STATE OF NORTH CAROLINA

WAKE COUNTY

BEFORE A STATE HEARING REVIEW OFFICER
FOR THE STATE BOARD OF EDUCATION
PURSUANT TO N.C.G.S. 115C-109.9(a) (b)

08 EDC 2231

Father and *Student*, by and for *Student*,	)	
Petitioners,	)	
	)	
v.	)	
	)	DECISION
Wake County Public Schools	)	
Respondent.	)	

This is an appeal of the Final Decision by Summary Judgment issued by Administrative Law Judge Augustus B. Elkins II on June 18, 2009.

The following records were received for review:

A certified copy of the Official Record for case 08 EDC 2231
A separate notebook of Exhibits
Written Arguments from the Petitioner
Written Arguments from the Respondent

Having reviewed the records for this case, the undersigned State Hearing Review Officer makes the following

FINDINGS OF FACT

1. Pursuant to Chapter 115C and 150B of North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq*., Respondent's Motion for Summary Judgment came before Administrative Law Judge Elkins.

2. At issue is the identification and provision of a free appropriate public education for *Student*, daughter of *Father* and *Mother*, Petitioners. *Parents* are seeking reimbursement for tuition and all expenses incurred during their daughter's treatment at an out-of-state residential therapy center.

Petitioners contend that the Wake County Public Schools violated the IDEA - by failing to conduct assessments in areas of suspected disability, failing to fulfill its obligations to *Student* under "Child Find," denying FAPE, failing to develop and collaboration on an IEP, and failing to provide "Prior Written Notice." Hereinafter, *Father*, and *Student* will be referred to as *Mother*, *Father*, or *Parents*.

3. Respondent is the Wake County Public School System, a local education agency required by IDEA to provide a free appropriate public education to children with disabilities who have been identified according to the mandates of IDEA. Hereinafter, the school system will be referred to as the local education agency (LEA) or WCPSS. ABC High School will be referred to as *ABC High School*.

4. *Student* was born on ***, 1991. At the time the due process petition was entered (September 23, 2008), she was 17 years old and was enrolled in "*XYZ*, a residential treatment program for adolescents experiencing a variety of behavioral, substance abuse, and mental health issues that is located in **, Utah." (P18) (R15) Prior to enrollment at *XYZ*, *Student* lived with her family in Raleigh, North Carolina. The family moved to Raleigh from New York in 2005.

5. *Student* registered as a freshman in July 2005 at *ABC High School*, a unit of the Wake County Public School System. During the enrollment process, Mother signed a form in which she indicated that "My child does not have an Individualized Education Plan (IEP) and does not require special program services" and "My child does not have a 504 Plan." (R 3, Depo.1)

6. For her freshman and sophomore years (2005-06 and 2006-07), *Student* earned grades of As, Bs and one C. For her junior year (2007-08), she earned one A, two Bs, three Cs and two Fs. She took two honors courses each year. She had been recommended for two AP classes for her junior year. She received failing grades in Chemistry and Spanish II. She earned 22 out of a potential 24 credits. As of June 10, 2008, her GPA weighted score was 3.1667; her un-weighted GPA was 2.9167. Her transcript also notes that for The University of North Carolina Board of Governors minimum admission requirements, she had only three requirements remaining, English IV, Spanish (1 credit) and Physical Science. (R1) She took the SAT in May 2008 and earned a score of 1560. During her sophomore year, she participated in extra-curricular activities, did volunteer work, and had a part time job. She worked at a restaurant up until the day she left for Utah. However, Mother now wonders if she really did go to work. She had lied to *Parents* previously, saying that she was going to one place and instead would go to another. (R2, pp. 25-27) *Student* did not return to *ABC High School* to take her final exams. Her grades were computed based on the work she had completed this year. (R9, Aff. Ex. D)

7. *Student* has never been identified as a student with special needs as defined by IDEA. She has not been declared eligible for special education services under the mandates of IDEA by any public or private educational agency.

8. On XXX, 2007, following a disagreement with her parents, *Student* took an overdose of Tylenol. She was taken to WakeMed. While admitted, she was evaluated by a psychiatrist who noted that her "psychiatric history is significant for a prior diagnosis of obsessive compulsive behavior, and perhaps, depressive disorder for which she is being treated by Dr. Shaeda Maroof, psychiatrist, and Dr. Cathy Matthews, her psychologist and therapist, who are seeing her on an approximately weekly basis." (R5, pp 3) "We will continue her Prozac at the current dosage."(R5, pp. 4) She was released with the recommendation that she continue with further outpatient treatment. *Student*'s doctors recommended that she get back to her normal routine. They suggested that *Parents* "take her out of the AP classes if she feels it's overwhelming".
(R3, pp.66-67)

9. Father told *PK*, *Student*'s guidance counselor that *Student* had taken an overdose and expressed his concerns about her safety. At father's request, *PK* removed the two AP courses from *Student*'s schedule. (R 3, p.121)

10. While *Parents* told LEA personnel that *Student* was in therapy, they did not inform the LEA that she was taking medications. Since she was not taking medications at school, *Parents* saw no reason to inform the school. (R3, pp.41- 43; pp.91-94)

11. During the spring semester of 2007, *Parents* became concerned about *Student*'s lying. Her father began driving her to school, waiting as long as he could to see if she entered the building. *Student* did not always go to her first period class. She was often late. At lunchtime, she was leaving campus without permission. *Parents* asked *PK* and Dr. S.G. (*ABC High School* principal) for help. *Parents* were looking for some way to keep *Student* safe and on campus. (R2, pp. 23-24)(R3, p.13)

12. *Student* had been dating another *ABC High School* student since her second year of high school. Her parents were concerned that the relationship was becoming more "volatile". At one time, she had been forbidden to see the boyfriend. But, on the advice of *Student*'s therapist, they relaxed the rule. Father expressed his concerns about the relationship to
Dr. S.G.. (R3, pp.75-77).

13. In March or April of 2008, *Parents* found marijuana in *Student*'s purse. She told them that she bought it from someone at school. She said that she had only used it once. *Parents* later found that *Student* had used it more than once, even to the point to be considered "abuse." *Parents* did not report this incident to the school.
(R 3, pp. 84-86)(R10)

14. During *Student*'s junior year, Father had frequent contacts with the Guidance Counselor and some of *Student*'s teachers regarding her emotional state and attendance. (P1)

15. *Parents* kept *Student* home from school at the end of May because they could not trust her to go to school. They were worried about her safety. They did not contact *ABC*

High School to tell them why she would be absent or how long she would be absent. Father testified that he didn't think that it would be long term. ((R2, p.48) (R3, pp.57-58)

16. On May 30, 2008, *Student* ran away from home. She walked to **. She called her father to come for her. She told him that she was "gonna walk on 70 and throw herself in front of a car, truck". *Parents* had her admitted to H.H.. (R 3, pp.56-58)

17. *Student* was admitted to H.H. Hospital on ***, 2008. She was still hospitalized on June 3, 2008, the date on which the H.H. Hospital School Form was signed. The form contains only patient admission and discharge dates. (R3, Depo.Ex.2)

18. In response to a teacher's e-mail asking how *Student* was, Father wrote; *Student* "has been sick. I am going to call *PK* and see what needs to get done. I am not sure that she is going to make it back this year". (P 1)(R 3, Depo.2)

19. Dr. R.S. of H.H. Hospital staff completed the discharge form for *Student* "Patient needs a residential program that provides DBT to help Patient be able to maintain healthy relationships with self and family, to maintain coping skills, healthy communications. " *Student* was discharged to *Parents*, who took her to Utah where she had a 3:00 PM admissions appointment on June 6, 2008. (P 5)(R8)

20. Prior to her H.H. admission, *Student* and her family had participated in DBT sessions led by Dr. B. (*Student*'s psychiatrist) and another doctor. *Student* had individual sessions with Dr. B. as well as group sessions. The sessions took place at Duke. (R2, pp.44-46)

21. At *Student*'s discharge from H.H., Dr. Skewer, recommended residential treatment. *Parents* consulted with Dr. B., who advised that DBT was the largest component of *Student*'s therapy. Using the internet and contacts, *Parents* researched possible residential centers looking for one that used the DBT model. They chose *XYZ* because it uses the DBT model and they felt that it would keep her in "a safe environment where she can get better". (R 3, p.89)

22. According to the In-Take Assessment form, *XYZ* would provide the following services to *Student*: Individual Therapy 2x per week; Family Therapy 1x per week; Group Therapy 6 hours per week; Psychological Testing; Behavior Modification Program; Substance Abuse Individual Therapy 1x per week; Substance Abuse Group Therapy 1x per week; Psychiatric Assessment 1 week; Academic Services; and Recreational Therapy 3-5 x per week. (P8)(R11)

23. The only recommendation on the Educational-Vocational Assessment form was: "Needs to be challenged!" There were no recommendations for special education or academic modifications. (P8)(R1)

24. According to the psychiatric evaluation conducted by Dr. R. M. on June 13, 2008, *Student* was referred to *XYZ* for "further mood stabilization." Her treatment plan

included continuing her medication regimen, and individual, group, and family therapy with “a strong focus towards acquiring DBT skills.” (P9, p.1, p.148)

25. On July 3, 2008, Dr. K.F. conducted a psychological evaluation of *Student* *Parents* and *Student* stated that throughout 2007, *Student* participated in out-patient mental health therapy and medication management programs. *Student* and *Parents* reported that she “benefitted minimally” from out-patient mental health therapy and medical management programs. “She has struggled to internalize her therapeutic experiences”. (P18, p.6)

26. According to Dr. K.F., “*XYZ* is clearly her most intensive treatment to date.” (P9, p.6)

27. Dr. K.F.’s recommendations mirrored those of Dr. R. M.: medication management, and individual, group, and family therapy. He added substance abuse therapy. (P18, pp.17-19)

28. *Student* was in H.H. Hospital from May 30 to June 6, 2008. From H.H., she went directly to *XYZ*. She was admitted to *XYZ* on June 6, 2008. *Parents* did not plan to bring *Student* back to *ABC High School* for her senior year. (R2, pp.100-102) She graduated from Pineridge Academy and received her high school diploma at a ceremony on March 19, 2009. (P13)

29. On or about June 5, 2008, *Parents* requested that the LEA send *Student*’s cumulative records to *XYZ* Academy, a residential treatment center and therapeutic boarding school in **, Utah.(R12)(R2, p.12)

30. *Student* was officially withdrawn from *ABC High School* on June 10, 2008. (R12)

31. *Parents* did not submit a written request for evaluation and special education services prior to withdrawing *Student* from *ABC High School*.

32. At no time prior to withdrawing *Student* from *ABC High School*, did the parents notify *ABC High School* in writing that they were placing *Student* in a private residential treatment center or that they intended to seek reimbursement for *Student*’s enrollment at that facility.

33. In July 2008, after *Student* had been admitted to *XYZ*, Mother called Jeff Larsen, Director of Secondary Support Services for the WCPSS. She told him that *Student* had been placed in residential treatment. During the conversation, Mr. Larsen asked her if *Student* had an IEP. He also inquired if *Student* had been tested, or if Mother wanted her to be tested. (R2, pp.75-79) There is no evidence that *Parents* followed up with a written request for evaluation or referral for special education services. (R 2, pp.75-78)

34. On September 2, 2008, Ms. J.B., an education advocate with Possibilities Educational Services, wrote the LEA to inform them that her office had been retained by

Parents to represent *Student* Through Ms. J.B., *Parents* were requesting "an immediate" IEP team meeting to discuss *Student*'s "unique needs and educational planning". "Unique needs" were neither defined nor explained. The letter served notice that *Parents* were asking the LEA to "fund the unilateral placement". She also requested that all further correspondence be directed to her office in California. (R 13, Aff. Ex.A)

35. On September 16, Ms. J.B. informed the LEA that she still had not received the records she requested. She wrote that she had been asked to fax her letter again, and, that she had received a call from an LEA staff member "indicating that they would be calling my clients for an IEP date." Again, she requested that all communications be directed to her office. (R13)

36. On September 23, 2008, Ms. J.B. filed a request for due process with Office of Administrative Hearings for *Student* and her *Parents*. At the same time, the WCPSS personnel were in the process of responding to the Advocate's request for records and trying to arrange an IEP meeting. (R13)

37. Petitioners waived resolution, but agreed to mediation. A mediation session was held on November 14, 2008. The issues presented in the Due Process Request were not resolved.

38. On September 23, Ms. M.M., Senior Administrator for Special Education Services for the Wake County Public School System, talked with Ms. J.B. about her request for copies of *Student*'s school records. She also spoke with Ms. J.B. several times in early October while trying to schedule an IEP Team meeting to consider the initial special education referral for *Student* In order to accommodate the schedules of Ms. J.B. and *Parents*, a meeting was set for October 24, 2008. (R13)

39. Mother acknowledged that she had received a copy of the Handbook on *Parents*' Rights. (R2, p.96)

40. On October 13, 2008, Ms. M.M. requested that Ms. J.B. send a copy of "any psychological testing, education testing, mental health evaluations or any other reports that the parents would like to have considered".(R13, Aff. Ex.B)

41. The IEP Team met on October 24, 2008 with all appropriate LEA Personnel present plus Deborah Stagner, Counsel for the LEA. Mother and Ms. J.B., Advocate for the *Parents*, participated by telephone. *Parents* wanted outside evaluations to be considered. One was the psychological evaluation that had been conducted in July, 2008. That evaluation had not been sent to the school. Ms. M.M. requested that it be sent to her office. Ms. J.B. said that she would need a release from *Parents* before she could send it. A consent form was faxed to Mother; Mother signed it and faxed it to Ms. J.B.. Given the content and length of the evaluation, the Team needed time to review the document. The meeting was adjourned to reconvene on November 5, 2008. (R13, Aff. Ex. B) (R14)

42. The IEP Team reconvened on November 5, 2008. Mother and Ms. J.B. participated by telephone. The team decided that further evaluations were necessary before they could determine *Student*'s eligibility for special education and related services. Mother and Ms. J.B. disagreed. They stated that the information they provided was sufficient to determine that *Student* was eligible under the category of emotionally disturbed. In their opinion, further evaluations were unnecessary. Mother verbally agreed to allow the LEA to conduct further evaluations. (R 13)(R14)

43. Ms. M.M. received a copy of the signed *Consent for Evaluation* Form from Mother on November 18, 2008. She called Mother to arrange a schedule for the additional evaluations. Mother did not know when *Student* would be available for testing because she did not know if *Student* would be home from Utah for the holidays. (R13)

44. Also on November 18, 2008, Ms. M.M. received an e-mail from Ms. J.B. supporting Mother's statements re the possibility of *Student* coming home for the holidays. She volunteered to arrange a visiting assessor's room if the WCPSS would like to pursue that option. She added, "The parent's (sic) have previously requested that all contact be made thru (sic) my office." (R13, Aff.Ex.C)

45. Ms. M.M. tried to contact *Parents* again on November 24, 2008. There was no response. (R13, Aff.Ex.D)

46. On November 26, 2008, Ms. M.M. e-mailed *Parents* to inform them that she was sending them a letter regarding the evaluations. In an e-mail of the same date, Ms. J.B. notified her that *Student* "is now represented by counsel along with this office."She requested that all correspondence be directed to her or to Mr. H. Ms. M.M. was not to communicate with their client.

47. On January 2, 2009, Ms. M.M. sent Ms. J.B. a letter enclosing survey forms from the Behavior Assessment System for Children, Second Edition (BASC) to be completed by *Student*, *Parents* and her current teachers. (R13, Aff. Ex. F)

48. On January 23, 2009, Ms. J.B. returned one form (completed by Mother) to the LEA's attorney which was then forwarded to Ms. M.M. The remaining assessments have not been returned. (R.13)

49. On February 26, 2009, Ms. M.M. wrote to *Parents*, explaining the need to complete the evaluations of *Student* . There has been no response.

Based on the Findings of Fact, the undersigned State Review Officer makes the following:

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings, the Administrative Law Judge and the State Review Officer have jurisdiction with regard to this case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 *et seq*., and the implementing regulations, 34 C.F.R. Part 300.

2. The Review Officer shall conduct an impartial review of the findings and decision under appeal, and, upon completion of the review, make an independent decision. N.C.G.S. 115C-109.9 (a)

3. The Petitioners have the burden of proof by the preponderance of the evidence. Schaffer v. Weast, 546 U.S. 49, 62 (2005)

4. Conclusion of Law number 5 no longer stands due to the Supreme Court decision in Forest Grove School District v T. A. on June 22, 2009, whereby parents have the right to seek reimbursement for unilateral private school placement even if their child had not received special education services in a public school system.

Removing conclusion 5 does not in any way affect Judge Elkins' decision or the review process.

5. Subject to N.C.G.S. § 115C-109.6(b), "The party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition.

On August 7, 2007, *Student* took an overdose of Tylenol and was hospitalized. Petitioners rely on this incident to support their claim that the WCPSS should have conducted an evaluation of *Student* pursuant to the requirements of Child Find. The request for Due Process was filed on September 23, 2008. The August 2007 incident is more than one year from the filing of the petition. Therefore, according to North Carolina's one year statute of limitations, the incident is barred from consideration in this case.

6. While the Supreme Court ruling in Forest Grove allows parents to pursue reimbursement even if their child had not received special education services in a public school, there is no guarantee that parents will be able to obtain reimbursement.

7. The cost of reimbursement may be reduced or denied if "At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency stating their concerns and their intent to enroll their child in a private school at public expense. 20 U.S.C. §1412(a)(1)(C) (iii), NC 1501-8.1(d)(2)

There is no document in the Official Record of this case to support Petitioner's claim that they gave the LEA ten days' prior notice before unilaterally placing S .B. at *XYZ*.

Student was admitted to *XYZ* on June 6, 2008. She was formally withdrawn from *ABC High School* on June 10, 2008.

The Due Process Request form states, "*Parents* gave notice to the District of unilateral placement in July 2008. This office has given notice of unilateral placement on both September 2, 2008 and September 16, 2008." The July, September 2nd and September 16th notices are not appropriate responses to the prior notice requirement.

8. "Each LEA must conduct a full and individual initial evaluation in accordance with NC 1503-2.4 through NC 1503-2.7 before the initial provision of special education and related services to child with a disability under these policies." NC 1503-2.2

Petitioners claim that *Student* "clearly meets the criteria of a student with special needs by her treating physicians." There is a difference between the medical/therapeutic paradigm of DSM-IV and the legal/special education paradigm of the IDEA.

To be eligible under the IDEA, a child must have a disability that adversely affects his/her academic performance and requires specially designed instruction. Eligibility is determined through an identification procedure that begins with IEP Team meetings to discuss available data, arrange an evaluation schedule, and, if the child is eligible, develop an IEP.

A psychological or medical diagnosis alone is not sufficient to determine eligibility for special education services. There must be a demonstrated need for special education. See e. g., Alvin Indep. Sch. Dist. V. Patricia F., 503F.3d. 378,382(5th Cir. 2007)

"Thus, a child may suffer from an emotional disturbance clinically, but not suffer from such educationally so as to be eligible for special education." Fauguier Pub. Schs. 20 IDELR 579 (Va. SEA 1993)

The District Court ruled that a day treatment program was appropriate for a 17 year-old student with emotional/behavior disorder because the student's social and emotional needs could be untangled from her educational needs. "The residential placement was required solely to address the student's social and emotional needs." Independent School District 284, Wayzata, Minnesota, v. A.C. by and through her Parent C. C., 32 IDELR 143 (2000)

“If residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local education agency need not fund the residential placement.” Burke County Board of Education v. Denton 895 F.2d. 973, 980(4th Cir. 1990)

Through testimony and exhibits, it is clear that *Student* was placed in *XYZ* for therapeutic purposes. *Parents* presented no evidence to the contrary. *Parents*, rightfully so, were concerned with her safety. There were no references to special education services. *Student* graduated three months earlier than her peers at *ABC High School*.

9. “The initial evaluation must be conducted; eligibility determined; and, for an eligible child, the IEP developed; and placement completed within 90 days of receipt of a written referral…” The timeframe does not apply to an LEA if the parent of a child repeatedly fails or refuses to produce the child.” NC1503-2.2(c)(1)(d)(91)

10. The Seventh Circuit held that parents who fail to cooperate and “do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral placement.” Patricia P. ex rel. Jacob v. Board of Educ. Of Oak Park and River Forest High Sch. Dist., 31 IDELR 211 (2000)

The U.S. District Court, Western District of North Carolina denied a parent’s request for reimbursement because she did not allow the district to evaluate her child and she did not take part in the placement process. L.K. on behalf of her son, J.H., as well as on her own behalf, Plaintiff v. Board of Education for Transylvania County a/k/a Transylvania County Public Schools, Defendant, 33 IDELR 213 (2000)

“When a school district does not have the opportunity to conduct an assessment, it cannot reach a determination regarding the student’s eligibility for special education.” Moraga Elementary School District and Contra Costa County Mental Health, 103 LRP 6547

From November 18, 2008 through February 26, 2009, the LEA tried, without success, to arrange an evaluation schedule.

Petitioners suggested that the LEA send personnel to Utah to conduct the evaluations. In the case of Great Valley Sch. Dist. V. Douglas M., 807 A.2d 315, 37 IDELR 214 (Pa. Cmwlth.), parents gave the LEA written permission to test their child in California where he was enrolled in a private school. When the LEA declined to send personnel from Pennsylvania to California, the parents requested due process. On appeal, the court held that an LEA cannot be compelled to evaluate a child for special education services while he remains out-of-state in a unilateral placement.

11. *Parents* unilaterally placed *Student* at *XYZ* for therapeutic purposes. The LEA did not participate in the decision. *Parents* did not notify the LEA at least ten days prior to admitting her to the residential center. They did not notify the LEA that they were

expecting the LEA to fund the placement. The LEA was not given an opportunity to complete the initial referral evaluations.

Student graduated from high school in March 2009. There is no reason to continue with the initial referral process. *Student*'s education is no longer within the jurisdiction of the LEA.

Petitioners did not meet their burden of proof by a preponderance of the evidence.

Based on the Foregoing Findings of Facts and Conclusions of Law, the Undersigned State Review Officer for the North Carolina State Board of Education makes the following:

DECISION

The final decision of the Administrative Law Judge is affirmed. His Final Decision by Summary Judgment is upheld.

NOTICE

Any person aggrieved by this decision may institute civil action in State court within 30 days after receipt of this decision as provided in N.C.G.S. 115C-116 or file an action in federal court as provided in 20 U.S.C. 1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction in writing of such action so that the records for this case can be forwarded to the court.

This the ___day of July, 2009

_____
Betty A. Levey, State Review Officer