conflict over (1) whether to evaluate a student, or (2) how to deal with an evaluated student. The plain language of the statute makes that a reasonable interpretation. Plenty of IDEA cases come before the courts as the result of a parent and the local education agency disagreeing over the proper classification of a child or the proper appropriate education. Such cases fit neatly into the statutory scheme. As discussed above, once an issue has come to a point of contention, the content requirements for the prior written notice (and the due process hearing complaint, for that matter) make sense.

However, applying the IDEA in cases where there is no point in dispute between a parent and the public agency not only renders the statutory language absurd, but also appears to go against the purpose of the IDEA. The core of the IDEA "is the cooperative process that it establishes between parents and schools." The IDEA was enacted to provide better education for children with disabilities by "strengthening

> the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." Rather than empowering parents and strengthening their role and responsibility in their children's education, this majority's interpretation of the school district's duties weakens parents' role by casting the responsibility to monitor and identify children's development *solely* on to the shoulders of our school system.

(Citations omitted; parentheses and emphasis in original.) *Compton Unified Sch. Dist.*, 598 F.3d at 1188-89.

## REASONS FOR GRANTING THE PETITION

### I. SUMMARY OF REASONS FOR GRANTING THE PETITION

The majority's decision fundamentally alters the bargain between the federal government and the states, and imposes on state and local agencies a new standard of care that will be nearly impossible to manage. Claims for educational malpractice – not cognizable in the context of nondisabled students – will now exist for disabled students.

The majority's opinion will impact virtually all residents of the Ninth Circuit – taxpayers, students, teachers, parents. The opinion will likely also be relied upon by lower administrative tribunals and district courts throughout the nation. The cost of another local agency challenging the majority's interpretation is so prohibitive that it is unlikely that the decision will be challenged at any time in the near future, if ever.

It is respectfully submitted that intervention by the Supreme Court is warranted.

## II. THE ISSUE PRESENTED INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

### A. The Majority Has Dramatically Enlarged The Scope Of Due Process Hearings Beyond What Is Authorized In The IDEA.

As explained by Judge Smith in the dissent, the due process hearing procedures are available only with respect to intentional decisions made by school districts and for which written prior notice is provided.

### 1. A Due Process Complaint May Only Be Brought Where There Is An Actual Dispute Regarding A School District's Proposal To Act Or Refusal To Act; No Claim Is Available Based On A Negligent Prior Failure To Act.

The IDEA is not direct federal legislation. Rather, Congress enacted the IDEA pursuant to the Spending Clause, under which Congress provides federal funds to assist State and local agencies in educating children with disabilities and conditions such funding upon a State's compliance with the IDEA rules and regulations. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 295-296 (2006); *Schaffer v. Weast*, 546 U.S. 49, 51 (2005).

In *Arlington*, the Supreme Court explained that legislation enacted pursuant to the Spending Clause is in the nature of a contract and, to be bound by federally imposed conditions, recipients of federal funds must accept them "voluntarily and knowingly." Therefore, the Supreme Court added, when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously." *See Arlington*, 548 U.S. at 296.

When a party seeks to impose obligations on an educational agency pursuant to the IDEA, the IDEA must be viewed from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the

obligations that go with those funds. The courts must ask whether the IDEA furnishes clear notice regarding the liability at issue in the case. *See id.*

The Supreme Court has held that, in evaluating whether the IDEA has provided "clear notice" of the scope of a claim, the courts should begin with the plain text in question. *See id. at* 296-297.

Here, the statutory framework expressly provides that parents may file for due process when a school district "proposes to initiate or change the identification, evaluation, or educational placement" of student or "refuses" to do so.

The choice of the words "proposes" and "refuses" (as opposed to "proposes" and "fails"; or "proposes" and "neglects") in the IDEA, the C.F.R.'s and the Education Code reflects that the IDEA cannot have been intended by the federal government, or expected by the States, to include claims that a school district unintentionally or negligently failed to act in a certain way.

Further, the statutory and regulatory framework expressly provides that a school district must provide "prior written notice" whenever the district "proposes to initiate or change the identification, evaluation, or educational placement" of student or "refuses" to do so.

The requirement that a school district provide "prior written notice" before "proposing" or "refusing"

certain action is inconsistent with an unintentional or negligent failure to act. In other words, one cannot give "prior written notice" if one is unwittingly erring in failing to act.

Finally, even the term "due process" (used in connection with the "due process hearing" provided for under the IDEA) itself connotes a deliberate procedure whereby a citizen is provided certain "process" that is "due" before the government proposes to act or declines to act. *See, e.g.,* U.S. Const. amends. V & XIV; *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913).

An IDEA due process complaint may only be brought where there is an actual dispute regarding a school district's proposal to act or refusal to act. No claim is available based on a negligent prior failure to act.

### 2. The Reference to the Term "Any Matter Relating To" In 20 U.S.C. § 1415(b)(6) Does Not Support Student's Claim.

In its opinion, the majority held that 20 U.S.C. § 1415(b)(6) broadly authorizes the filing of due process hearing complaints with respect to matters other than just "proposals or refusals" to assess, find eligible, or provide services to a student.

20 U.S.C. § 1415(b)(6) provides, in pertinent part, as follows:

> (b) Types of procedures. The procedures required by this section [20 U.S.C. § 1415] shall include the following:
>
> * * *
>
> (6) An opportunity for any party to present a complaint--
>
> (A) with respect to ***any matter relating to*** the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child . . . .

(Emphasis added.)

However, subsection 1415(b)(6) cannot be read in isolation. Reading subsection 1415(b)(6) in context confirms that the due process procedures are not broadly open-ended as claimed by Student.

20 U.S.C. § 1415(f)(1)(A) provides that, whenever a complaint is received under subsection 1415(b)(6), the party bringing the complaint shall have an opportunity for an impartial "due process hearing" at which the dispute will be adjudicated.

20 U.S.C. § 1415(f)(1)(A) provides, in pertinent part, as follows:

> (f) Impartial due process hearing.
>
> (1) In general.

> (A) Hearing. Whenever a complaint has been received under subsection (b)(6) or (k)[3], the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(b)(7)(A) requires that the party bringing the due process hearing complaint provide "due process complaint notice" in accordance with the written prior notice provisions of subsection 1415(c)(2).

Among the information required to be contained in the due process complaint notice pursuant to subsection 1415(b)(7)(A) is a description of the nature of the problem of the child relating to "such proposed initiation or change."

20 U.S.C. § 1415(b)(7)(A) provides, in pertinent part, as follows:

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[3] Due process hearing complaints are also available with respect to disputes involving alternative educational placements for students involved in disciplinary infractions. The underlying case herein did not involve such matters and therefore Petitioner focuses the discussion towards subsection (b)(6).

> (b) Types of procedures. The procedures required by this section [20 U.S.C. § 1415] shall include the following:
>
> * * *
>
> (7) (A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)--
>
> (i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and
>
> (ii) that shall include—
>
> * * *
>
> (III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem . . . .
>
> (Emphasis added.)

20 U.S.C. § 1415(b)(7)(B) provides that a party may not have a due process hearing until the party files a notice that contains the information required in 20 U.S.C. § 1415(b)(7)(B), as follows:

> (b) Types of procedures. The procedures required by this section [20 U.S.C. § 1415] shall include the following:
>
> * * *
>
> (7) . . .
>
> (B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

Under 20 U.S.C. § 1415(f)(3)(B), the matters at issue in a due process hearing are limited to matters for which due process complaint notice was provided in subsection 1415(b)(7), unless the other party otherwise agrees.

20 U.S.C. § 20 U.S.C. § 1415(f)(3)(B) provides:

> (f) Impartial due process hearing.
>
> * * *
>
> (3) Limitations on hearing.
>
> * * *
>
> (B) Subject matter of hearing. The party requesting the due process

> hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

Furthermore, if there were any doubt, the federal government's duly enacted regulations contained in 34 C.F.R. § 300.507 expressly confirms that due process hearings are to be held, "on any of the matters described in 34 C.F.R. § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child)."

The matters described in section 300.503(a)(l) and (2) are matters where a school district proposes to do something and the parent opposes the proposal, or the school district refuses to do something that the parent proposes.

### 3. The Majority's Construction Of The IDEA Creates A Claim For Educational Malpractice Where None Exists For Non-Disabled Students.

Under the majority's construction, parents with disabled students will essentially be able to assert claims of educational malpractice against public school districts – effectively arguing that districts knew or should have known of some specific student needs and failed to act upon such needs.

This construction is unreasonable and should be rejected.

First, claims for educational malpractice are essentially unavailable throughout the United States because of the flood of litigation that would ensue if such claims are cognizable. *See*, *e.g.*, *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 825 (1976) (California); *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 444 (New York); *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 475-76 (1993) (Kansas).

Second, in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Supreme Court explained that the purpose of the IDEA was to provide disabled students with a "basic floor of opportunity" and that so long as the services offered by the school district were "reasonably calculated to provide some educational benefit," school districts were in compliance with the law. *See id. at 200-01.*

A conclusion that disabled students have rights to assert claims of educational malpractice where no such claim is available to non-disabled students appears unreasonable, especially considering the relatively basic standard for services contemplated by the Supreme Court in *Rowley*.

The majority has dramatically enlarged the scope of due process hearings beyond what is authorized in the IDEA.

### B. The Question Presented Is Of Exceptional Importance And Warrants The Granting Of The Petition.

The question presented in this case directly impacts millions of students, parents, and taxpayers throughout the circuit.

According to the U.S. Department of Education's National Center for Educational Statistics, as of the 2008-09 school year there were in excess of 2200 school districts within the boundaries of the Ninth Circuit.[4] *See http://nces.ed.gov/pubs2010/pesagencies08/tables/table_03.asp.*

The National Center for Education Statistics's records also reflect that, as of the 2007-08 school year, there were in excess of one million (1,000,000) special education students being served under the IDEA in the school districts within the boundaries of the Ninth Circuit.[5] *See http://nces.ed.gov/programs/igest/d09/tables/dt09_052.asp.*

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[4] Alaska: 53; Arizona: 225; California: 960; Hawaii: 1; Idaho: 115; Montana: 420; Nevada: 17; Oregon: 194; Washington: 295 (Excludes Guam and the Commonwealth of the Northern Mariana Islands).

[5] Alaska: 17,535; Arizona: 131,136; California: 670,904; Hawaii: 20,441; Idaho: 27,989; Montana: 18,158; Nevada: 48,332; Oregon: 78,264; Washington: 123,698 (Excludes Guam and the Commonwealth of the Northern Mariana Islands).

The majority opinion enlarges the scope of due process hearing procedures from "proposed or refused" actions by school districts to an open-ended "any matter relating to" standard, which includes claims of negligence.

This occurs at a time when local public agencies are facing a nationwide funding crisis, and are in a precarious financial state.

The majority's opinion will have a profound impact on parents, students, local government officials, as well as all taxpayers throughout the circuit who must foot the bill for the cost of the enlarged mandate.

### C. It Is Extremely Unlikely That A Comparable Case Will Gravitate To Another Circuit Court Of Appeals Before Substantial Damage Is Inflicted On School Districts In The Ninth Circuit And Throughout The Nation.

In order to navigate the present case to the current procedural posture, the following steps were required:

a. An administrative law ruling on the scope of IDEA due process procedures;

b. A school district willing to appeal the ruling through the district court; and

c. A school district willing to appeal the district court decision to the Ninth Circuit.

It is now over 5 years since the filing of the original due process hearing complaint. The District is unaware of any other district court or circuit court of appeals presently considering the issue.

Assuming that another school district were willing to incur the expense of litigating the same issue through to the appellate courts, it could take 5 years or so from initiation of a due process hearing to arrive at the same procedural posture.

During this period of time, in the absence of any other controlling authority, the lower courts and administrative tribunals will likely be compelled to follow the majority's opinion.

It is extremely unlikely that a comparable case will gravitate to another circuit court of appeals before substantial damage is inflicted on school districts in the Ninth Circuit and throughout the nation.

## CONCLUSION

The majority's decision fundamentally alters the bargain between the federal government and the states, and imposes on state and local agencies a new standard of care that will be nearly impossible to manage. Claims for educational malpractice – not cognizable in the context of nondisabled students –

will now exist for disabled students. The majority opinion should not stand.

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully Submitted,

Barrett K. Green
*Counsel of Record*
Daniel J. Cravens
Daniel L. Gonzalez
LITTLER MENDELSON P.C.
2049 Century Park East, 5th Floor
Los Angeles, CA 90067.2693
Telephone: 310.553.0308
bgreen@littler.com

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPTON UNIFIED
SCHOOL DISTRICT,
*Plaintiff-Appellant,*

No. 07-55751
v. D.C. No.
CV-06-04717-AHM

STARVENIA ADDISON;
GLORIA ALLEN,
*Defendants-Appellees.*

COMPTON UNIFIED
SCHOOL DISTRICT,
*Plaintiff-Appellant,*

No. 07-56013
v. D.C. No.
CV-06-04717-AHM

STARVENIA ADDISON;
GLORIA ALLEN,
*Defendants-Appellees.*

OPINION

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted
October 23, 2008 – Pasadena, California

Filed March 22, 2010

Before: Harry Pregerson and N. Randy Smith, Circuit Judges, and Raner C. Collins,* District Judge.

Opinion by Judge Pregerson;
Dissent by Judge N.R. Smith

## COUNSEL

Barrett K. Green and Daniel J. Cravens, Littler Mendelson, Los Angeles, California, for the appellant.

George D. Crook, Newman Aaronson Vanaman, Sherman Oaks, California, for the appellee.

## OPINION

PREGERSON, Circuit Judge:

Compton Unified School District (the "School District") appeals the district court's decision granting judgment on the pleadings in favor of Starvenia Addison ("Addison"), a student in the School District. The School District argues that Addison does not have a cognizable claim against the School District for its failure to identify her disabilities. We have jurisdiction

*The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

under 28 U.S.C. § 1291. We review matters of law, such as the jurisdictional issue raised here, de novo, *see Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1179 (9th Cir. 2002), and affirm.

## I. Background

Addison received very poor grades and scored below the first percentile on standardized tests during her ninth-grade year in 2002-2003. The school counselor attributed Addison's poor performance to common "transitional year" difficulties. The counselor did not consider it atypical for a ninth-grader such as Addison to perform at a fourth-grade level.

In the fall of her tenth-grade year, Addison failed every academic subject. The counselor considered these grades to be a "major red flag." Teachers reported that Addison was "like a stick of furniture" in class, and that her work was "gibberish and incomprehensible." Teachers also reported that Addison sometimes refused to enter the classroom, colored with crayons at her desk, played with dolls in class, and urinated on herself in class.

Addison's mother was reluctant to have the child "looked at," and School District officials decided not to "push." Instead, the School District referred Addison to a third-party mental-health counselor. The third-party counselor recommended that the School District assess Addison for learning disabilities. Despite the recommendation, the School District did not refer Addison for an educational assessment, and

instead promoted Addison to eleventh grade.

In September 2004, Addison's mother wrote a letter to the School District explicitly requesting an educational assessment and Individualized Education Program ("IEP") meeting. The assessment took place on December 8, 2004. The IEP team determined that Addison was eligible for special education services on January 26, 2005.

Addison brought an administrative claim under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485, seeking compensatory educational services for the School District's failure to identify her needs and provide a free appropriate public education. The administrative law judge found for Addison, and the district court affirmed. This appeal timely followed.

## II. Analysis

### *A. IDEA Claims*

[1] The IDEA seeks to ensure that children with disabilities have access to a free appropriate public education. 20 U.S.C. § 1400. The IDEA "provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). One of these conditions is that states enact policies and procedures ensuring that "all children with disabilities . . . who are in need of

special education services[ ] are identified, located, and evaluated." 20 U.S.C. § 1412(a)(3)(A). This obligation is also known as the "child find" requirement.

[2] The IDEA also requires states to implement a number of procedural safeguards to ensure that disabled children receive an appropriate education. Among these safeguards is the opportunity for any party to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(6)(A). 34 C.F.R. § 300.507 implements this due process complaint requirement.

[3] As another, separate procedural safeguard, the IDEA requires that local educational agencies provide written notice to a child's parents whenever the agency "proposes to initiate or change" or "refuses to initiate or change the identification, evaluation, or educational placement of the child . . . ." 20 U.S.C. § 1415(b)(3). 34 C.F.R. § 300.503(a) implements these notice requirements.

[4] California, in compliance with the IDEA, mandates that local educational agencies "shall actively and systematically seek out all individuals with exceptional needs." Cal. Educ. Code § 56300. "All children with disabilities . . . shall be identified, located, and assessed." Cal. Educ. Code § 56301(a). California also allows parents to initiate a due process hearing when there is a proposal or a refusal to initiate or change "the identification, assessment, or educational placement" of a child. Cal. Educ. Code §

56501(a).

The School District first argues that the IDEA's written notice procedures limit the jurisdictional scope of the due process complaint procedure. The notice provisions set forth in 20 U.S.C. § 1415(b)(3) and 34 C.F.R. § 300.503(a) apply to proposals or refusals to initiate a change regarding a student's identification, assessment, or placement. The School District asserts that, because it chose to ignore Addison's disabilities and take no action, it has not affirmatively *refused* to act. The School District therefore contends that the notice requirement does not apply. The School District further asserts that there can be no due process right to file a claim unless the notice provisions specifically apply to such a claim. We reject this argument.

[5] We read statutes as a whole, and avoid statutory interpretations which would produce absurd results. *See United States v. Morton*, 467 U.S. 822, 828 (1984); *Arizona State Bd. for Charter Schools v. United States Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006). As the Supreme Court recently stated in the context of an unrelated provision of the IDEA, a "reading of the [Individuals with Disabilities Education] Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services." *Forest Grove School Dist. v. T.A.*, 129 S.Ct. 2484, 2495 (2009). The jurisdictional requirements for an IDEA complaint are clearly set

out in 20 U.S.C. § 1415(b)(6)(A), apart from the notice provisions of 20 U.S.C. § 1415(b)(3). Section 1415(b)(6)(A) states that a party may present a complaint "with respect to *any matter* relating to the identification, evaluation, or educational placement of the child." (emphasis added). The notice requirements of 20 U.S.C. § 1415(b)(3) do not cabin this broad jurisdictional mandate.[1] Addison's claim is cognizable under the IDEA.[2]

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[1]The School District also argues that notice requirements in 20 U.S.C. § 1415(b)(7)(A) strictly limit the scope of 20 U.S.C. § 1415(b)(6). Strict adherence to the language of Section (b)(7)(A), however, would conflict not only with 20 U.S.C. § 1415(b)(6) (granting jurisdiction over "any matter"), but also with 20 U.S.C. § 1415(b)(3) (establishing notice requirements where an agency proposes or refuses to act). Section (b)(7)(A)(ii)(III) requires "a description of the nature of the problem of the child relating to such proposed initiation or change." Nowhere does Section (b)(7)(A) refer to a *refusal* to act, despite the explicit inclusion of such language in Section (b)(3). "It is a well-established principle of statutory construction that legislative enactments should not be construed to render their provisions mere surplusage." *American Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (internal quotation omitted). We therefore do not accept the School District's suggestion that we should read Section (b)(7)(A) to strictly control the scope of IDEA's notice and jurisdictional provisions.

[2]Even if the School District were correct in its contention that IDEA claims may only be brought over proposals or affirmative refusals to initiate a change, Addison's claim would still be cognizable. The School District does not contest that a due process hearing is available when an education agency "refuses to initiate or change[ ] the identification, evaluation, or educational placement of the child, or the provision of a free appropriate

[6] The School District also contends, based on *Arlington Century School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006), that it did not have "clear notice" of the availability of an administrative hearing in "child find" cases. This argument has no merit, as the IDEA clearly allows complaints "with respect to *any matter relating to the identification*, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(6)(A) (emphasis added).

*B. Attorneys' Fees*

[7] We lastly address, and reject, the School District's argument that the district court's award of attorneys' fees should be vacated. The district court may, in its discretion, award attorneys' fees to the prevailing party. *Aguirre v. Los Angeles Unified School Dist.*, 461 F.3d 1114, 1115 (9th Cir. 2006). In *Aguirre*, we held that the "degree of success obtained" is the most critical factor in determining whether fees are warranted in an IDEA case. *Id.* at 1118. Citing *Henley v. Eckerhart*, 461 U.S. 424 (1983), we also stated that there is "no precise rule or formula for making these determinations," and that a district

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education to the child." 20 U.S.C. § 1415 (b)(3)(B). Instead, the School District seeks to cast its deliberate indifference as something other than a "refusal." We do not agree with the School District's characterization. To refuse is "to show or express an unwillingness to do . . . ." *Webster's New Collegiate Dictionary* 972 (1973 ed.). The School District's wilful inaction in the face of numerous "red flags" is more than sufficient to demonstrate its unwillingness and refusal to evaluate Addison.

court may award "full fees even where a party did not prevail on every contention." *Id.* at 1121 (citations omitted). Here, though the district court did not use the term "degree of success," it did cite *Aguirre* as the applicable standard. Considering Addison's substantial degree of success in administrative and district court proceedings, the district court did not abuse its discretion in awarding attorneys' fees.

## III. Conclusion

We conclude that claims based on a local educational agency's failure to meet the "child find" requirement are cognizable under the IDEA, and that here, the School District had clear notice of this fact. Accordingly, the district court's orders granting judgment on the pleadings and awarding attorneys' fees are **AFFIRMED**.

N.R. Smith, Circuit Judge, dissenting:

The majority finds and district judge found that Congress clearly intended to create a cause of action when it drafted 20 U.S.C. § 1415 of the IDEA. I cannot agree. The clear language of the statute makes them wrong. Further, even if their position could be harmonized with the statute, one cannot find that Addison is entitled to relief on this record.

This case comes before our panel as an appeal from a judgment on the pleadings against Plaintiff, CUSD. We review *de novo* a Rule 12(c) judgment on the pleadings. *Fleming v. Pickard*, 581 F.3d 922, 925

(9th Cir. 2009). A judgment on the pleadings is proper if, taking all of CUSD's allegations in its pleadings as true, Addison is entitled to judgment as a matter of law. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993).

On appeal to the district court, CUSD only challenged whether the ALJ had authority to conduct a due process hearing, in which the ALJ could determine whether CUSD violated the IDEA's child-find provision. CUSD argued that, under the IDEA and state law, a due process hearing may be held only where the school district purposefully acts or refuses to act, not when the complained-of conduct is best described as negligence.

"In the absence of clear evidence of congressional intent, we may not usurp the legislative power by unilaterally creating a cause of action." *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230-31 (9th Cir. 2008) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.")). Thus, the burden of establishing a private cause of action falls upon the plaintiff; a burden Addison has not carried.

## I. THE EXISTENCE OF A PRIVATE CAUSE OF ACTION

In federal court, parents may only challenge a

school district's failure to carry out its IDEA obligations based on the provisions of the IDEA. It is not a common law action, and an action cannot be brought against a school district pursuant to 42 U.S.C. § 1983. While the IDEA presents standards for educating children, a private right of action must exist in order for a court to grant relief for a statutory violation. Thus, it is not enough that Addison shows a statutory violation, she must also establish that the statute creates a private cause of action.

Looking first to the IDEA, Congress left the details of how the objectives of the IDEA are to be achieved to the states, by requiring those states who wish to obtain funding, "submit[ ] a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets [the conditions of the IDEA]." 20 U.S.C. § 1412(a). In California, this plan is found in Part 30 of the California Education Code. As set out in the California Education Code, the state has, in turn, given local education areas the task of establishing written policies and procedures to govern implementation of the IDEA in its area. Cal. Educ. Code § 56301(d)(1). Therefore, to determine whether parents may bring an IDEA due process hearing, one must consider all three plans: federal, state, and local. Addison brought her claim for due process on the ground that CUSD violated the IDEA's Child-find provision. The district court found § 1415(b)(6) and its accompanying regulation, 34 C.F.R. § 300.507, establish a private cause of action for violations of the Child-find provision.

The plain language of § 1415 requires that states establish and maintain procedures allowing parties to present a complaint as to matters regarding identification of children.[1] The Child-find provision, 20 U.S.C. § 1412(a)(3)(A), requires that the state has "in effect policies and procedures to ensure that the State meets . . . the following condition[ ]:"

> All children with disabilities residing in the State, ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

The state must present these policies and procedures to the satisfaction of the Secretary. *Id.* at § 1412(a). Section 1412 thus requires that the state have *policies and procedures* in place, to the satisfaction of the Secretary.

In § 1415, Congress requires that the education

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[1]When a statute only requires that the state or school district have a procedure in place, governing a certain course of action, I refer to it as creating a "procedural requirement." However, when the statute actually governs the very course of action, I refer to it as creating a "substantive standard" or "substantive requirement."

agency "shall establish ***and maintain*** procedures in accordance with *this section* to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies." *Id.* at § 1415(a) (emphases added). Looking at the plain language of § 1415, a school district "maintains" a procedure when it follows and enforces that procedure. The list of procedures that must be maintained includes a procedure providing "[a]n opportunity . . . to present [ ] complaint[s] with respect to any matter relating to the identification, evaluation, or educational placement of the child . . . ." *Id.* at § 1415(b)(6)(A). By requiring that the *states* develop and maintain procedures governing initiating a due process hearing, Congress instructed the courts that we are to give deference to the states.

California allows parents to initiate due process hearing procedures (as prescribed by Chapter 5, Part 30, Division 4, Title 2, of the California Education Code) under circumstances where the school district has refused to initiate the identification, assessment, or education placement of a child. Cal. Educ. Code § 56501(a)(2). The majority holds that CUSD's inaction, in the face of these troubling facts, amounts to a "refusal" under the IDEA. The majority cites no authority for its interpretation of the term "refusal."

## A. Defining "Refusal"

### (1) *Refusal Is Not Defined In The IDEA, The CFRs, or The California Education Code*

The IDEA does not define the term "refusal." However, it does discuss the consequences of a school district's refusal to initiate identification, evaluation, or educational placement of a child of Addison's age (at the relevant time) in its section on procedural safeguards. Section 1415 requires that states establish and maintain a procedure requiring the governmental agency provide parents written prior notice whenever it "refuses to initiate or change, the identification, evaluation, or educational placement of the child." 20 U.S.C. § 1415(b)(3)(B). Such notice must include :

(1) "a description of the action . . . refused by the agency," § 1415(c)(1)(A);

(2) "an explanation of why the agency . . . refuses to take the action," § 1415(c)(1)(B);

(3) "a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the . . . refused action," *Id.*;

(4) "a description of other options considered by the IEP Team and the reasons why those options were rejected," § 1415(c)(1)(E); and

(5) "a description of the factors that are relevant to the agency's . . . refusal," § 1415(c)(1)(F).

The regulations accompanying the IDEA also do little to help this court interpret "refusal." An agency must give written notice to the parent of a child with a disability "a reasonable time before the public agency" "[r]efuses to initiate or change the identification, evaluation, or educational placement of the child." 34 C.F.R. § 300.503(a)(2). The regulation mimics § 1415 as to the required contents of that notice, in that it requires that the notice include all five of the statements listed above. 34 C.F.R. §§ 300.503(b)(1), (b)(2), (b)(3), (b)(6), (b)(7).

The California Education Code repeats the requirements found in the IDEA and accompanying CFRs without adding any more detailed definition for "refusal." Pursuant to § 1415(b)(3) and 34 C.F.R. § 300.503, California requires a public agency provide parents with prior written notice upon a child's initial assessment, and notice a reasonable time before its refusal to initiate or change identification, assessment, or educational placement of a child. Cal. Educ. Code § 56500.4(a). The agency must also "provide a description of any assessment procedures the agency proposes to conduct." *Id.* The contents of a notice requirement are identical to the content requirements found in the CFR. *See id.* at § 56500.4(b).

(2) *Statutory Interpretation*

The IDEA, the CFRs, and the California Education Code all presuppose that there has been purposeful action with regard to a specific student, before any "refusal" occurred. "When the statutory

'language is plain, the sole function of the courts—at least where disposition required by the text is not absurd—is to enforce it according to its terms.' " *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Interpreting refusal to include a school district's negligent failure to identify students with disabilities in a timely manner—as the majority argues here—leads to an absurd result (even under the distressing facts before us) and leaves a host of questions in its wake.

The IDEA states implicitly, and the CFR and the California Education Code state explicitly, that written notice is to be given to a parent prior to the refusal. 20 U.S.C. § 1415(c), 34 C.F.R. § 300.503(a), and Cal. Educ. Code § 56500.4(a). Public agencies are required to give prior written notice to the parents of the student (a) describing the refused action, (b) explaining why the agency refused the action, and (c) setting out the factors considered by the agency in making its refusal. We cannot read the IDEA to require an agency give prior written notice that it *will* be negligent: describing the decision concerning which it will be negligent, the reasons it has decided to be negligent, and the factors it considered in deciding to be negligent. It would make the prior written notice requirement absurd (unless CUSD's actions are described as something other than negligence; here, neither party claims that CUSD acted purposefully in its failure to evaluate Addison).

The term "refusal" obviously includes purposeful agency action in response to a conflict over (1) whether to evaluate a student, or (2) how to deal with an evaluated student. The plain language of the statute makes that a reasonable interpretation. Plenty of IDEA cases come before the courts as the result of a parent and the local education agency disagreeing over the proper classification of a child or the proper appropriate education. Such cases fit neatly into the statutory scheme. As discussed above, once an issue has come to a point of contention, the content requirements for the prior written notice (and the due process hearing complaint, for that matter) make sense.

However, applying the IDEA in cases where there is no point in dispute between a parent and the public agency not only renders the statutory language absurd, but also appears to go against the purpose of the IDEA. The core of the IDEA "is the cooperative process that it establishes between parents and schools." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The IDEA was enacted to provide better education for children with disabilities by "strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." 20 U.S.C. § 1400(c)(5)(B). Rather than empowering parents and strengthening their role and responsibility in their children's education, this majority's interpretation of the school district's duties weakens parents' role by casting the responsibility to monitor

and identify children's development *solely* on to the shoulders of our school system.

Finally, not having a private cause of action does not mean that there is no public recourse for violations of the IDEA, the CFRs, or the California Education Code. As seen at every level of this legislation, funding is conditioned upon compliance. Cal. Educ. Code §§ 56045, 56125, 56845. Furthermore, such compliance is ensured not merely through the investigation of complaints—as discussed in § 56500.2—but also in monitoring. Cal. Educ. Code §§ 56125, 56135.

Finding that CUSD did not "refuse" under the statute means that the ALJ did not have authority to conduct a due process hearing, because Congress did not create a private right of action as a method of recourse for the school district's actions here.

## II. FINDING A CHILD-FIND VIOLATION

Even if Addison were to demonstrate that a private cause of action existed under the IDEA, the record before this panel is not sufficiently developed so that we should render judgment in this case. On a motion for judgment on the pleadings, the panel cannot properly determine whether CUSD violated its Child-find requirement, because the CUSD local plan is not in this record. This panel must review the CUSD local plan, because the IDEA and its accompanying CFRs are procedural—allowing the states to determine how best to achieve the Child-find requirement, so long

as certain procedures are in place. At the state level, the California Education Code allows the school districts to develop local plans detailing how the districts will satisfy the Child-find requirement. In the absence of this local plan, the majority not only rules without a standard to apply, it ignores the statutory framework of the IDEA.

As mentioned above, § 1412 outlines the Child-find requirement for school districts. Unlike § 1415, § 1412 only requires that states establish certain procedures to the satisfaction of the Secretary. Therefore, while a state can violate § 1415 if it fails to either establish a procedure or to maintain that procedure, a state can only violate § 1412 by not having a procedure at all. Given that Congress included that additional substantive requirement only three sections later, it appears that Congress did not intend to create such a requirement in § 1412. (Again, this does not leave the public without redress; failure to perform under the IDEA can and does lead to reduced funding. *See Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993) (explaining that funding is conditioned "on compliance with certain goals and procedures."). A state does not comply with the IDEA, in regard to the Child-find provision, if it does not provide procedures that satisfy the Secretary.)

Therefore, in order to show that there was some sort of substantive Child-find violation, Addison must identify that violation in the Code of Federal Regulations or state or local procedures that were

adopted pursuant to this statute. The ALJ cited 34 C.F.R. § 300.125 (2006) (currently codified at 34 C.F.R. § 300.111) in her finding that Addison prevailed on the pleadings in her cause of action. However, 34 C.F.R. § 300.125 only requires that "[t]he State must have in effect policies and procedures to ensure that (i) All children with disabilities residing in the State . . . are identified, located, and evaluated." This mirrors the language of § 1412; it is a procedural requirement. Plaintiff never contended that California failed to have these procedures in place. The ALJ also cited California Education Code sections 56300 and 56301 as setting forth obligations that were violated by CUSD in this case. Again, because Addison did not allege any procedural violations, the panel must find that these statutory sections provide a substantive standard that has been violated.

At first glance, it would appear that the California Education Code may establish a substantive standard against which we might compare CUSD's actions. The California Education Code does begin with an imperative: an "agency shall actively and systematically seek out all individuals with exceptional needs." Cal. Educ. Code § 56300. However, the following two sections of the Education Code continue on to detail the manner in which that imperative is to be achieved. It must be achieved *through the creation of local plans*. Cal. Educ. Code §§ 56301, 56302.

Sections 56301 and 56302 clarify that the local plans govern what the Child-find process will look like.

"Each special education local plan area shall establish written policies and procedures . . . for a continuous child-find system . . . ." Cal. Educ. Code § 56301(d)(1). "Identification procedures shall include systematic methods of utilizing referrals of pupils from teachers, parents, agencies, appropriate professional persons, and from other members of the public." Cal. Educ. Code § 56302.

It seems apparent from sections 56301 and 56302 that the purpose of the imperative was to set the local *plans* as a standard against which a school district's actions are to be compared. Section 56205 supports such a reading by explaining the manner in which California assures compliance with IDEA requirements: "Each special education local plan area submitting a local plan to the Superintendent under this part shall ensure . . . that it has in effect policies, procedures, and programs that are consistent with state laws, regulations, and policies governing the following: . . . (3) Child-find and referral. . . . (11) Compliance assurances . . . . (12)(A) A description of the governance and administration of the plan . . . . (15) Participation in state and districtwide assessments, . . . and reports relating to assessments." Cal. Educ. Code § 56205(a).

Given this precedent, we cannot hold that there has been a violation of the Child-find requirement without, at very least, reviewing the CUSD local plan. Further, if reviewing the local plan is not a prerequisite, local plans serve no purpose. The IDEA has been recognized as a model of "cooperative

federalism," *see Schaffer*, 546 U.S. at 52, a system where Congress set out the goals and procedures, but allows states the freedom to decide how those goals and procedures were to be implemented on a day-to-day basis. By finding that the school district has violated the Child-find provision, without even reviewing the CUSD procedures, the majority ignores the statutory complex outlined here.

## III. CONCLUSION

I am sympathetic to Addison's plight in this case and disappointed that more was not done to aid her while she was as student in the school district. However, I cannot find a private cause of action within the IDEA statutory structure, and I cannot harmonize the language of the statute with a private cause of action for negligence. Further, even if I were to find such things, I do not believe that the record is sufficiently developed for a final judgment at this juncture. For these reasons, I must dissent.

CINDY A. BRINING, State Bar No. 235637
LAW OFFICES OF CAROL H. GRAHAM
233 Wilshire Boulevard, Suite 400
Santa Monica, California 90401

Attorney for Defendants,

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

COMPTON UNIFIED
SCHOOL DISTRICT,
Plaintiff,

vs. Case No. CV 06-4717-AHM(PJWX)

STARVENIA ADDISON, an individual;
and GLORIA ALLEN, an individual,
Defendants.

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CLERK, U.S. DISTRICT COURT
APR 23 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /s/_____DEPUTY

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APR 24 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /s/_____DEPUTY

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ENTERED
CLERK, U.S. DISTRICT COURT
APR 23 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

PROPOSED JUDGMENT

This action came on for hearing before the Court, on April 20, 2007, Hon. A. Howard Matz, District Judge Presiding, on a Motion for Judgment on the Pleadings. The evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED ADJUDGED that no material issue of fact remains to be resolved and defendants are entitled to judgment as a matter of law. "Child find" is a cognizable issue for a due process hearing under the IDEA, 20 U.S.C. § 1400 et seq. Defendants are entitled to an award of attorney fees and costs as a prevailing party in this claim as well as in the underlying administrative action pursuant to 20 U.S.C. § 1415 (i)(3)(B).

DATED: April 24, 2007

/s/
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[DATE STAMP]
FILED
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APR 20 2007
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

COMPTON UNIFIED
SCHOOL DISTRICT,
Plaintiff,

v. CASE NO. CV 06-4717 AHM (PJWx)

STARVENA ADDISON, et al.,
Defendant(s).

ORDER GRANTING JUDGMENT
ON THE PLEADINGS

## I. INTRODUCTION

Plaintiff Compton Unified School District ("CUSD") is a public school district duly organized and existing under the laws of the State of California. Defendants are a student ("Student") and her mother, Gloria Allen, who initiated a due process hearing before an Administrative Law Judge ("ALJ") for the State of California Office of Administrative Hearings, alleging that Student was denied her right to a Free and Appropriate Education ("FAPE") as

required under the federal Individuals with Disabilities Education Act ("IDEA").

From March 21-24, 2006, the ALJ conducted a due process hearing to consider the IDEA issues raised by the student and her mother. One of their complaints was that from November 28, 2002 through January 26, 2005, CUSD failed to meet its obligation to identify Student's disabilities and to provide an educational program to address those needs. That was the first issue that the ALJ addressed (*See In the matter of Student v. Compton Unified Sch. Dist.,* OAH No. N2005110837), Defs. Mot., Ex. A ("Decision") at 2).[2] On April 27, 2006, the ALI ruled that beginning in the fall of 2003, CUSD had in fact violated its obligation to identify Student as someone requiring special services and did not assess or provide services to Student, in violation of the IDEA. *(Id.* at 17-20). The ALJ also ruled in favor of Student on several other issues and awarded her compensatory educational services. *(Id.* at 18-23).

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[2]The ALJ characterized this issue as follows:

> In this proceeding, Student alleges that the District did not meet its child-find obligations from November 28, 2002, until January 26, 2005, by failing to earlier identify her as eligible for special education as a student with an SLD [Special Learning Disability] or an emotional disturbance.

(Decision at 2).

On July 27, 2006, CUSD filed its complaint in this Court, appealing only one issue: whether the ALJ correctly determined that she had jurisdiction to consider whether CUSD's failure to identify Student's disabilities is a violation of the IDEA. CUSD alleges that the IDEA does not require or authorize a due process hearing or impose liability based on a school district's negligent failure to timely identify a student as eligible for special educational services under the IDEA. CUSD does not challenge any other part of the ALJ's decision. Student and her mother do not challenge any portion of the ALJ's decision.

On March 20, 2007, Student and her mother filed this motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). For the following reasons, I GRANT Defendants' motion.

## II. FACTUAL BACKGROUND

The parties are familiar with the facts of this case and the Court need not set forth the details here. A comprehensive description of the factual and procedural background is set forth in the ALJ's decision. *(See* Decision at 2-12).

In essence, the ALJ found that in Student's ninth-grade school year (2002-2003), she received four "Ds" in core academic courses, and two "Cs" (in chorus and physical education), but presented no conduct sufficient to alert the District that she had special education needs. (Decision at 4-5). In the fall

of her tenth-grade year (2003-2004), however, Student received "Fs" in every academic subject and certain of her teachers found that she "did not 'get it';" "was 'like a stick of furniture';" colored with crayons and played with dolls rather than doing her work; and needed psychological help. *(Id.* at 5-6). Her counselor "knew or had reason to suspect that Student ... required a referral for assessment." *(Id.* at 6). The counselor contacted her mother, who expressed reluctance to have Student "looked at," and he decided not to convene a Student Study Team. *(Id.).* Nor did he explain the range of interventions or services available to Student. *(Id.).*

Later, Student's counselor learned that she had urinated on herself in a classroom, and she was referred to a mental health services provider. *(Id.).* In April 2004 the provider recommended that Student receive tutoring and have an IEP to assess for learning disabilities. *(Id.* at 6). Despite receiving counseling services from this mental health services provider, Student again performed below the first percentile on standardized tests, received failing grades in her academic subjects and failed the California High School Exit Examination. *(Id.* at 6-7). Yet CUSD did not refer Student for assessment or otherwise explain the range of possible interventions to Student or her mother. *(Id.* at 6). Instead, it promoted her to the eleventh grade. *(Id.).*

Only after Student's mother submitted a written request for an Individualized Education Plan ("IEP") evaluation did the District initiate a psycho-

social assessment of Student. *(Id.* at 7). The District's psychologist who performed the assessment recommended that Student be further assessed by the Department of Mental Health. *(Id.* at 9). As of April 2, 2007, Student had not been referred for further assessment. *(Id.* at 10).

Student's IEP team convened a meeting in January 2005 and concluded that Student had a special learning disability ("SLD") and developed an IEP providing Student with special educational services. *(Id.* at 9-10). Student began receiving such services in the spring term of her eleventh-grade year. *(Id.* at 10). Student was denied those services at the beginning of her twelfth-grade school year (2005-2006), when her name was mistakenly removed from the Resource Specialist Program ("RSP") list. *(Id.* at 11). She was not placed back in the RSP program until the beginning of October, 2005. *(Id.* at 11).

On January 31, 2006, the IEP team met again for Student's annual review. *(Id.* at 12). The IEP team found that Student continued to be eligible for special education as a student with a SLD. *(Id.).* All the same goals and objectives from the previous year were continued because those goals had not been met. *(Id.).* As of January 31, 2006, Student was forty credits shy of completing credits necessary to graduate in June 2006 with her classmates. *(Id.).*

## III. THE IDEA AND APPLICABLE REGULATIONS

*Miller* v. *San Mateo-Foster City Unified Sch. Dist.,* 318 F.Supp. 2d 851, 853-54, (N.D. Cal. 2004) pithily summarized the language, purpose and history of the IDEA and federal and state implementing regulations, as follows:

> Congress passed the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs .... " 20 U.S.C. § 1400(c).
>
> If a State provides every qualified child with a free appropriate public education ("FAPE") under federal statutory requirements, the IDEA provides that State with federal funds to help educate children with disabilities. In exchange for these federal funds, the State must comply with "Child Find," which requires the State to design a program to identify and provide services to children with special education needs. 20 U.S.C. § 1412(a)(3)....
>
> California maintains a policy of complying with IDEA requirements. *See, e.g.,* Cal. Educ. Code §§ 56000, 56100(1), 56128.... It implements the Child Find program by requiring local

school districts to identify disabled students by "actively and systematically seeking out all individuals with exceptional needs." Cal. Educ.Code § 56300... Individualized education plans ("IEPs") are required for disabled students. 20 U.S.C. § 1414(d); Cal. Educ.Code § 56344. *See also Hacienda La Puente Unified School Dist. v. Honig,* 976 F.2d 487, 491 (9th Cir.1992).

In addition to its substantive requirements, the IDEA provides procedural safeguards. Some violations of these procedural safeguards may prevent a child from receiving a FAPE. Among the most important procedural safeguards are those that protect parents' rights to be involved in the development of their child's IEP. *Amanda J v. Clark County Sch. Dist.,* 267 F.3d 877, 882 (9th Cir.2001). In addition to the procedural right to participate in the development of an IEP, parents have the right to "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of [a FAPE] to such child." 20 U.S.C. § 1415(b)(1)(E). After making such a complaint, parents are entitled to "an impartial due

> process hearing ... conducted by the State educational agency or by the local educational agency or an intermediate educational unit, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(b)(2). If either party is dissatisfied with the state educational agency's review, that party may bring a civil action in state or federal court. 20 U.S.C. § 1415(e)(2). California has implemented the mandated procedural safeguards in California Education Code sections 56500 through 56507.

## IV. STANDARDS OF REVIEW

### A. Motion for Judgment on the Pleadings

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). The standard applied on a Rule 12(c) motion is essentially the same as that applied on Rule 12(b)(6) motions; a judgment on the pleadings is appropriate when, even if all the allegations in the complaint are true, the moving party is entitled to judgment as a matter of law. *Westlands Water District v. Firebaugh Canal,* 10 F.3d 667, 670 (9th Cir. 1993); *Hal Roach Studios, Inc. v. Richard Feiner* & *Co., Inc.,* 896 F.2d 1542, 1550 (9th Cir. 1989). In other words, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in

support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa,* 886 F.2d 260, 262 (9th Cir. 1989) (employing *Conley v. Gibson* standard). When determining a motion for judgment on the pleadings, the Court should assume the allegations in the Complaint to be true and construe them in the light most favorable to the plaintiff, and the movant must clearly establish that no material issue of fact remains to be resolved. *McGlinchey v. Shell Chemical Co.,* 845 F.2d 802, 810 (9th Cir. 1988). However, "conclusory allegations without more are insufficient to defeat a motion [for judgment on the pleadings]." *Id.*

As with Rule 12(b)(6) motions, "[g]enerally, a district court may not consider any material beyond the pleadings[.] ... However, material which is properly submitted as part of the complaint may be considered." *Hal Roach Studios, Inc. v. Richard Feiner* & *Co.,* 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted); William W Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial' 9:339.1 (2005). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss[,]" or on a Rule 12(c) motion, without converting the motion into a motion for summary judgment. *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994) (*citing Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 879 n. 3 (1st Cir.

1991)). If the documents are not physically attached to the complaint, they may be considered if their "authenticity ... is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP, Inc.,* 146 F.3d 699, 705-06 (9th Cir. 1998). "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d ed. 2004).

### B. Judicial Review of IDEA Claims

In *Miller,* Judge Patel also succinctly summarized the standard of review of an IDEA claim, which this Court adopts in full:

> The IDEA provides that a party aggrieved by the findings and decision made in a state administrative due process hearing has the right to bring an original civil action in a state court of competent jurisdiction or in federal district court in order to secure review of the disputed findings and decision. *See* 20 U.S.C. § 1415(i)(2). The party challenging the decision bears the burden of persuasion on its claim. *Clyde K. v. Puyallup Sch. Dist.,* No.3, 35 F.3d 1396, 1399 (9th Cir. 1994). The statute provides "the court shall receive the records of the administrative

proceedings; shall hear additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Id.* at § 1415(i)(2)(B).

Judicial review of state administrative proceedings under the IDEA is less deferential than the review of other agency actions. *Ojai Unified School District v. Jackson,* 4 F.3d 1467, 1471 (9th Cir. 1993). However, "because Congress intended states to have the primary responsibility for formulating each individual child's education, [courts] must defer to their 'specialized knowledge and experience' by giving 'due weight' to the decisions of the states' administrative bodies." *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.,* 267 F.3d 877, 888 (9th Cir. 2001) (quoting in part *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-08 (1982)). This review requires the district court to carefully consider the administrative agency's findings. *Susan N. v. Wilson Sch. Dist.,* 70 F.3d 751, 758 (3rd Cir.1995). "The amount of deference accorded the

> hearing officer's findings increases where they are thorough and careful." *Capistrano Unified Sch. Dist. v. Wartenberg,* 59 F.3d 884, 891 (9th Cir. 1995). After such consideration, "the court is free to accept or reject the findings in part or in whole." *Susan N.,* 70 F.3d at 758. When the court has before it all the evidence regarding the disputed issues, it may make a final judgment in what "is not a true summary judgment procedure [but] a bench trial based on a stipulated record." *Ojai,* 4 F.3d at 1472.

*Miller,* 318 F.Supp. 2d at 858-859 (footnote omitted).

## V. ANALYSIS

### A. The ALJ's Child-Find Determinations

The relevant factual findings that the ALJ made concerning the child-find obligation are set forth above. *(See* Part II, *supra; see also,* Decision at 2-12). In deciding the legal consequences of what she found to be CUSD's failure to timely assess Student, the ALJ cited the following authorities and principles:

> 4. The IDEA and State special education law impose upon each school district the duty to actively and systematically identify, locate, and assess all children

with disabilities who require special education and related services. (20 U.S.C. § 1412; 34 C.F.R. § 300.125; Cal. Educ. Code §§ 56300, 56301.) The obligation set forth in this statutory scheme is often referred to as the "child-find" or "seek and serve" obligation. This obligation to identify, locate, and assess applies to "children who are suspected of being a child with a disability ... and in need of special education, even though they are advancing from grade to grade." (34 C.F.R. § 300.125, subd. (a)(2).) The comments to 34 C.F.R. section 300.300, subdivision (a)(2), note the "crucial role that an effective child-find system plays as part of a State's obligation of ensuring that FAPE is available to all children with disabilities." (68 Federal Register no. 48 (March 12, 1999) at p. 12573.)

5. Under State special education law, the school district must establish written policies and procedures for a continuous child-find system. (Cal. Educ. Code § 56301.) The policies and procedures must include written notification to all parents of their rights and the procedure for initiating a referral for assessment. *(Id.)* Identification procedures shall include "systematic

> methods of utilizing referrals of students from teachers, parents, agencies, appropriate professional persons, and members of the public," and shall be coordinated with school site procedures for referral of pupils with needs that cannot be met with modification of the regular education program. (Cal. Educ. Code § 56302.).

The ALJ went on to hold:

> The child-find issue is a cognizable claim. The District failed its obligations from the fall of 2003, through January 26, 2005, when it first determined Student was eligible for special education and related services. The District knew or had reason to know that Student was eligible for special education services either as a student with a specific learning disability or under the category of emotional disturbance. *Id.,* Issue 1, p.l7.
>
> * * *
>
> ... Child-find obligations ... are a precursor to a school district's responsibility to offer and provide a disabled student with a FAPE. Thus, contrary to the District's assertion, a school district's duty to identify a child

> who is in need of assessment to determine eligibility for special education services is a cognizable claim for this due process hearing and is fairly subsumed within California Education Code section 56501, subdivisions (a)(1) and (2). *(See Grant Miller v. San MateoFoster City Unified School District,* 318 F.Supp. 2d 851 (N.D. Cal. 2004)). *Id.*, ¶ 23.

### B. CUSD'S Contentions Re "Child Find" and Due Process Hearings

CUSD states that it "agrees wholeheartedly that the IDEA requires that states and local school districts actively seek out and locate students who are disabled." (Opp. at 22). Moreover, CUSD does not dispute the clear right of parents to bring a due process complaint to challenge the denial of rights afforded by the IDEA. CUSD does contend, however, that "not every charge under the IDEA is included as a claim available for due process under the due process hearing procedures of the IDEA." *(Id.).* CUSD further argues that Student's allegation that CUSD failed to discharge its obligation under the IDEA child-find provision is the type of complaint that is "not available for due process" because the District's failure to assess her for eligibility for SLD services was attributable to neglect, rather than a refusal to act. *(Id.* at 2; *passim*).

Except for claiming support from the recent

Supreme Court decision in *Arlington Cent. School Dist. Bd. of Educ. v. Murphy,* _ U.S. _, 126 S.Ct. 2455 (2006), which I will address *infra,* CUSD primarily relies on federal and state statutes and regulations. First, it notes that the IDEA itself provides that the procedures a state must establish "to ensure that children with disabilities and their parents are guaranteed procedural safeguards" (20 U.S.C. § 1415(a)) shall include:

> (b)(3) Written prior notice to the parents of the child in accordance with subsection (C)(1) … whenever the local educational agency --
>
> (A) *proposes* to initiate or change; or
>
> (B) *refuses* to initiate or change, the identification, evaluation or educational placement of the child, or the provision of a [FAPE]."

20 U.S.C. § 1415 (b)(3) (emphasis added). (Opp. at 3-5).

Next, CUSD notes that 34 C.F.R. § 300.503, concerning the "prior notice" that educational agencies shall provide to parents and students, also refers to "proposals" or "refusals" to initiate or change the "identification, evaluation or educational placement" of the child. *(Id.* at 4-5).

Next, CUSD points to 34 C.F.R. § 300.507, concerning the filing of a due process complaint, which "nowhere mentions any of the child find sections cited by the ALJ as being the proper subjects of due process." *(Id.* at 22).

Finally, the CUSD notes that although the ALJ cited California Education Code section 56501 (a)(1)(2), that section merely contains "language mirroring 34 C.F.R. section 507."[2] *(Id.* at 7).

Fairly summarized, then, CUSD's fundamental argument is that if the federal

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[2]Section 56501 provides, in relevant part that:

> (a) The parent or guardian and the public education agency involved may initiate the due process hearing procedures prescribed by this chapter under any of the following circumstances:
>
> (1) There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child.
>
> (2) There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child.

Cal. Educ. Code § 56501(a).

government and the State of California intended to afford parents the right to a due process hearing for a school district's failure to discharge its child-find duties – which CUSD characterizes as "negligence" or "educational malpractice" – their respective statutes would have said so explicitly, by adding the word "neglects" to the words "proposes" and "refuses."

CUSD's fundamental contention conflicts with the clear language of the IDEA and federal regulations, is not supported by applicable case law and would lead to the illogical and unjust conclusion that Student and her mother have a recognized right under the IDEA but no means to enforce (and, ultimately, no remedy for) violations of that right. I reject CUSD's challenge and uphold the ALJ's conclusion, for the following reasons.

### C. Governing Statutes and Regulations

First, and most significantly, the IDEA, federal regulations, and California law expressly contemplate that in a due process complaint a parent may raise issues relating to the identification of a student as eligible for special services.

- The IDEA requires school districts to establish policies and procedures *"identif[ying],* locat[ing] and evaluat[ing]" children with disabilities. 20 U.S.C. § 1412(a)(3) (emphasis added).

- The IDEA authorizes a parent to

present a complaint "with respect *to any matter relating to the identification,* evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A) (emphasis added).

• The federal regulations implementing the IDEA (codified at 34 C.F.R. § 300 et seq.) provide that a parent may file a due process complaint to enforce her and her child's rights under the IDEA. Specifically,

> A parent or a public agency may file a due process complaint on any of the matters described in § 300.503 (a)(1) and (2) *(relating to the identification,* evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).
>
> 34 C.F.R. § 300.507(a) (emphasis added).

• California Education Code section 56501 provides, in relevant part, that a parent may bring a complaint when there "is a proposal to initiate or change the *identification,* assessment, or educational placement of the child" or when there "is a refusal to initiate or change the *identification,* assessment, or educational placement of the child." Cal. Educ. Code § 56501(a) (emphasis added).

Despite the clear language of these provisions, CUSD nevertheless suggests that section

1415(b)(3)(A)(B) and 34 C.F.R. § 300.503 imply that there is no right to bring a complaint based on inaction, because a district cannot provide notice of inaction. (Opp. at 18). This is a weak and unpersuasive argument. The sections CUSD points to merely address requirements *an educational agency* must satisfy when it decides or declines to take certain actions; they do not deal with what a *parent and child* may complain about.

The applicable provisions are 20 U.S.C. § 1415(b)(6) and its accompanying regulation, 34 C.F.R. § 300.507. They authorize a complaint concerning *"any* matter *relating* to identification ... of a child." (emphasis added). These broadly-phrased provisions do not limit the content of complaints to affirmative acts or refusals to act. *See M.T.V., et al. v. DeKalb County Sch. Dist.,* 446 F.3d 1153, 1158 (11th Cir. 2006) (the complaint provision of 20 U.S.C. § 1415(b)(6) is "broad" and encompasses a claim for retaliation, which is not specifically enumerated in the statute) (citing *Weber v. Cranston Sch. Comm.,* 212 F.3d 41, 51 (1st Cir. 2000)). *See also Rose v. Yeaw,* 214 F.3d 206, 210 (1st Cir. 2000) ("The scope of the due process hearing is broad" and the "complaints" identified in 20 U.S.C. § 1415(b)(6) encompass discrimination where school district *"failed* to ensure appropriate accommodation" of student's asthma condition) (emphasis added).

The applicable provisions of the California Education Code are consistent with the federal

scheme. Section 56300 provides that "Each district ... shall actively and systematically seek out" eligible recipients of special education and related services. Cal. Educ. Code § 56300. *Cf.* 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).[3] Section 56301, entitled "Child find process," provides that "All children with disabilities ... shall be identified, located and assessed .... " Cal. Educ. Code § 56301(a). *Cf* 20 U.S.C. § 1412(3)(A); 34 C.F.R. § 300.111(a)(1)(i). Section 56302 ("Identification and assessment of needs") obligates each district to "provide for the identification and assessment of an individual's exceptional needs" and mandates a number of exacting procedures to be followed in meeting this requirement. Cal. Educ. Code § 56302. *Cf.* 20 U.S.C. § 1412(3)(A); 34 C.F.R. § 300.111 (a)(1)(i).

To be sure, Section 56501 ("Due process hearing ... ") uses the words "proposal" and "refusal" in characterizing the actions that may give a party the right to initiate a due process hearing,[4] but the

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[3]Formerly 34 C.F.R. § 300.125.

[4]The ALJ cited *Miller v. San Mateo-Foster City, U.S.D., supra,* for the proposition that the child-find obligation is fairly subsumed within California Education Code section 56501, subdivisions (a)(1) and (2)." *(See* Decision at 17, ¶ 23). *Miller* does not quite establish that proposition. It does note that under federal law child-find programs are mandated and that Cal. Educ. Code § 56300 is California's legislative implementation of that requirement. 318 F.Supp. 2d at 854. It also suggests, without ruling explicitly, that the procedural right to present complaints in 20 U.S.C. § 1415(b)(1)(E) encompasses Child Find claims. *Id.*

broad construction of the corresponding federal provisions *(see* Order at 13, *supra)* should apply to this section as well.[5] Under CUSD's proposed reading of section 56501, a substantial number of children with undiagnosed – but undoubtedly diagnosable – disabilities would not be entitled to a FAPE because the school district failed to identify and assess them. This would provide a perverse incentive to school districts to refrain from implementing child-find programs, possibly to limit the attendant costs of providing mandated services to eligible students. *Miller, supra,* noted that the objectives of both the IDEA and California were to require school districts "to design a program to

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But in *Miller* the District did not contend that the child-find provisions afford no right to a due process hearing, and the school district-defendant was not charged with failing to detect and address a disability.

[5]Section 56501 must be read as a whole and not in isolation. *See United States v. Morton,* 467 U.S. 822, 824 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). The provisions of the California Education Code cited on the preceding page impose a responsibility on school districts to seek out, identify, and assess children with disabilities. *See* Cal. Educ. Code § § 56301, 56302. It would be absurd to recognize these responsibilities, but to then preclude students and parents from requiring school districts to discharge them. *See Arizona State Bd. for Charter Schools v. United States Dep't of Educ.,* 464 F .3d 1003, 1008 (9th Cir. 2006) ("[W]ell-accepted rules of statutory construction caution us that statutory interpretations which would produce absurd results are to be avoided.") (internal citation and quotation marks omitted).

identify and provide services to children with special needs." *Miller,* supra, 318 F.Supp.2d at 854 (discussing 20 U.S.C. § 14l2(a)(3) and Cal. Educ. Code §§ 5600, 56100(i), 56128). Under CUSD's construction, those objectives would be undermined.

*Hacienda La Puente Unified Sch. Dist. of Los Angeles v. Honig,* 976 F.2d 487 (9th Cir. 1992) supports the Court's rejection of CUSD's construction of these federal and state statutes. In *Hacienda,* a student was expelled from school after frightening another student with a stolen starter pistol. *Id.* at 489. Thereafter, the student and his parents requested an administrative hearing to determine, among other things, whether the student was eligible for special education and related services. A hearing officer decided in favor of the student and ordered his reinstatement in school and the provision of compensatory educational services. *Id.* at 489.

The school district "challenged the decision of the hearing officer primarily on the ground that she lacked jurisdiction over the matter." *Id.* at 490. The school district argued that under section 48915.5 (g) of the California Education Code, dealing with expulsion of disabled children, the student had no right to an administrative due process hearing because he had not previously been identified as a student with exceptional needs. The Ninth Circuit described the "essence" of the district's argument as follows: "[T]hat because the IDEA most often refers to children with disabilities ... it is necessary for a

school district or similar agency to identify a child as disabled before the procedural safeguards mandated by 20 U.S.C. § 1415 [i.e., the right to a due process hearing] can be invoked." *Id.* at 492. The Ninth Circuit disagreed, and held that the expelled student was entitled to an administrative due process hearing. *Id.* at 492-93. The Court noted that the district's interpretation of the statute conflicted "with the federal statutory and regulatory law by which California has chosen to abide." *Id.* Therefore, "[e]ven if the School District's interpretation of section 48915.5(g) is correct, we would be obligated to void the statute insofar as it would prevent [the student] from obtaining an administrative hearing on the question of his disability." *Id.* at 492.

### D. *Arlington Century* and "Clear Notice"

As indicated above, CUSD also argues that Student and her mother are barred from obtaining the child-find relief afforded to them by the ALJ because CUSD did not have "clear notice" that it would be subject to such liability. In support of this farfetched argument, Plaintiff relies on the Supreme Court's recent decision in *Arlington Century Sch. Dist. Bd. Of Educ. v. Murphy,* _ U.S. _, 126 S. Ct. 2455, 2458 (2006).

In *Arlington,* the parents of a student who had prevailed on his claims under the IDEA moved to recover expert witness fees that the parents had incurred. The Supreme Court reversed the lower courts' award of such expert fees. Applying well-

established principles of Spending Clause jurisprudence and statutory construction, the Court ruled that fees for expert witnesses were not recoverable under the IDEA fee-shifting provisions because the IDEA does not provide clear notice that such fees would be recoverable. *Id.* at 2463.

CUSD argues that, like the school district in *Arlington,* it did not have clear notice that it would be held liable for its failure to timely identify Student's disabilities. (Opp. At 17). CUSD lacks support for this premise. As discussed in considerable detail above, various substantive and procedural provisions in the IDEA, as well as the IDEA's explicit objectives, provided notice to the District that children and their parents may bring a due process complaint on *"any* matter related to the identification ... of a child .... " *See e.g.,* 20 U.S.C. § 1415(b)(6); see also, *Mr. I., et al. v. Maine Sch. Admin. Dist. No. 55,* 480 F.3d 1, _ (1st Cir. 2007) (rejecting school district's *Arlington-based* argument that the IDEA fails to put states on clear notice that they have a duty to provide benefits to children whose conditions "have merely an 'adverse effect' on their educational performance, because that requirement could be fairly gleaned from the statute's definition of "disability").

### E. CUSD's "Educational Malpractice" Concerns

CUSD contends that "[i]f Student's position were accepted, parents with disabled students would

essentially be able to assert claims of educational malpractice" and that such claims "are essentially unavailable throughout the United States because of the flood of litigation that would ensue if such claims are cognizable." Opp. p.19 (citing various state court decisions). CUSD' s concern that upholding the ALJ decision here will open those floodgates is misplaced.

First, this Court's decision is heavily fact-based (as was the ALJ's decision). The facts cited above in Section II are not disputed. They establish, in essence, the IDEA violation committed by CUSD resulted not from its educators and administrators failing to detect Student's disabilities, but their delay in assessing and classifying those disabilities – which they *had* observed – as constituting a special learning disability warranting an IEP. (They continued to disregard their child-find duties even after the District's own psychologist recommended a Department of Mental Health assessment.) The CUSD's own documented record provided the basis for the ALJ's decision, not expert testimony based on some witness's application of an educational "standard of care," Moreover, this Court's (and the ALJ's) application of the applicable state and federal statutes do not impose any new requirement or duty on a school district. In short; this case does not at all involve, or even conjure up, the specter of educational malpractice.[6]

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[6]CUSD cites various state court decisions in support of its claim that "educational malpractice" is not cognizable. *(See* Opp.

## VI. CONCLUSION

The IDEA was created to protect and educate children with disabilities. To accept Plaintiff's argument that students cannot enforce their rights under the Child-Find provision of the IDEA would be detrimental to unidentified students with disabilities and in contravention of the explicit language and purpose of the IDEA.

Whether the child-find issue is cognizable in a due process hearing under the IDEA is a legal determination, There is no issue of material fact regarding that question. Accordingly, the Court holds that the ALJ properly concluded that it had

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at 19-20 (citing *Finstad* v. *Washburn Univ. of Topeka,* 845 P.2d 685, 476-77) (1993) (refusing to recognize tort cause of action for negligent "conduct and supervision" of class); *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal.App.3d 814 (1976) (no cause of action for alleged failure to provide plaintiff with adequate instruction in basic academic skills); *Donohue v. Copiague Union Free Sch. Dist.,* 47 N.Y.2d 440, 444 (N.Y. 1979) (Former student may not bring claim that lack of comprehension of written English was due to defendant school district's failure to educate plaintiff; courts lack capacity to make judgments as to validity of broad educational responsibilities, and for courts to do so would interfere with state's constitutional allocation of responsbilities.)). In those cases the courts' refusals to recognize such claims were based on reasons of public policy and a perceived need to protect school districts from a deluge of claims for tort damages. *See Finstad,* 845 P.2d at 693; *Peter W.,* 60 Cal.App.3d at 824-25; *Donohue,* 47 N.Y.2d at 444-45. Here, in contrast, Student and her mother seek to enforce explicit federal and state law and policy, which CUSD purports to embrace, and they do not seek monetary damages.

jurisdiction to consider the school district's failure to identify, assess and timely provide services to Student. The motion for judgment on the pleadings is GRANTED.[7]

IT IS SO ORDERED.

DATED: April 20, 2007

/s/
A. HOWARD MATZ
United States District Judge

[7]Dkt. No. 19

**BEFORE THE**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**SPECIAL EDUCATION DIVISION**
**STATE OF CALIFORNIA**

In the Matter of:

STUDENT,
Petitioner,

vs. OAH No. N 2005110837

COMPTON UNIFIED
SCHOOL DISTRICT,
Respondent

## DECISION

Judith E. Ganz, Administrative Law Judge (ALJ) for the Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on March 21-24, 2006, in Compton, California.

Student was represented at the hearing by her attorney Cindy Brining. Ms. Brining was assisted by her associate, attorney Carol Graham on the first two days of hearing. Student's mother was also present on the first day of hearing. Attorney Daniel Gonzalez represented the District Compton Unified School District (District), and was assisted on several occasions by his associate, attorney Patrick Wang. The chair of the Department of

Special Education for Dominguez High School, Stephon Brown, was also present on behalf of the District. Assistant Vice Principal Garry Robinson appeared on behalf of the District on the first morning of hearing.

Student testified on her own behalf and called the following witnesses: Student's mother; Dr. Janet Vivero, Shields for Families' clinical psychologist; Nicole Starr, Shields for Families' therapist; and Mary Tapia, Shields for Families' case manager. In addition, Student called the following District personnel as witnesses: Stephon Brown, special education coordinator; Dana Wolf, special day class teacher; Mjenzi Ujamaa, school counselor; Susanna Vargas, general education mathematics teacher; Kimberly Anderson-Jefferson, general education English/language arts teacher; Ricardo Olivares, resource specialist teacher; Julianne Beebe, general education English teacher; Diane Bilbrew, general education social studies teacher; Jerry Reed, general education art teacher; Cathalena Preston, health technician; Lupe Alvarado, program coordinator for children with special needs; Gerard Sales, general education social science teacher; and Brad Keller, school psychologist.

The District cross-examined Student's witnesses.

## INTRODUCTION AND STATEMENT OF THE CASE

Student is a twelfth grade student at one of

the District's high schools, who was first found eligible for special education and related services on January 26, 2005, as a student with a specific learning disability (SLD).

On November 28, 2005, Student, through her attorney, filed a Complaint requesting a due process hearing, naming the District as respondent. On December 21, 2005, OAH served a Notice of Due Process Hearing and Mediation. On January 5, 2006, the District, filed a Notice of Insufficiency of Complaint (NO). On January 9, 2006, Student objected to the District's NO as untimely. On January 12, 2006, Administrative Law Judge Elsa H. Jones, denied the District's challenge to the complaint. Also on January 12, 2006, Student's request for a continuance was granted. On March 6, 2006, Administrative Law Judge Vincent Nafarrete conducted a prehearing conference and clarified the issues for hearing.

The matter convened for hearing on March 21-24, 2006, in Compton, California. Sworn testimony and documentary evidence was received. The record was held open for the submission of written closing arguments. Upon receipt of the parties' closing briefs on April 7, 2006, identified as Exhibit S for Student and Exhibit 18 for the District, the matter was submitted for decision.

## ISSUES

1. Did the District meet its child-find

obligation in regard to Student from November 28, 2002, until January 26, 2005, to identify Student's disabilities and provide an educational program to address her needs?[1]

2. Was the District's December 8, 2004 assessment of Student appropriate?

3. Did the District deny Student a free appropriate public education (FAPE) by failing to timely convene an Individualized Education Program (IEP) meeting and failing to provide appropriate academic support and address her social and emotional needs, as described in its January 26, 2005 IEP?

4. If the District failed to identify Student's disabilities and offer or provide her with a FAPE, is she entitled to compensatory education and services?

CONTENTIONS OF THE PARTIES

In this proceeding, Student alleges that the District did not meet its child-find obligations from

[1]The parties agree that the three-year statute of limitations applies. (Cal. Educ. Code § 56505(l).)

November 28, 2002, until January 26, 2005, by failing to earlier identify her as eligible for special education as a student with an SLD or an emotional disturbance (ED). Student further alleges that the District's December 8, 2004 assessment of Student failed to examine all areas of suspected disability, namely her social and emotional needs and written language deficits. Student also maintains that the January 26, 2005 IEP that the District provided for two hours in the resource specialist program was insufficient to meet her academic and social and emotional needs, and thus not an offer of FAPE. Student further contends that although the IEP team agreed to make a referral for mental health services, the District failed to do so. If the issues are resolved in Student's favor, Student seeks an independent pyscho-educational evaluation at District expense, compensatory education consisting of five hundred hours of one-to-one tutoring by a nonpublic agency, and placement in a nonpublic school.

The District contends that the alleged failure to meet child-find obligations is not a legally cognizable cause of action for a special education hearing. In the alternative, if the merits are reached, the District maintains that it attempted general education intervention before resorting to special education resources by referring the family for counseling services. It further asserted that its December 2004 assessment was appropriate, it conducted a follow-up assessment in October 2005 to assess Student's social and emotional needs,

Student's mother signed consent for Student's initial IEP, and Student's program has since been modified to adequately address her educational needs. According to the District, Student is not entitled to any remedies.

The ALJ makes findings of fact, legal conclusions, and orders as follows:

## FACTUAL FINDINGS

*The Parties and Jurisdiction*

1. Student is a seventeen-year old student who lives with her older brother, mother, and grandmother within the boundaries of the District. Student has attended District schools since the fourth grade (1997-1998). Student began her senior year at Dominguez High School in the fall of 2005 but has not satisfied credit requirements or passed the California High School Exit Examination, and is not expected to graduate. Student will turn eighteen in September 2006.

2. Student was first identified as a student with an SLD, qualifying her for special education on January 26, 2005, and was placed in the District's resource specialist program. Student continued to receive special education and related services at all times during the pendency of this proceeding.

*Student's Educational History/District's Child-Find Obligations*

3. Student was in the regular education program during her elementary, middle school, and ninth (2002-2003) and tenth grade (2003-2004) high school years.

4. In middle school, Student received Cs, Ds, and Fs in academic subjects in both the seventh (2000-2001) and eighth (2001-2002) grade school years.

5. At the end of middle school, in her eighth grade school year in May 2002, Student achieved grade equivalency scores of 4.0 in total reading, and 4.3 in total mathematics on standardized tests (Stanford Achievement Test-9).

*Ninth-Grade School Year (2002-2003)*

6. At the start of high school, in the ninth grade (2002-2003), Student continued to receive low and failing grades in academic subjects, including an F in English I and an F in general biology. She earned a B grade in preparatory mathematics.

7. Student's mother was concerned about her daughter's poor grades but attributed her performance to lack of motivation

8. Roberta Escorpion, Student's ninth-grade English teacher, characterized Student as not particularly bright, but a quiet student who did not call for extra attention. Ms. Escorpion had never referred one of her students for special education

and did not refer Student.

9. On standardized testing administered in the Spring of 2003, Student achieved below the first percentile in total reading and general mathematics. No grade-equivalency scores were provided.

10. At the end of the ninth-grade school year (2002-2003), Student received the following grades: D in English I, C in chorus, D in comparative literature, D in biology, C in physical education, and D in prepatory mathematics.

11. Mjenzi Ujamaa, the District's high school counselor, had a case load of approximately eight to nine hundred ninth and tenth-grade students when Student was in the ninth grade.

(A) Mr. Ujamaa conceded he did not pay a lot of attention to Student during her ninth grade year, but was aware of reports she was late to class. Mr. Ujamaa considered Student's low grades to be a product of poor attendance and the fact that the ninth grade was a "transitional year" for many high school students.

(B) Mr. Ujamaa believed that a ninth grader's performance at a fourth-grade level in high school was not atypical and that tutorial services and regular education class placements were meant to address student deficits.

12. Student presented no evidence from any

ninth-grade teacher or other witness describing either academic or social and emotional difficulties sufficient to alert the District that Student had special education needs. Student passed all her classes, albeit with poor grades. Student was promoted to the tenth grade and continued in the regular education program.

*Tenth-Grade School Year (2003-2004)*

13. In the fall of the tenth grade (2003-2004), Student received even lower grades than in the ninth grade earning Fs in every academic subject including English, language, algebra, general chemistry, and world civilization. She received a D in physical education.

14. Tenth-grade mathematics teacher Susanna Vargas reported to the school counselor on two or three occasions that Student was quiet, did not work in groups, did not complete warm-up assignments, and did not "get it." Instead of completing assigned work, Student colored with crayons at her desk. Student did not ask for help and was emotionally withdrawn. During lunchtime, Student stayed in the classroom.

15. Although Ms. Vargas previously taught in the Philippines for fifteen years, at the time Student was in her class she was relatively new to the California school system and was provided with little or no training regarding legal requirements. Based upon her more current awareness of special

education laws, Ms. Vargas would have referred Student for a special education assessment when Student was in her class.

16. Kimberly Anderson-Jefferson, an experienced general education teacher, was Student's tenth grade English teacher. Student failed her class and received an F grade for both the fall and spring semesters.

(A) Academically, Student failed to participate and was not performing at or near high school or even middle school standards. Student's work was gibberish and incomprehensible in all areas of study including reading, writing, listening, and speaking. Student got lost in her large class of thirty-nine students and was "like a stick of furniture."

(B) In the social and emotional domain, Student urinated on herself in class, stood outside the classroom, and would not enter the room even with coaxing. Student played with dolls in class.

(C) Ms. Anderson-Jefferson reported her concerns to Mr. Ujamaa. Ms. Anderson-Jefferson believed that Student should have been placed in a small class with one-on-one support and that Student's problems would have been more appropriately addressed by a trained psychologist.

17. Gerard Sales, an experienced general education teacher for eleven years, was Student's tenth-grade social studies teacher. Student received

F grades for both the fall and spring semesters. Student did not perform well academically, did not participate in class, and doodled and copied things out of magazines instead of completing in-class written assignments. She was a slow learner, performed below grade level, and did not read aloud in class.

18. As Student's tenth-grade school year (2003-2004) began, and no later than the first progress reporting period in the fall of that school year, Mr. Ujamaa was aware of Student's teachers' concerns, reports of Student's atypical behaviors both in and out of class, and her declining academic performance. Mr. Ujamaa considered Student's fall tenth-grade failing grades to be a "major red flag" and an indication that Student lacked sufficient foundation from the ninth-grade to meet tenth-grade curriculum requirements. Mr. Ujamaa knew or had reason to suspect that Student was a student who required a referral for assessment.

19. Sometime during the tenth-grade school year, Mr. Ujamaa contacted Student's mother, but upon Mother's expression of reluctance to have Student "looked at," he decided not to "push." Neither Mr. Ujamaa nor other District personnel convened an student study team (SST) meeting, or otherwise explained the range of interventions or

services available to Student.[2]

20. In March 2004, during the tenth-grade spring term after Mr. Ujamaa became aware that Student had urinated on herself in the classroom, Mr. Ujamaa referred the family to Shields for Families. Shields for Families subcontracted with the District to provide school-based mental health services to identified families.

21. On April 27, 2004, after initial interviews with Student, Mother, and District personnel, Shields reported that Student presented with a depressed mood, nightly enuresis, low self-esteem, poor personal hygiene, poor peer relationships, and was withdrawn. Student was extremely anxious upon entering and leaving the classroom and dealing with her peers in a group setting. Interviews with Student's teachers revealed that Student's poor attendance record was the result of her late entries into her classes. Shields recommended that Student receive tutoring and have an IEP to assess for learning disabilities.

22. Beginning in April 2004, and extending through the regular school session and the summer

[2]In the District, convening an SST meeting is a general education program function. Teachers and other District personnel meet with a parent and student to discuss academic or behavioral difficulties and develop strategies to address them. Typically, the SST meets again six to eight weeks later to consider the student's progress.

break, Shields provided counseling services to Student once each week.

23. On several occasions, Mr. Ujamaa accompanied Student and helped her enter the classroom. He observed that Student was fidgety, anxious, and had quickened speech.

24. Despite the provision of counseling services and Mr. Ujamaa's assistance, Student continued to receive failing grades. At the end of her tenth grade year (2003-2004), Student received the following grades: D in English, F in language, F in algebra, F in
general chemistry, F in world civilization, and C in physical education. Student did not pass the California High School Exit Examination administered in the spring of 2004, and continued to perform below the first percentile in reading and mathematics on standardized achievement tests. The District did not refer Student for assessment or other intervention and promoted her to the eleventh grade in the regular education program.

*Parental Request for Assessment/Eleventh-Grade School Year (2004-2005)*

24. At the start of Student's eleventh-grade school year (2004-2005), on September 27, 2004, Mother wrote a letter to the District stating in relevant part:

I am the parent of [Student], who is

> currently enrolled in the 11th grade at Dominguez. [Student] is low on credits and has been struggling with her academics in the past few years. I am requesting that an IEP meeting be held for my daughter as soon as possible. She has been having some problems at school I think that her program may need to be modified to address her individual needs.
>
> I am also requesting that a behavioral assessment be completed before the meeting and that I receive a copy of this assessment. I look forward to meeting with her counselor, teachers, and school psychologist.

Mother did not consent to waive IEP timelines.

25. Mary Tapia, Shields case manager assigned to Student since October 2004, was responsible for coordinating services with the District. On November 4, 2004, and then again on November 9, 2004, Ms. Tapia submitted a written request for an SST meeting to the District. Ms. Tapia attached Mother's previous written request for an IEP and behavioral assessment but asked for an SST meeting because she had been told by District personnel that an SST meeting must be attempted before an IEP meeting could be convened.

26. Lupe Alvarado, the District's program

coordinator for special needs children, received a copy of the November 2004 letter from Shields. Ms. Alvarado was aware that the SST procedure was in process but also aware that there had been a request for a psycho-educational assessment.

27. It is District policy to attempt the SST process before resorting to IEP procedures. Even if a parent requests an assessment and/or an IEP meeting, the District typically explains the SST process to the parent, and in most cases holds an SST meeting before the IEP process is initiated.

28. The SST meeting, scheduled for November 30, 2004, did not take place because Vice-Principal Wilson was unable to attend. The SST could not formally convene unless a school administrator was present.

29. At Ms. Tapia's urging, an informal meeting took place on November 30, 2004, with Mother, Student's grandmother, Student, Ms. Beebe, and Brad Keller, school psychologist for the District in attendance. After the meeting, Mr. Keller provided a proposed assessment plan to Ms. Tapia and asked her to obtain parental consent. The parties stipulated that Mother provided consent to the District's proposed assessment plan sometime after November 30, 2004, and before the date of the

assessment conducted on December 8, 2004.[3]

*The District's Initial Psycho-Educational Assessment*

30. Mr. Keller assessed Student on December 8, 2004. The basis for the referral was listed as: "[Student's] current teachers as well as her Shields for Families counselor expressed concern that she might have a learning disability and should be assessed to see if she qualified for special education services. There has also been concern expressed about the anxiety that she appears to have about being in school."

31. Mr. Keller assessed Student's cognitive functioning, academic achievement, visual-motor skills, and attempted to assess her social emotional status.

(A) In the academic domain, Mr. Keller administered several instruments and reported Student's scores as follows:

(1) The Naglieri Nonverbal Ability Test was a culture-free instrument that measured nonverbal thinking and reasoning skills. Student scored a standard score of 82 which fell in the twelfth percentile, and Mr. Keller concluded Student was in

[3]The District was unable to produce either the proposed or consented-to assessment plan.

the low-average range of cognitive functioning.[4]

(2) The Woodcock-Johnson Tests of Academic Achievement-III was administered to measure academic achievement. In the area of reading, Student achieved grade equivalency scores of 7.5 in word identification skills, 5.1 in passage comprehension, and a 5.4 score in broad reading. In the area of mathematics, Student achieved grade equivalency scores of 4.5 in calculation, 3.1 in applied problems, and a 3.8 score in broad mathematics. On the dictation language subtest, Student achieved a grade equivalency score of 6.6. Mr. Keller concluded that reading decoding and saying individual words were Student's areas of relative strength and mathematics was her greatest area of weakness.

(3) On the Beery Test of Visual Motor Integration, Student was asked to look at and copy geometric designs of increasing difficulty and was found to have visual motor skills deficits.

(4) The Learning Efficiency Test II was administered to test immediate, short and long-term memory for ordered and unordered sequences in both visual and auditory modalities. Student's low

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[4]Student is an African-American student. Thus, the District is prohibited from administering intelligence tests. (Larry P. v. Riles, 459 F. Supp. 926 (N.D. Cal. 1979), aff'd in part, rev'd in part, 793 F. Supp. 969 (9th Cir. 1986).)

scores in both areas indicated she had visual processing difficulties and auditory memory deficits.

(B) In the social and emotional domain, Mr. Keller administered the Piers-Harris II survey to Student, but determined the test results were invalid. Mr. Keller reported teacher observations that Student exhibited extreme anxiety, but he conducted no additional testing.

32. It is reasonable to infer that Mr. Keller recognized more information was needed in the social and emotional domain because he recommended to the IEP team that Student be further assessed by the Department of Mental Health (AB3632).[5]

33. Student presented no evidence in support of her contention that the District should have assessed Student in the area of written language.

*The January 26, 2005 IEP*

34. The IEP team met on January 26, 2005, to consider the District's assessment and teacher reports to determine whether Student was eligible

[5]"AB3632" is a common term applied to California Government Code sections 7570-7588, which determine when community mental health agencies operating under the Department of Mental Health must assess pupils with suspected disabilities, and provide those determined eligible with special education and related services.

for special education.

35. Student's eleventh-grade English teacher was Julianne Beebe, head of the English department, and characterized as a "seasoned teacher" by Mr. Ujamaa. Ms. Beebe reported that academically, Student had difficulty understanding the class curriculum. Student was a slow learner and she answered simple quizzes randomly. In the social and emotional domain, Student did not interact with peers, read magazines suitable for younger children, wrote out lists of celebrities, and seldom if ever did assigned work. Other students laughed about Student when she was not present.

Student's eleventh-grade social studies teacher was Diane Bilbrew, a credentialed teacher for twenty-five years. In her class, Student was extremely quiet, isolated from other students, did not participate in oral discussion, and did not read in class.

Mr. Ujamaa told the IEP team that Student seemed to work better in a one-to-one situation. Ms. Beebe told the IEP team that Student was misplaced and had academic and behavioral needs she was unable to service in her mainstream classroom.

36. Academically, Student was unable to focus, complete class assignments, and was behind her same-age peers in reading, writing, speaking, and listening. Behaviorally, Student did not ask for help, was lost in a large regular education class, and

was isolated from her peers.

37. The IEP team concluded that Student was eligible for special education as a student with a specific learning disability due to the severe discrepancy between her intellectual ability and her achievement in the areas of mathematics and language arts. The discrepancy was due to a disorder in one or more of the basic psychological processes and was not the result of environmental, cultural, or economic advantages. This discrepancy could not be corrected through regular services within the general education curriculum.

38. The IEP provided for placement in the resource specialist program (RSP) for forty-five minutes on Monday and two hours from Tuesday through Friday, in the areas of mathematics and language arts.

39. Mr. Ujamaa recommended the RSP to the IEP team because Student was significantly behind in English and based upon his belief an initial RSP placement complied with least restrictive environment requirements. Mr. Ujamaa would have recommended a placement that provided more academic support had he known he could have made that recommendation. Ms. Alvarado believed that District policy was to start with an RSP placement and that District members of the IEP team did not want to push Student too far.

40. The IEP included goals and objectives in

the areas of mathematics, reading comprehension, vocational skills, and social and emotional skills. An Individualized Transition Plan was also provided.

41. Modifications to the general education curriculum were listed, including additional time to complete tests, assignments broken into smaller parts or shortened, and use of computational aids.

42. The IEP team recommended a referral for AB3632 mental health assessment and services.

43. The District had no standard procedure to complete the referral for mental health testing. Through the close of the record in this matter, no referral to mental health has been made.

*Educational Progress from January 2005 to the present*

44. Ricardo Olivares was Student's assigned resource specialist teacher for the spring 2004-2005 school term. There were thirteen to fifteen students in his resource English class and less than ten students in the resource algebra section. Each class had one aide.

(A) Academically, Student doodled, came to class with stacks of magazines, but ultimately became attentive to the lessons. Student made appropriate academic progress in the RSP English class, but needed more academic support in mathematics than the RSP could provide.

(B) Student was very quiet and did not talk much at first, but then she became a "social butterfly."

45. In the spring term of her eleventh-grade year, Student continued to receive failing grades in the general education program earning F in world civilization, F in art, and F in world history. In the RSP classes, Student earned D in English II, C in English III, and C in algebra I.

46. At the start of her twelfth-grade school year (2005-2006) at the end of August, Student was placed in all regular education classes. Student's name had been mistakenly taken off the RSP list. Student was not placed back in the RSP program until the beginning of October.

47. The IEP team reconvened on October 14, 2005, and then again on October 25, 2005. Each of Student's general education teachers reported through Mr. Brown, that Student had difficulty completing all her assignments while the RSP teacher reported that in his class Student managed to finish her work. Mr. Brown indicated that he had just started to inform Student's regular education teachers how to implement modifications and accommodations to their programs. Student was significantly behind in credits needed to graduate. It was agreed that Student would be reassessed to determine if she was eligible for special education and related services under the category of emotional disturbance (ED). 48. School psychologist Keller

reassessed Student on October 31, 2005, to determine if she was eligible for special education under the category of ED.

(A) Mr. Keller administered the Woodcock-Johnson-III again. Student achieved a grade equivalency score of 3.5 in broad math, 5.6 in broad reading, and 6.6 in language.

(B) In the social and emotional domain, Mr. Keller administered several tests with the following results:

(1) RSP teacher Olivares completed the Burks' Behavior Scale. Mr. Olivares rated the following areas as significant: poor attention, poor academics, excessive anxiety, and poor ego strength. Mr. Olivares rated excessive withdrawal as very significant. On another scale rating, Mr. Olivares rated the following areas as significant: inability to learn, unhappiness or depression, physical symptoms or fears.

(2) The Behavior Assessment Scale for Children (BASC) was administered to Student. On this self-report, her school maladjustment composite rating was scored in the at-risk range; personal adjustment was scored in the high range, while other scores indicated a normal sense of well-being. Mr. Keller reported that these scores suggested Student's pervasive discomfort with school.

(C) Mr. Keller found that Student exhibited

characteristics that impeded her learning over a long period of time. Mr. Keller found that her lack of willingness to participate or communicate appeared to be beyond what should be expected and thus she exhibited inappropriate types of behavior and feelings under normal circumstances. However, Mr. Keller found it difficult to determine whether Student's lack of participation and failure to complete home and class work was due to emotional issues or a lack of interest in school.

49. In his report, Mr. Keller concluded that Student did not meet special education eligibility requirements under the emotional disturbance category. Mr. Keller candidly acknowledged that he was reluctant to label a student with ED at Student's age because of the potential negative effect on her future employment opportunities.

50. Mr. Keller recommended that a behavior support plan (BSP) be developed and implemented. Mr. Keller testified that he thought a BSP should have been in place earlier.

51. The IEP team met on December 5, 2005, to discuss Mr. Keller's recent assessment. The team determined that Student was not eligible for special education under the category of ED. A BSP was developed to address Student's anxiety between classes and lack of participation in class. The BSP provided for the RSP teacher to encourage journaling and an aide to accompany Student to class.

52. Student's placement was modified to provide for special day classes (SDC) as well as support through the RSP program. Student was continued in the RSP program for both math and English, and was placed in an SDC for science and United States history.

53. The IEP team determined that Student had not met any of the goals and objectives from the previous January 26, 2005 IEP. The same goals were continued for the remainder of the school year. The criteria to achieve each goal was reduced.

54. Beginning in October 2005, Student's counseling sessions with Shields for Families increased to twice each week.

On January 30, 2006, Shields for Families' psychologist, Dr. Janet Vivero, conducted an evaluation to assess Student's level of cognitive and adaptive functioning.

(A) Dr. Vivero administered a standardized intelligence test, the results of which are barred from consideration for educational planning purposes by law and District policy.

(B) Dr. Vivero conducted a social/emotional assessment including self-report and projective measures. The Roberts Apperception Test for Children revealed many themes suggesting anxiety. Other projective measures corroborated this finding (House-Tree-Person) suggesting Student's fear led to

isolation and withdrawal, and a tendency to avoid interpersonal relationships. In a clinical interview, Student explained she avoided entering classrooms because she feared peers' taunting and teasing. Student reported an incident where she had been lured into a car by a stranger and sexually assaulted.

55. On January 31, 2006, the IEP team met again for Student's annual review. The team found that Student continued to be eligible for special education as a student with a SLD. The team reported that Student continued to exhibit a high level of anxiety about being in the classroom and appeared to be uncomfortable around unfamiliar peers and adults. Student was functioning in the low average cognitive range and below average in mathematics. All the same goals and objectives from the previous year were continued because the goals had not been met in the areas of vocational skills, reading comprehension, mathematics, and social/emotional skills. The IEP team recommended that Student attend the extended school year program.

56. Student was offered placement in a life-skills class, but Mr. Ujamaa placed her in academic classes instead in the hopes she might earn credits towards graduation.

57. As of January 31, 2006, Student was forty credits shy of completing credits necessary to graduate in June 2006 with her classmates.

## LEGAL CONCLUSIONS

*Applicable Legal Principles*

1. Student, as the moving party, has the burden of proving the essential elements of her claims. (*Schaffer v. Weast*, _U.S._, 126 S. Ct. 528 (2005.)

2. Student may be entitled to continue to receive special education and related services until she reaches age twenty-two. (Cal. Educ. Code § 56026.)

3. Under both State special education law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400 (2005); Cal. Educ. Code § 56000.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parents, that meet State educational standards and that conform to the student's individualized education program (IEP). (20 U.S.C. § 1401(9).) The right to a FAPE arises only after a student is assessed and determined to be eligible for special education.

4. The IDEA and State special education law impose upon each school district the duty to actively and systematically identify, locate, and assess all children with disabilities who require special education and related services. (20 U.S.C. § 1412; 34

C.F.R. § 300.125; Cal. Educ. Code §§ 56300, 56301.) The obligation set forth in this statutory scheme is often referred to as the "child-find" or "seek and serve" obligation. This obligation to identify, locate, and assess applies to "children who are suspected of being a child with a disability… and in need of special education, even though they are advancing from grade to grade." (34 C.F.R. § 300.125, subd. (a)(2).) The comments to 34 C.F.R. section 300.300, subdivision (a)(2), note the "crucial role that an effective child-find system plays as part of a State's obligation of ensuring that FAPE is available to all children with disabilities." (68 Federal Register no. 48 (March 12, 1999) at p. 12573.)

5. Under State special education law, the school district must establish written policies and procedures for a continuous child-find system. (Cal. Educ. Code § 56301.) The policies and procedures must include written notification to all parents of their rights and the procedure for initiating a referral for assessment. (*Id.*) Identification procedures shall include "systematic methods of utilizing referrals of students from teachers, parents, agencies, appropriate professional persons, and members of the public," and shall be coordinated with school site procedures for referral of pupils with needs that cannot be met with modification of the regular education program. (Cal. Educ. Code § 56302.) Under State law, a child may be referred for special education only after the resources of the regular education program have been considered and, where appropriate, utilized. (Cal. Educ. Code §

56303.)

6. Assessments performed as part of a school district's child-find obligations are the first step towards finding a child eligible for special education and related services formulating an offer of a FAPE. This step provides for the direct access to FAPE that the IDEA guarantees. (34 C.F.R. § 300.351.)

7. A local educational agency's (LEA) child-find duty is not dependent on a request by the parent for special education testing or referral for services. "A child's entitlement to special education should not depend upon the vigilance of parents (who may not be sufficiently sophisticated to comprehend the problem)…" (*Hicks v. Purchase Line Sch. Dist.*, 351 F. Supp. 2d 1250, 1253 (W.D. Pa. 2003.)) Rather, the duty arises if the LEA had knowledge of facts tending to establish a suspected disability and a need for assessment to determine eligibility for IDEA special education services. An LEA must respond within a reasonable time after obtaining notice of the potential disability and need for special education services. If the child's behavior or performance indicates the need for special education, then the LEA is deemed to have knowledge of that fact. (20 U.S.C. § 1415(k)(8)(3)(ii.))

8. California Code of Regulations, subsection 3030, subdivision (j), sets forth the eligibility criteria for students with a specific learning disability. This category requires a showing of a disorder affecting one or more of the basic psychological processes,

together with a discrepancy between a student's aptitude and performance, as measured by standardized test results.

9. To be found eligible for special education and related services as a child with an emotional disturbance the pupil, because of an emotional disturbance, must exhibit one or more of the following characteristics over a long period of time to a marked degree, which adversely affect educational performance: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; and (5) a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030(i); 34 C.F.R. § 300.7(c)(4).)[6] In addition, it must be shown that the student requires instruction, services or both which cannot be provided with modification of the regular school program.

10. A referral for assessment means any written request for assessment made by a parent, teacher, or other service provider. (Cal. Educ. Code §

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[6]State special education law uses the term "serious emotional disturbance." (Cal. Code Regs., tit. 5, § 3030(i).) Federal law uses the term "emotional disturbance." (34 C.F.R. § 300.7(a).) The ALJ uses the federal term.

56029.) All referrals for special education and related services shall initiate the assessment process and must be documented. (Cal. Code Regs., tit. 5, § 3021, subd. (a).)

11. Once a student is referred for an assessment and the parent provides written consent to the assessment plan, the District must assess the student "in all areas related to the suspected disability including, if appropriate, health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status." (Cal. Educ. Code § 56320, subd. (f).) Special education law permits a school district the alternative to seek a due process hearing if a parent refuses consent for assessment. (Cal. Educ. Code § 56501, subd. (a)(3).) The purpose of an initial evaluation is to determine a student's eligibility for special education and to determine the educational needs of the child. (20 U.S.C. § 1414, subds. (a)(1)(B)(i) and (ii).)

12. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension and shall attach a copy of the notice of parent's rights to the assessment plan. (Cal. Educ. Code §§ 56043, subd. (a)); 56321, subd. (a).) A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a

decision whether to consent to the assessment plan. (Cal. Educ. Code § 56403, subd. (b).) After obtaining parental consent, assessment may begin immediately. A school district must develop an IEP no later than 50 calendar days from the date of the receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Cal. Educ. Code § 56043, subd. (d).)[7] Referral to a student study team cannot delay the assessment and IEP timelines absent parental consent. (Cal. Educ. Code § 56321, subd. (a).)

13. A school district may initiate a referral to a local mental health agency for assessment of a pupils' social or emotional status and qualification for services. (Cal. Gov't. Code § 7576, subd. (b); Cal. Code Regs., tit. 2, § 60060(c).)

14. Under California special education law, the IDEA, and effective July 1, 2005, the Individuals with Disabilities Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that provides special education and related services designed to meet their unique needs and provide them with educational benefit, and to prepare them for employment and independent living. (Cal. Educ. Code §§ 56000, et seq; 20 U.S.C. § 1401(25) (1997); 20 U.S.C. § 1402(29) (2004.) FAPE consists of special education and related services

[7]The ALJ applies the law then in effect. (Compare, Cal. Educ. Code § 56043, subd. (c)., effective 10/7/05.)

that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education, and conform to the child's IEP. (20 U.S.C. § 1401(8) (1997); 20 U.S.C. § 1402(9) (2004).)

15. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982), 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court held that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.*, at 198-200.) De minimus benefit or only trivial advancement, however, is insufficient to satisfy the Rowley standard of "some benefit." (*Walczak v. Florida Union School District,* 142 F.3d 119, 130 (2d Cir. 1998.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1121 (2d Cir. 1997.)

16. Special education law also requires that a student be educated in the least restrictive environment (LRE) and that removal of a student from the regular education environment occur only

when the nature and severity of the student's disability is such that education in regular education classes cannot be achieved satisfactorily. (20 U.S.C. § 1412(1)(5)(A); 34 C.F.R. § 300.550(b); Cal. Educ. Code § 56301.)

17. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee*, 998 F.2d 1083, 1089 (1st Cir. 1993).) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).)

18. The District can be held responsible for information it had a basis for knowing at the time it developed the IEP. "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable... at the time the IEP was drafted." (*Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999), quoting *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1041 (3d Cir. 1993).) A school district is obligated to revise a student's educational program if it becomes apparent over the course of the school year that the student is not receiving educational benefit.

19. A parent may obtain an independent educational evaluation (IEE) performed by a

qualified specialist at public expense if the parent disagrees with an assessment obtained by the educational agency, and the educational agency is unable to show at a due process hearing that its assessment was appropriate. (34 C.F.R. § 300.502(b); Cal. Education Code § 56329(b).)

20. When a school district denies a child a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359, 369 (1985); *Student W. v. Puyallup School District*, 31 F.3d 1489 (9th Cir. 1994); 14 U.S.C. §1415(i).) In addition, equitable considerations may be weighed in granting relief and courts have broad discretion to fashion a remedy which helps a student overcome lost educational opportunity. (*Burlington*.) There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Puyallup*, 31 F.3d at 1497.)

21. An order for a prospective placement must be based upon a finding that the institution is certified by the State of California. (Cal. Educ. Code § 56505.2, subd. (b).) A potential placement does not have to be the exact proper placement or services required under the IDEA, but it is required that the prospective placement be designed to address a student's unique needs and provide some educational benefit. (*Alamo Heights Independent*

*Sch. Dist. v. State Bd. of Education*, 790 F.2d 1153, 1161 (5th Cir. 1986); *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 13-24 (1993).)

22. An expert's credibility may be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. County of Los Angeles*, 267 Cal.App.2d 837, 847 (1968).)

*Determination of Issues*

Issue 1: The child-find issue is a cognizable claim. The District failed its child-find obligations from the fall of 2003, through January 26, 2005, when it first determined Student was eligible for special education and related services. The District knew or had reason to suspect that Student was eligible for special education either as a student with a specific learning disability or under the category of emotional disturbance.

23. As a preliminary matter, the District argues that a school district's compliance with its child-find obligations is not within the subject-matter jurisdiction of special education due process hearings. Child-find obligations, set out in legal principles 4 and 5 above, are a precursor to a school district's responsibility to offer and provide a disabled student with a FAPE. Thus, contrary to the District's assertion, a school district's duty to identify a child who is in need of assessment to determine eligibility for special education services is

a cognizable claim for this due process hearing and is fairly subsumed within California Education Code section 56501, subdivisions (a)(1) and (2). (See *Grant Miller v. San Mateo-Foster City Unified School District*, 318 F. Supp. 2d 851 (N.D. Cal. 2004).)

24. Based upon Findings 6-10 and 12 above, from November 28, 2002, through the end of Student's ninth-grade school year in June 2003, the District did not know or have reason to suspect that Student required an assessment to determine special education eligibility. Thus, the District did not deny Student a FAPE for this time period.

25. As set forth in Findings 13, 14, and 16-18 above, school counselor Ujamaa's assumptions proved incorrect as Student started her tenth-grade school year (2003-2004). By the first reporting period in the fall of 2003, Mr. Ujamaa knew or should have suspected that Student required an assessment to determine special education eligibility. Teachers reported to Mr. Ujamaa detailing Student's continued and worsening academic performance and unusual and disturbing behavioral manifestations.

26. Based upon legal principle 7 and Finding 19, Mother's response to Mr. Ujamaa was neither a bar to intervention nor an adequate justification for the District's failure to act. While parental consent may be necessary to conduct an assessment, Mr. Ujamaa failed to provide Mother with a proposed assessment plan, or seek a due process hearing in the absence of such consent. (Legal principle 11.)

27. The referral to Shields for counseling services in March 2004, while a needed service, did not satisfy the District's child-find obligations. Despite the provision of counseling, Student continued to fail all her academic subjects, exhibit anxiety, and fall further behind in achieving credits needed to graduate for the remainder of the tenth grade. (Findings 16, 17, 21, 22, 23.)

28. Based upon legal principle 8 and Factual Findings 14, 16(A) and (C) and 17 above, the District had reason to know that Student had difficulty attending to tasks, understanding assignments, and was performing below her cognitive ability. Had the District referred Student for assessment in the fall of the tenth-grade school year, it would have found Student eligible for special education as a student with an SLD.

29. Based upon legal principle 9, the District had ample reason to suspect that there was an emotional component to Student's poor academic performance. As set forth above in Findings 14, 16(B) and (C), and 20-22, Student exhibited anxiety, isolation, and withdrawal, atypical behaviors such as playing with dolls and crayons, as well as enuresis at home manifesting emotional disturbance criteria across environments and thus to a marked degree. As set out above in Findings 16(B), 21, and 22, Student was afraid to enter the classroom. It requires little explanation to conclude that Student's anxiety which rendered her unable to enter a classroom adversely affected her educational

performance. At a minimum, the District knew or had reason to know that Student qualified for special education under the emotional disturbance category from the fall of her tenth-grade school year.

30. Based upon Legal Determinations 25-29 above, the District knew or had reason to know that Student was eligible for special education and related services and was therefore entitled to a FAPE. From the fall of 2003 to January 26, 2005, when the District found Student eligible for special education and offered her a special education placement, the District denied Student a FAPE.

Issue 2: The District's initial assessment of Student was inappropriate because it failed to assess Student in a suspected area of need, namely the social and emotional domain.

31. Based upon legal principle 11 and Findings 30, 31(B), and 32, Student established that the District failed to assess Student in all areas of suspected disability, namely the social and emotional domain, and thus was inappropriate.

Issue 3: The placement described in the January 26, 2005 IEP denied Student a FAPE.

32. Student asserts that the District committed a procedural violation which denied her a FAPE by failing to comport with statutory timelines summarized above in legal principle 12. Thus, to determine whether the District offered or provided

Student with a FAPE, the analysis is two-fold, requiring an examination whether procedural steps were followed and whether the educational program is substantively appropriate.

33. Based upon legal principle 12 and Finding 24, the IEP was held beyond the statutory timelines after Mother's request for assessment and IEP meeting. Although the law requires a school district to consider utilizing the resources of the general education program before referring a student for special education, it must do so only if it is "appropriate." (Cal. Educ. Code § 56043.) Under the facts and circumstances of this case, particularly those set out above in Findings 13-14, 16-18, the District knew or had reason to know that the resources of the general education program were inadequate. Initiating the SST process instead of timely responding to Mother's request was unjustified. Special education intervention came over one year after the District knew or suspected Student needed services. This additional delay resulted in further loss of educational opportunity, was prejudicial to Student's interests, and denied her a FAPE.

34. The ALJ turns next to whether the educational program was substantively appropriate. (*Gregory K. v. Longview School District*, 811 F.2d 1314 (9th Cir. 1987).) If the District's program was designed to address Student's unique needs, was reasonably calculated to provide her with some educational benefit, comported with her IEP, then

the District provided a FAPE.

35. As set out in Findings 35-36, Student had unique academic and social, emotional, and behavioral needs. Student required academic instruction in a small-group setting in all content areas of the high-school curriculum, and required intensive one-to-one academic support in reading and mathematics. She also required skills to prepare her for employment and independent living.

36. Based upon Legal Determination 31 above, the District did not possess objective baseline data regarding Student's social, emotional, and behavioral needs. Lacking this critical information, the IEP team was unable to develop an educational program to address this undisputed area of need. The failure to conduct an appropriate assessment in the social and emotional domain, in light of legal principles 17 and 18, is sufficient in and of itself to find that the educational program was not designed to meet Student's needs or reasonably calculated to provide her with educational benefit.

37. Based upon Findings 13-18, 35, and 36, Student established that her unique academic needs required more intensive academic support in a small-group and one-to-one setting than the limited placement in the RSP program could provide. Eight hours and forty-five minutes each week of RSP support, with all remaining classes conducted in the regular education program, was not designed to meet Student's academic unique needs, or

reasonably calculated to provide her with educational benefit. As set forth in Finding 39, Student further established that the RSP program was selected by District members of the IEP team over placement in a smaller SDC, not in response to Student's unique needs, but rather on a mechanical application of LRE requirements. Children with disabilities may receive their education to the maximum extent *appropriate* with their nondisabled peers. Removal from the general education program is acceptable where, as here, education in regular classes cannot be satisfactorily achieved. (Legal principle 16.) Thus, the RSP program was not reasonably calculated to provide Student with educational benefit.

38. Student failed to receive educational benefit from the program described in the January 2005 IEP. As set forth in Findings 45, 47, and 53, Student, provided with only minimal RSP support, continued to fail all subjects in the regular education program and fell behind in credits needed to graduate. As set forth in Findings 48 and 54, nearly one year later, Student continued to exhibit social and emotional problems. In January 2006, Student had not met a single goal set forth in her initial IEP. (Finding 63.)

39. The program provided to Student failed to comport with the IEP. Based upon Finding 47, as of October 2005, the modifications and accommodations set forth in Student's IEP, intended to be applied by Student's regular education teachers, had yet to be

implemented. In addition, based upon Finding 43, the referral for AB3632 assessment and services was never accomplished. Contrary to the District's assertion that the IEP team met frequently to modify Student's program as her needs became more apparent, as set forth in Finding 46, Student was mistakenly placed in the regular education program at the start of the 2005-2006 school year.

40. In sum, Student was denied a FAPE since: (A) the District failed to convene a timely IEP meeting resulting in further lost educational opportunity; (B) the educational program lacked objective data to explain the relative contribution of Student's social and emotional deficits to her learning and thus failed to meet Student's social, emotional, and behavioral needs; (C) the RSP placement did not provide sufficient academic support; (D) the educational program was not reasonably calculated to provide Student with educational benefit; and (E) the educational program provided did not comport with the IEP.

Issue 4: Student is entitled to an independent evaluation, the completion of the referral for a mental health assessment, and one-to-one academic tutoring by a credentialed teacher. Student did not establish that she is entitled to placement in a nonpublic school.

*Independent Evaluation*

41. As set out in Legal Determination 31, the

District's initial assessment was inappropriate. Based upon legal principle 19, Student is entitled to an independent assessment. The District argues that Mr. Keller's second assessment, performed in October 2005, renders any additional assessment unnecessary. However, the second assessment, conducted nearly one year after the IEP team meeting and initial determination of eligibility, came too late to impact Student's educational placement for that time frame. In addition, based upon Finding 49, namely Mr. Keller's candor regarding the opprobrium he associates with the ED label and concomitant reluctance to apply it, and legal principle 22, Mr. Keller's findings and conclusions are suspect. Thus, the October 2005 District assessment is not a bar to relief and lends further support to Student's request for an independent assessor. Test instruments shall be selected to comply with legal requirements and to assess the relative contribution of social and emotional issues to Student's programmatic and service needs.

The independent assessment report shall be made available to the IEP team at least twenty business days before the start of the 2006-2007 school year to assist the IEP team to determine the appropriate educational placement.

Based upon Finding 33, Student's request for a written language assessment is denied.

*AB3632 Referral*

42. In light of legal principle 13, and Findings 32 and 42-43, the District shall complete its AB3632 referral to assist the IEP team with knowledge of Student's therapeutic needs.

*Compensatory Education*

43. Based upon Legal Determinations 28 and 40, Student lost educational opportunity from the fall of the 2003-2004 school year through the present. There is some evidence to suggest that the implementation of the placement described in the January 2006 IEP, namely the current combined program of RSP and SDC classes is easing some of Student's anxiety and appears to be providing some educational benefit. Nevertheless, Student will not graduate with her classmates.

44. To determine the appropriate amount of compensatory education for this loss of educational opportunity, Student has provided little guidance and has requested five hundred hours of services. Based upon Findings 55-57 and Legal Determinations 28 and 40, the ALJ concludes that Student's loss of educational opportunity has been substantial. Student has regained some motivation, requires academic tutoring in all curriculum content areas required to graduate, and responds well to one-to-one assistance. Thus, the ALJ finds that Student is entitled to one-to-one intensive academic support in her identified areas of need, including the curriculum content necessary to complete State graduation credit standards to be provided at least

until the end of the 2006-2007 regular school year.

45. In light of legal determination 44, Student is awarded three hours of one-to-one academic tutoring by a credentialed teacher every week that school is in session during the remainder of the current regular school year, the 2005-2006 extended school year, and continuing into the 2006-2007 school year, in an amount not to exceed one-hundred fifty hours. The one-to-one academic tutoring shall be provided by a credentialed teacher and may be by District staff. If the District does not have appropriately trained staff, it shall identify, arrange, and provide the academic support as ordered.

46. The IEP team is in the best position to determine, based upon the totality of the circumstances, the academic areas in which Student requires support. Although the ALJ has ordered that the tutoring take place for at least one year, the IEP team will retain the discretion to extend that tutoring beyond one year, as necessary, or into the extended school year, if appropriate. The District shall implement the compensatory educational services in a manner that has minimal impact on Student's school day and ability to participate in her special education program. Nevertheless, the District shall take cognizance of the fact that Student's loss of educational opportunity was substantial.

*Placement in a nonpublic school*

47. Student, who will turn eighteen in September, expressed reluctance and embarrassment if she were to repeat her senior year at her current high school with younger students. However, the ALJ is unable to determine whether an unnamed and undescribed nonpublic school placement will provide Student the academic and behavioral support, the therapeutic environment she may require, and some educational benefit. Student failed to present any facts or legal authority for placement in a nonpublic school. Accordingly, in light of legal principle 21, this request for relief is denied.

ORDER

1. Student is entitled to an independent assessment, conducted by a qualified assessor, at District expense. Test instruments shall be selected to comply with legal requirements and to assess the relative contribution of social and emotional issues to Student's programmatic and service needs. The assessment report shall be made available to the IEP team at least twenty business days before the start of the 2006-2007 school year to assist the IEP team to determine the appropriate educational placement.

2. Within twenty business days from the effective date of this Order, the District shall complete the referral for an AB3632 assessment.

3. Within thirty business days from the effective date of this Order, the District shall convene the IEP team to amend Student's IEP to include: three hours of one-to-one academic tutoring by a credentialed teacher every week that school is in session during the remainder of the regular school year, the 2005-2006 extended school year, and continuing into the 2006-2007 school year, in an amount not to exceed one-hundred fifty hours. The IEP team will determine the content area of the tutoring. The academic tutoring shall be provided by a credentialed teacher and may be by District staff. If the District does not have appropriately trained staff, it shall identify, arrange, and provide the academic support as ordered. The IEP team will retain the discretion to extend that tutoring beyond one year, as necessary, or into the extended school year, if appropriate.

4. The District shall reconvene the IEP team at least ten business days before the start of the 2006-2007 school year. The IEP team shall consider the results of the IEE and AB3632 referral ordered above in (1) and (2), to make an offer of FAPE, including consideration of credits needed to graduate, skills needed for employment and independent living, as well as Student's academic and social and emotional needs.

5. Student's further 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. The following findings are made in accordance with this statute: Student prevailed to the extent that the District failed to comply with its child-find obligations from the fall of 2003 until January 26, 2005, the District's assessment was inappropriate for failing to assess in all areas of suspected disability, namely the social and emotional domain, and the January 26, 2005 IEP denied Student a FAPE. The District prevailed to the extent that it complied with its child-find obligations from November 28, 2002, through the end of Student's ninth-grade school year (2002-2003).

## NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Cal. Educ. Code section 56505, subd. (k).)

DATED: April 26, 2006

_____

JUDITH E. GANZ

Administrative Law Judge
Office of Administrative Hearings

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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U.S. COURT OF APPEALS

COMPTON UNIFIED SCHOOL DISTRICT,
*Plaintiff-Appellant*,
v.
STARVENIA ADDISON; GLORIA ALLEN,
*Defendants - Appellees*.

No. 07-55751
D.C. No. CV-06-04717-AHM
Central District of California, Los Angeles

COMPTON UNIFIED SCHOOL DISTRICT,
*Plaintiff-Appellant*,
v.
STARVENIA ADDISON; GLORIA ALLEN,
*Defendants - Appellees*.

No. 07-56013
D.C. No. CV-06-04717-AHM
Central District of California, Los Angeles

**ORDER**

Before: PREGERSON and N.R. SMITH, Circuit

Judges, and COLLINS, District Judge.*

Judge Pregerson and Judge Collins vote to deny the petition for rehearing. Judge Pregerson votes to deny the petition for rehearing en banc, and Judge Collins so recommends. Judge N.R. Smith would grant the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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*The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

TITLE 20. EDUCATION
CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES
ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

20 USCS § 1415

§ 1415. Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and 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, and to obtain an independent educational evaluation of the child.

(2) (A) Procedures to protect the rights of the

child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of--

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency--

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint--

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7) (A) Procedures that require either party, or

the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)--

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include--

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that

meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements.

(1) Content of prior written notice. The notice required by subsection (b)(3) shall include--

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.];

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice.

(A) Complaint. The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint.

(i) Local educational agency response.

(I) In general. If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include--

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency. A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response. Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing. The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination. Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a

determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice.

(i) In general. A party may amend its due process complaint notice only if--

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline. The applicable timeline for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice.

(1) In general.

(A) Copy to parents. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents

only 1 time a year, except that a copy also shall be given to the parents--

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website. A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including--

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process--

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party. A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the

mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with--

(i) a parent training and information center or community parent resource center in the State established under section 671 or 672 [20 USCS § 1471 or 1472]; or

(ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators. The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs. The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location. Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement. In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that–

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and (iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing.

(1) In general.

(A) Hearing. Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session.

(i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing

under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint--

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing. If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall commence.

(iii) Written settlement agreement. In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is--

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period. If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations.

(A) In general. Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant

evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing.

(A) Person conducting hearing. A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum--

(i) not be--

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this title [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing. The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this part [20 USCS §§ 1411 et seq.] to be provided to the parent.

(E) Decision of hearing officer.

(i) In general. Subject to clause (ii), a

decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies–

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction. Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal.

(1) In general. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision. The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions--

(A) shall be made available to the public consistent with the requirements of section 617(b) [20 USCS § 1417(b)] (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)].

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under

subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(C) Additional requirements. In any action brought under this paragraph, the court--

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the

United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees.

(i) In general. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction. Nothing in this subparagraph shall be construed to affect section

327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) In general. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP team meetings. Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints. A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered--

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that--

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A), the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent

of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority. School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority. If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children

without disabilities, except as provided in section 612(a)(1) [20 USCS § 1412(a)(1)] although it may be provided in an interim alternative educational setting.

(D) Services. A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall–

(i) continue to receive educational services, as provided in section 612(a)(1) [20 USCS § 1412(a)(1)], so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational

agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation. If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall--

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement

described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification. Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting. The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal.

(A) In general. The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer.

(i) In general. A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order. In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may--

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals. When an appeal under paragraph (3) has been requested by either the parent or the local educational agency--

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within

10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred--

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [20 USCS § 1414(a)(1)(B)]; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception. A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 614 [20 USCS § 1414] or has refused services under this part [20 USCS §§ 1411 et seq.] or the child has been evaluated and it was determined that the child was not a child with a disability under this part [20 USCS §§ 1411 et seq.].

(D) Conditions that apply if no basis of knowledge.

(i) In general. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be

conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this part [20 USCS §§ 1411 et seq.], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities.

(A) Rule of construction. Nothing in this part [20 USCS §§ 1411 et seq.] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records. An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions. In this subsection:

(A) Controlled substance. The term

"controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug. The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Weapon. The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18, United States Code.

(D) Serious bodily injury. The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§

1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)--

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be

incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].

(n) Electronic mail. A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(o) Separate complaint. Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part B, § 615, as added Dec. 3, 2004, P.L. 108-446, Title I, § 101, 118 Stat. 2715.)

TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER III -- OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, DEPARTMENT OF EDUCATION PART 300 -- ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES SUBPART E -- PROCEDURAL SAFEGUARDS DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

34 CFR 300.503

§ 300.503 Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required

under paragraph (a) of this section must include--

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

(c) Notice in understandable language. (1) The notice required under paragraph (a) of this section must be–

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure--

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

**HISTORY:** [57 FR 44798, Sept. 29, 1992; 64 FR 12406, 12449, Mar. 12, 1999; 71 FR 46540, 46753, Aug. 14, 2006]

**AUTHORITY:** (20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

**NOTES:**

[EFFECTIVE DATE NOTE: 71 FR 46540, 46753, Aug. 14, 2006, revised Part 300, effective Oct. 13, 2006.]

TITLE 34 -- EDUCATION SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION CHAPTER III -- OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, DEPARTMENT OF EDUCATION PART 300 -- ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES SUBPART E -- PROCEDURAL SAFEGUARDS DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

34 CFR 300.507

§ 300.507 Filing a due process complaint.

(a) General.

(1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a

due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f) apply to the timeline in this section.

(b) Information for parents. The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if--

(1) The parent requests the information; or

(2) The parent or the agency files a due process complaint under this section.

(Approved by the Office of Management and Budget under control number 1820-0600)

**HISTORY:** [57 FR 44798, Sept. 29, 1992; 64 FR 12406, 12450, Mar. 12, 1999; 71 FR 46540, 46753, Aug. 14, 2006]

**AUTHORITY:** (20 U.S.C. 1415(b)(6))

**NOTES:** [EFFECTIVE DATE NOTE: 71 FR 46540, 46753, Aug. 14, 2006, revised Part 300, effective Oct. 13, 2006.]

California Education Code Section 56501

(a) The due process hearing procedures prescribed by this chapter extend to the parent or guardian, as defined in Section 56028, a pupil who has been emancipated, and a pupil who is a ward or dependent of the court or for whom no parent or guardian can be identified or located when the hearing officer determines that either the local educational agency has failed to appoint a surrogate parent as required by Section 7579.5 of the Government Code or the surrogate parent appointed by the local educational agency does not meet the criteria set forth in subdivision (f) of Section 7579.5 of the Government Code, and the public agency involved in any decisions regarding a pupil. The appointment of a surrogate parent after a hearing has been requested by the pupil shall not be cause for dismissal of the hearing request. The parent or guardian and the public agency involved may initiate the due process hearing procedures prescribed by this chapter under any of the following circumstances:

(1) There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.

(2) There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.

(3) The parent or guardian refuses to consent to an assessment of the child.

(4) There is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child, including the question of financial responsibility, as specified in Section 300.148 of Title 34 of the Code of Federal Regulations.

(b) The due process hearing rights prescribed by this chapter include, but are not limited to, all of the following:

(1) The right to a mediation conference pursuant to Section 56500.3.

(2) The right to request a mediation conference at any point during the hearing process. The mediation process is not to be used to deny or delay a parent's or guardian's right to a due process hearing, or to deny any other rights afforded under this part, or under the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.). Notwithstanding subdivision (a) of Section 56500.3, attorneys and advocates are permitted to participate in mediation conferences scheduled after the filing of a request for due process hearing.

(3) The right to examine pupil records pursuant to Section 56504. This provision shall not be construed to abrogate the rights prescribed by

Chapter 6.5 (commencing with Section 49060) of Part 27.

(4) The right to a fair and impartial administrative hearing at the state level, before a person knowledgeable in the laws governing special education and administrative hearings, under contract with the department, pursuant to Section 56505.

(c) In addition to the rights prescribed by subdivision (b), the parent or guardian has the following rights:

(1) The right to have the pupil who is the subject of the state hearing present at the hearing.

(2) The right to open the state hearing to the public.