



2. Is T.A. eligible as a student with a disability (qualified handicapped student) under Section 504 of the Rehabilitation Act of 1973<sup>5</sup>?
3. If T.A. is eligible, due to the District's failure to find T.A. eligible and offer him a free and appropriate public education, should T.A.'s parents be reimbursed for costs associated with securing and providing appropriate placements for T.A.?

### **EVIDENTIARY RULINGS**

Exhibits A1 through A32 were admitted into the record. An objection to Exhibit A29 was overruled. Exhibits B1 – B27 were admitted into the record without objection. Exhibits B1a through B18a<sup>6</sup> were admitted at the hearing on the District's Motion to Dismiss, as were Exhibits C1 and C2.

**Note About the Transcript:** The transcript of the May testimony relating to the Motion to Dismiss has the same page numbers as the transcript of the continuation of the hearing beginning on September 25, 2003. Citations to the first transcript are therefore identified as "MTr."

### **SUMMARY OF DECISION**

T.A. has attended school in the District since kindergarten. As indicated by his school records, his teachers noted repeatedly through the years that T.A. had difficulties paying attention and completing his school work. These difficulties increased after T.A. entered FGHS in September 2000. The District's evaluation of T.A. in 2001 was inadequate as the District failed to assess T.A. for Attention Deficit Hyperactivity Disorder (ADHD) despite information which indicated that such an evaluation was appropriate. In addition the District at that time failed to pursue its own conclusion that T.A. might be eligible for services under Section 504.

Throughout T.A.'s high school education his mother (and sometimes his father and sister) worked with him for hours, almost daily, to assist him in completing his class work and homework. In March 2003 Dr. Fulop, a psychologist, issued a report diagnosing T.A. with ADHD. Although this and much additional information was available to the District, in July and August 2003 the District failed to identify T.A. correctly as a student with a disability who met the eligibility requirements for special education services under the IDEA, and as a qualified handicapped person under Section 504

T.A.'s disability, an Other Health Impairment (ADHD), has an adverse impact on his educational performance; and T.A. needs special education services as a result of that disability. He was able to progress from grade to grade in the regular curriculum in

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5 Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

6 These exhibits were originally numbered B1 through B18. The District used those numbers for different documents when submitting their exhibits for the hearing beginning on September 25, 2003. To avoid confusion these exhibits were renumbered.

his first five semesters at FGHS because his parents and sister provided him with what was in effect special education at home. It is, however, the responsibility of the District and not the parents to provide a FAPE for T.A. Therefore the District is liable for the necessary costs of T.A.'s education at Mt. Bachelor Academy – an appropriate placement – until it offers T.A. at FAPE. T.A. is also eligible for services as a qualified handicapped person under Section 504 of the Rehabilitation Act of 1973.

The fact that it was T.A.'s escalating drug abuse, depression and out of control behavior that caused his parents to remove him (temporarily, they anticipated) from FGHS and the District does not diminish the legal significance of the District's failure to offer T.A. a FAPE, or the legal right of T.A.'s parents to be reimbursed for providing him with an appropriate education at Mt. Bachelor Academy.

The District is not required to reimburse T.A.'s parents for the cost of the evaluation by Dr. Fulop or T.A.'s stay at Catherine Freer Wilderness Therapy Expeditions.

## **FINDINGS OF FACT**

### *Background*

(1) T.A. is an 18 year old young man (born September 11, 1985) who has been a student in the Forest Grove School District (District) since kindergarten.

(2) From kindergarten through eighth grade a number of T.A.'s teachers indicated T.A. was having difficulty paying attention in class and completing his school work. See *Ex A28*. Their comments on his report cards included, "An area of improvement would be in staying on task during work periods and focusing attention for longer periods" (first grade, 1992 - 93); completes work on time: 35% third quarter and 60% fourth quarter (third grade, 1994 -95); "Complete work on time by staying focused. I know you can" (fourth grade, 1995 - 96); "[T.A.] is very conscientious about making certain all work is turned in. He completes very few assignments during class" (fifth grade, 1996 - 97); "[T.A.] has had a better second quarter! He still struggles with using time appropriately, paying attention, and being prepared for class. Despite these problems, he has gotten his homework turned in and his grades have improved," needs improvement in the areas of use of time and paying attention (6<sup>th</sup> grade, 1997 - 98); "Missing required work/projects/tests," "Does not use time productively" (7<sup>th</sup> grade, 1998 - 99); and "Needs to complete work on time," "Missing required work/projects/tests," "See teacher for incomplete work" (8<sup>th</sup> grade, 1999 - 2000). *Ex A29, Tr 856 – 60*.

(3) Although generally T.A.'s teachers liked him, and some especially appreciated his creativity and sense of humor, in the early years T.A. had some isolated behavior problems in school, and more at home. *Exs A28, 29*. When T.A. was eight years old he saw a therapist for anger management therapy and was diagnosed with potential oppositional disorder. *Exs A19, A28, Tr 1169*. Between the ages of 11 and 13 he routinely displayed destructive behavior at home, such as writing on the walls of his room, carving into the woodwork and breaking things. He was frequently angry with his parents and sister and experienced a lot of frustration. *Ex A19*.

(4) From the time T.A. was in elementary school Ms. A., and to a lesser extent Mr. A., have assisted T.A., when he does homework or school work at home. *Ex A28.*

(5) When T.A. reached high school, almost every day after Ms. A. returned home from work, and sometimes on the weekends, she would help T.A. stay focused on his school work and complete his class assignments and homework. *Tr 1154 – 55, 1363 – 64.* Sometimes, on school nights, she would work with him until 11:00 p.m., although she was not helping him continuously. *Tr 1363.* Ms. A. worked with T.A. an average of at least two hours daily and sometimes three or four hours on the weekends, or possibly half a day if T.A. was working on a project or a paper or had a lot of work to make up. *Tr 1194.* At times over Christmas break, spring break and on weekends Ms. A. would bring T.A. to her work place ( [REDACTED] ) and help him do his school work. Mr. A. helped T.A. in math (algebra) with catching up on old homework, completing current homework, and preparing for makeup tests. Also he and Ms. A. drilled T.A. on the multiplication tables so he could pass that portion of his algebra class. *Tr 1152.*

(6) When T.A. was in high school Mr. and Ms. A. had to give T.A. reminders to attend to his school work “many, many times a night,” because he did not stay focused. They had to keep redirecting him with many time outs and specific instructions as to which task to work on. When T.A. got distracted he would run out of the room, sharpen his pencil repeatedly, run upstairs, look in the mirror, play with the cat, get a drink of water, etc. *Tr 1158 – 59. See also Tr 1192 – 93.*

(7) T.A. talked a lot about how hard it was for him to focus in high school. He got lost in lectures because his mind would soon wander and he could not figure out what the teacher was talking about. *Tr 1196 - 97.*

(8) In March 2003 T.A. was diagnosed by Dr. Michael Fulop with attention deficit hyperactivity disorder (ADHD), combined subtype, accompanied by deficiencies in executive functioning<sup>7</sup>. *Ex B5.* In assisting T.A. with his school work Mr. and Ms. A. had compensated for T.A.’s limitations by attempting to keep T.A. organized and ensure he remembered what he needed to do; helping T.A. figure out how to do it, when to do it, and how much time it would take; breaking down big projects into smaller steps; and helping T.A. get started, maintain focus and complete his work. It was really hard for T.A. to finish anything. *Tr 1180 – 82.*

(9) T.A. had friends in school but since the age of 12 had never invited anyone to his home, and almost never visited other students’ homes. *A19, Tr 1047, 1163 - 64.* In high school he almost never participated in extracurricular activities. Until he started using marijuana heavily in his junior year of high school he very rarely socialized, outside of school, with anyone other than his relatives. *Tr 1227, Ex A28.* Typically when T.A. came home from high school he would call his mother at work (both parents worked full time) and talk with her for a little while. *Tr 1248.* T.A. did not drive or work. After school he spent most of his time doing school work.

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<sup>7</sup> Executive functioning has to do with the way the brain organizes itself. It includes initiating an action; sustaining attention and concentration; sustaining energy and effort; managing affective interference; and utilizing working memory and accessing recall. *Tr 623 – 27.*

(10) T.A.'s grades went down after seventh grade. His final grade point average was 2.00 at the end of 8<sup>th</sup> grade; 1.85 at the end of 9<sup>th</sup> grade; 1.64 at the end of 10<sup>th</sup> grade, and 1.38 at the end of the first semester of 11<sup>th</sup> grade. *Exs A2, B11.*<sup>8</sup> Nevertheless, he was progressing with his class from grade to grade.  
*FGHS: 9<sup>th</sup> Grade*

(11) Although T.A. had looked forward to high school, once he entered 9<sup>th</sup> grade (in September 2000) he was quickly overwhelmed. He became depressed and had big mood swings. His physician, Marilyn Booth, M.D., recommended that he see a therapist for counseling. *Ex A28.*

(12) In T.A.'s 9<sup>th</sup> grade year his parents observed that he was completely disorganized. He could not keep track of work done or whether he had turned in his work. He duplicated, lost or failed to turn in some of his assignments. He could not keep track of dates when assignments were due, tests were scheduled, or teachers were available after school. Ms. A. contacted T.A.'s teachers and collected work that had to be made up over Christmas break, which T.A. attempted with "extensive help" from his parents. *Ex A28.* In 9<sup>th</sup> grade T.A. spent 3 – 4 hours a night doing school work and additional time on weekends, due in part to the fact that he generally could not sit still for more than a few minutes without getting distracted. *Ex A28.*

(13) Jaime Vieth was T.A.'s teacher for freshman (9<sup>th</sup> grade) world studies. She had extensive e-mail contact with T.A.'s parents about what his current and future assignments were, to "keep T.A. on track and make sure that he was turning things in." *Tr 1319.* Also, Ms. A. met with Ms. Vieth more than once and talked about how T.A. was interested in history but could not do the work. Ms. A. told Ms. Vieth T.A.'s organization and study skills were poor, he couldn't keep track of anything, and he told Ms. A. he did not understand what was happening in class. *Tr 1348 – 1350.* T.A. failed the first three tests he took in Ms. Vieth's class but was allowed to retake them. After intensive help with studying from Ms. A., who tried to teach T.A. how to read a textbook, he took the tests again and passed. *Tr 1348 – 49.* In the course of the year T.A. failed to turn in 11 of 34 assignments, and turned in five of the assignments - as well as a major project - late. Quiz, test and project grades were factored into his course grades in addition to credit for homework. *Tr 1327, 1332 – 33.* T.A. was doing better than probably a third of the students in the class in terms of missed assignments, and better than average in terms of late assignments. *Tr 1334.* Including T.A., approximately 80% of the students the first semester and 66% of the students the second semester passed the class. *Tr 1335.*

(14) Ms. A. also met with T.A.'s CCC (?) teacher to try to understand his assignments so she could help T.A. T.A.'s Spanish teacher allowed T.A. to draw a cartoon in Spanish so he could pass the course. Ms. A. worked with T.A.'s English teacher to try to get T.A. to complete his journal entries in class instead of trying to catch up every week or two at home. She also did a lot of reading out loud at home with T.A. to help him with his assignments. She brought T.A.'s science notebook to

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<sup>8</sup> His grade point average changed after the end of certain semesters due to credit recovery, *see* note 12, below, or, in the Fall 2002 semester, a grade of Incomplete which became an F because T.A. left FGHS without making up the missing work. *Ex A21.*

school a few times when he forgot it, and met with his science teacher to discuss the long-term project students were required to do. *Tr 1348 – 56.*

### *The 2001 Evaluation*

(15) By December 2000, when T.A. was 15, he was behind in most of his classes and Ms. A. contacted T.A.'s school counselor, Laurel Kaufman "regarding concerns over the discrepancy in \* \* \* what teachers said he was capable of, and what he was actually doing in school." *Ex 28.* Ms. Kaufman recommended referral for an evaluation for special education services, *Ex A28*, and T.A.'s parents followed her advice. On December 31, 2000 Ms. Kaufman, *Tr 881*, filled out a Referral for Special Education form, which identified the following areas of concern: cognitive development/mental abilities; reading; written language; communication; and study skills. *Ex B1 at 1.* On the same date Ms. Kaufman, *MTr 63 – 64*, filled out a Parent Notification For Special Education Evaluation Referral form (Referral)<sup>9</sup> indicating that T.A. had been referred for a special education evaluation. The Referral was addressed to Ms. A. *Ex A1.*

(16) The Referral indicated T.A. had been experiencing the following difficulties in the classroom: missing assignments; not following verbal directions; talking; not following written directions; easily distracted; low test scores; does not do his work or turns in late work; short attention span; does not do much homework. The Referral also stated that the classroom teachers had tried the following to assist T.A.: sent to ISS (?); teacher has allowed late work without penalty; smaller classroom environment; one on one attention; meet with student after school to make up work; variety of testing styles;<sup>10</sup> spoken with parents about study strategies; moved T.A. to the front of the class; frequent check in to see what work is missing. *Ex A1, Tr 1133 – 34.* District staff notes for a Multidisciplinary Team (MDT) meeting on January 16, 2001 include, in the discussion of the Referral, "Maybe ADD [attention deficit disorder]/ADHD?"<sup>11</sup> MDT notes for February 13, 2001 relate, "Lorna will add medical state[ment] due to suspected ADHD." *Ex A12.* The District requested and eventually received a medical statement for T.A. It was signed by Janice Tsuchida, T.A.'s family nurse practitioner, and dated June 8, 2001. In response to a question about whether there were health conditions affecting T.A.'s educational performance, Ms. Tsuchida reported only that T.A. needed glasses. *Ex B1.*

(17) Lorna Shofner, a learning disability specialist at FGHS, was assigned to be the "case shepherd" for T.A.'s evaluation. *MTr 64.* Ms. A. told Ms. Shofner about T.A.'s elementary school years; how easily frustrated T.A. was; how he could not focus or complete work in class, and took a great deal of work home; how the parents had a lot of reports from T.A.'s teachers that he was unprepared for class and was completely disorganized; that she and Mr. A. were spending hours with T.A. helping with his school work; that T.A. had no study skills; that she was teaching T.A. how to read a textbook

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<sup>9</sup> The person who filled out this form was identified incorrectly (as Ms. Shofner) in the ruling on the Motion to Dismiss.

<sup>10</sup> A comment after this is illegible but might say, "all scores the same."

<sup>11</sup> See note 21, below.

and take a test; how he could only recall information for a short time; and that he had research papers and projects due that had multiple components and he was unable to break them down and get started. *Tr 1201 – 02.*

(18) Pursuant to the Referral, in June 2001 T.A. was evaluated by Vinny Martin, FGHS school psychologist, to determine whether he had a learning disability. Mr. Martin reported the following background information/reason for referral:

[T.A.] was seen for a psychological evaluation at his parent's request to determine the possible presence of a Learning Disability. [T.A.] has been seeing a community psychologist (Dr. Patchin) for "general adolescent issues," according to his mother. Apparently, [T.A.] can be "strong willed . . . sensitive to others . . . angry at times."<sup>12</sup>

Review of school records indicated variable achievement with primarily Cs and Bs in grade 8. [T.A.] did not meet benchmark standards in Math, Reading and Literature in grade 8 state testing. Grade 9 grades deteriorated as the year progressed (3 Fs in 1<sup>st</sup> marking period of the second semester). Conversation with Mr. Wanner (applied pre-algebra teacher in 1st sem.) indicated relatively good test scores with missing assignments pulling down [T.A.'s] grade.

*Ex B1 at 10.*

T.A. readily cooperated with Mr. Martin's evaluation and exerted good effort. Mr. Martin considered the test results valid and reliable. He observed that T.A.'s comments about his classes indicated he is aware that many of the difficulties he experiences are due to motivational factors. He said, "They're going all right, but I could be doing better...(How?) I could turn in all my work...I do it, but I don't hand it in (Why not?) If I understand it, I don't feel like going thru it all again (i.e. doing homework)...Sometimes, I don't do a couple and don't want to hand it in."<sup>13</sup>

*Exs A2, A20.*

Mr. Martin saw T.A. for one hour and one-half. *Tr 1122.* Reviewing the Referral during this hearing, Mr. Martin found nothing in the list of concerns on the form that would suggest that he should evaluate whether T.A. had a learning disability. He considered it "the default to look into a learning disability, it's usually the primary reason why students are referred." *Tr 1132 – 33.* In deciding how (for what) to evaluate T.A. he also considered the forms in Exhibits B1 (at 1) and B2a, and the guidance counselor may have presented additional information from T.A.'s teachers. *Tr 1134 – 36, 1139 - 40.*

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<sup>12</sup> See Exhibit A11.

<sup>13</sup> Mr. Martin thought that in the last sentences T.A. was changing topics a little and responding to two different issues: number one, not doing the work; and number two, sometimes not handing it in because he didn't do it all. *Tr 1110 – 11.* He saw nothing in the way T.A. presented himself during the evaluation that led him to believe T.A. might have ADD. *Tr 1112 – 13.* Yet concerning he has identified as OHI due to ADD, he explained, "They'll sometimes, you know, lose a trend of thought, be explaining something to you and then forget what it is after half a minute or 20 seconds, what the question was \* \* \* ." *Tr 1113.*

(19) In high school T.A. received progress reports, with tentative grades, every six weeks, but the only grades that were counted toward his grade average were those on his report cards at the end of each semester. Commenting on his April 2001 progress report T.A. told Mr. Martin that his English class was “pretty easy” and he probably had a grade of F because he was missing work worth a lot of points. In Spanish (graded F) T.A. said he paid attention but it was hard to remember “a lot of stuff.” He liked World Studies (graded C) a lot but it was harder to study for tests because there were specific things to remember. Science (graded F) had been going well but he didn’t do well on a test because he didn’t study as much or as long as he could have. In Applied Pre-Algebra (graded C) he understood the material for the most part. *Ex A20.* (At the end of that semester T.A. failed Pre-Algebra and English, received Ds in Science and Spanish, and maintained a C in World Studies.) *Ex A21, Tr 1107 – 1108, 1119.*

(20) When Mr. Martin questioned T.A. about the possible presence of “attentional deficits” T.A. said, “After a while I don’t feel like listening to her (mother) any more or paying attention, but I don’t think that’s what it (ADD) really is...If it’s not interesting to me or it’s too hard, I just start thinking about something else.” *Ex A2.* At that time T.A. could not yet admit that there was something different about his brain and the way he thought. That was a huge concern of his; he believed for some time that he could solve his own problems. He answered Mr. Martin “out of that framework of being embarrassed, of being ashamed, of not wanting to admit he was different.” *Tr 688 – 89 (Testimony of Patchin).*

(21) Mr. Martin felt the difficulties indicated on the Referral (missing assignments, short attention span, easily distracted, etc.) did not reach the threshold to trigger an evaluation for ADHD issues. To reach that threshold he would have required “some evidence that some factors like [T.A.’s] volitional decisions to do work or not do work or pay attention or not pay attention were really not a factor.” He thought T.A.’s actions were volitional at least in part because that is what T.A. told him. *Tr 1072 - 73.* According to Dr. Callum, a witness for the District (see Findings of Fact no. 127 *et seq*, below) if there was “maybe ADHD” that should have been addressed separately from the learning disability, with further evaluation. *Tr 851.* Based on the information in the Referral, if Dr. Neill, with whom the District contracted to evaluate T.A. (see Findings of Fact no. 104 *et seq*, below) were deciding how to evaluate T.A. she would have evaluated T.A. for Other Health Impairment (OHI), emotional disturbance (ED) and a learning disability. If she had concerns about distractibility, following directions, focus, paying attention she would have screened for attention deficit. *Tr 993 – 94.*

(22) Mr. Martin did not interview T.A.’s parents or his regular education teachers as part of his evaluation. *Tr 1090, 1092.* Although T.A. was concerned that people would think less of him if they knew he had a problem, neither Mr. A. nor Ms. A. asked that T.A. not be evaluated for ADHD or depression. *Tr 1175.*

(23) As part of his evaluation Mr. Martin administered the Woodcock-Johnson Tests of Cognitive Abilities – Third Edition (WJ-III) to T.A. He found T.A.’s verbal ability was in the high average range for his age, his thinking ability was in the average range, and his cognitive efficiency (automatic cognitive processing) was in the low range. He thought T.A.’s cognitive performance might have been influenced by his phonemic

awareness (average) and working memory capacity (limited). He made the following comment about T.A.'s social/emotional functioning:

The purpose of this evaluation was not to provide an in-depth personality assessment. However, it appeared evident that motivational factors play a significant role in [T.A.'s] functioning. He appears to understand behavioral and academic expectation and make clear choices to either comply or not comply with those expectations. The reasons why are beyond the scope of this evaluation.

*Ex A2 at 3.*

On May 7, 2001 Mr. Martin wrote, in notes relating to T.A., "T not too sure what M[other?] means re: concern re: ADD." *Tr 1088*. He reported T.A.'s comment, above, about "attentional difficulties" and concluded, "Brief rev[iew] of results at end. Aver[age] abil[ity], no ADD." *Ex A11 at 2.*

(24) Ms. Shofner administered the Wechsler Individual Achievement Test to T.A. on May 1, 2001. T.A. scored in the 42nd percentile (grade equivalent (GE) 8.3) in basic reading; 27<sup>th</sup> percentile (GE 7.3) in math reasoning; 23<sup>rd</sup> percentile (GE 6.9) in spelling; 95<sup>th</sup> percentile (GE over 12.9) in reading comprehension; 4<sup>th</sup> percentile (GE 5.6) in numerical operations; and 55<sup>th</sup> percentile (GE 11.6) in written expression. *Ex B1.*

(25) As part of the evaluation Ms. Pappelis, Learning Specialist and Special Needs Coordinator, observed T.A. for 20 minutes in his art class and noted that he worked quietly and independently, and was appropriate. *Ex B1.*

(26) The evaluation results were considered, and T.A. was found not to have a learning disability and determined to be ineligible for special education, at an MDT meeting on June 13, 2001 at which Ms. A., Ms. Shofner, Mr. Martin and Ms. Pappelis were present. All four agreed with that determination. *Ex B1.* Considerations discussed at the meeting were possible tutoring for T.A. in math over the summer, credit recovery<sup>14</sup> or a tutorial in the Fall, and reconsideration of eligibility depending upon T.A.'s progress in the Fall. *Exs A2, A11, A28.* Ms. Shofner encouraged Ms. A. to take a "wait and see" approach, as in Ms. Shofner's experience many boys had similar problems but started "turning around" in their sophomore or junior years. *Ex A28.*

(27) Mr. Martin did not complete his evaluation report until September 2001. *Ex B3a.* A note from the MDT dated September 10, 2001 stated, "Sent report out to Parent. Not eligible LD [learning disabled] 6/13/01. Possible 504." *Ex A1.* Neither the District nor the FGHS staff took any action in response to the comment, "Possible 504." Ms. Pappelis thought that comment indicated the parent would have the option to rerefer T.A. to the counselor and provide the counselor with some sort of documentation regarding T.A.'s ADHD. She did not identify any procedures the school staff would follow in response to that information. *Tr 900 – 901.* Mr. Martin did not follow up on the

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<sup>14</sup> "Credit recovery" is an opportunity for students who fail a class to take it over. *Tr 237.* If a student fails a class and then successfully completes credit recovery, the original F grade will change to NG ("no grade") on the transcript and the student will get credit for the passing grade resulting from credit recovery. *Tr 893 – 94.*

reference to" possible 504." That was typically handled by the guidance counselor at FGHS, rather than the special education staff. *Tr 1098.*

(28) Ms. A. discussed the results of the evaluation with T.A. and told him the conclusion that the only thing he could qualify for possibly was a math disability. T.A. was pretty upset because he thought the evaluation might show why he was having so much difficulty in school. He concluded it must be his fault and he needed to try harder, and he really wanted to try, do well in school, and go to college. *Tr 1205.*

(29) On August 30, 2001 Ms. A. sent an e-mail to Ms. Shofner, Mr. Martin, Mr. Wanner (who was teaching a pre-algebra class T.A. had failed the previous semester) and one other person, stating that T.A. had been in the District since kindergarten and still could not do the most basic math functions. She inquired whether there might be a more appropriate method of teaching for him, as he "apparently cannot process information or learn from the teaching methods used thus far." She said she would like to see some individual attention such as tutoring. *Ex B3a.* There was no evidence FGHS provided any assistance in response to this request.

(30) After T.A. was found not eligible for special education in June 2001 neither his parents nor any staff member at FGHS referred him for or requested a special education evaluation. *Exhibit B8a.* T.A. did not receive special education or related services from the District.

#### *Notice of Procedural Safeguards*

(31) At the bottom of the Referral which Ms. Kaufman prepared on December 31, 2000 was the statement, "Parents of a child with a disability have protection under the procedural safeguards which are enclosed. For assistance in understanding this information you may contact:" Betty Flick, Assistant Director of Student Services. Beneath that information the words "Enclosure: Procedural Safeguards" were printed. *Ex B1a.* The form was sent or given to Ms. A. Ms. A. did not inform the District that she had not received the Procedural Safeguards statement.

(32) Ms. Shofner sent Mr. and Ms. A. a Prior Notice About Evaluation form dated January 20, 2001, asking that they give written consent for the MDT to evaluate T.A.'s need for special education services. At the bottom of the form was the statement, "Parents of a child with a disability have protection under the procedural safeguards which are enclosed. For assistance in understanding this information you may contact:" Betty Flick, Assistant Director of Student Services. Beneath that information the words "Enclosure: Procedural Safeguards" were printed. *Exhibit B2a.* Ms. Shofner was very meticulous about following procedures. *MTr 84 (Testimony of Flick).* Ms. A. consented to the evaluation by signing the form, on March 9, 2001. The form was received by the MDT on or about March 19, 2001. *MTr 66.* Neither Ms. A. nor Mr. A. informed the FGHS staff that they had not received the Procedural Safeguards statement. *MTr 68.*

(33) It is standard procedure at FGHS for the parental rights statement to be handed to the parent or parents at an eligibility meeting, usually at the very beginning of the meeting. *Testimony of Pappelis, MTr 69, 74.* It is Ms. Pappelis' practice to give parents a copy of the parental rights brochure, with procedural safeguards, at the time

the school seeks permission to evaluate and again at the eligibility meeting. She had no reason to believe she varied from this standard practice with regard to the meetings convened with T.A.'s parents, including the MDT eligibility meeting on June 13, 2001. *Exhibit B11a*. It was Ms. Shofner's standard practice to hand parents a copy of their parental rights at eligibility meetings, and she believed she always did that. *MTr 181*. Ms. A. did not recall receiving the parental rights statement at the meeting on June 13, 2001 nor did she have a copy of it in the folder where she kept information about T.A.'s high school education. *Tr 99*.

(34) The Notice of Procedural Safeguards (Notice) distributed by the District in the 2000 - 2001 school year had the same information as the current Notice booklet concerning when reimbursement for private school education can be reduced or denied. *MTr 80 (Testimony of Flick)*.

(35) Between December 31, 2000 and June 13, 2001 the District sent or gave Mr. and Ms. A. at least one copy of the Notice. *See Ex B16a, Ruling on Motion to Dismiss*. The Notice gave the following advice about reimbursement for parental placements:

When Reimbursement May Be Required. A court or hearing officer may require a school district to reimburse parents for the cost of private school placement made without the consent of or referral by the school district only if:

- the child received special education and related services under the authority of a public agency before enrolling in the private school;
- the court or hearing officer finds that at that time the school district did not make a free appropriate public education available to the child in a timely manner; and
- parent provided notice removing the child from public school.
- The court or hearing officer may reduce or deny reimbursement if the parents did not inform the school district that they were rejecting the placement proposed by the school district and state their concerns and their intent to enroll their child in a private school at public expense. This notice must be given either:
  - at the most recent IEP meeting that the parents attended before removing the child from public school; or
  - in writing to the school district at least ten business days before removing the child from public school.
- A court or hearing officer may not reduce or deny reimbursement if a parent does not give this notice if:
  - \* \* \* \*

- the parent had not receive a copy of this *Notice of Procedural Safeguards* or otherwise been informed of this notice requirement \* \* \* .

*Ex B16a at 21 – 22* (bold face emphasis added).

(36) The Notice distributed in 2002 explained that parents had the right to an independent educational evaluation at public expense if they disagreed with the evaluation that the District provided, unless the District requested a due process hearing to show that its evaluation was appropriate. The Notice stated, “If you request an independent evaluation, it is important to clearly inform the district about your request.” *Ex B16a at 8*. Whether this language appeared in the Notice distributed in 2000 and 2001 is unknown. See *MTr 80*.

*FGHS: 10<sup>th</sup> grade*

(37) T.A. began 10<sup>th</sup> grade in September 2001. In math, T.A.’s first progress report showed he was not turning in work and failing tests. Ms. A. contacted Mr. Martin, who said T.A. could be referred for an evaluation again (“for consideration of a learning disability and special ed services”) but it would be difficult to find him eligible. *Exs A28, B3a*. T.A. was in a credit recovery class to make up a 9<sup>th</sup> grade English credit. *Ex A28*.<sup>15</sup> It took T.A. 28 weeks to complete his missing credit, as compared to an average of eight to 10 weeks for other students. The credit recovery teacher advised Mr. and Ms. A. not to send T.A. to summer school because there, as in credit recovery, students work at their own pace. *Ex A28*.

(38) T.A.’s six week progress report also indicated he was failing most of his classes. *Tr 510*. Because T.A. was having so much difficulty, in November 2001 Mr. and Ms. A. hired T.A.’s older sister, A.A. (who was home from college for a year), to tutor him 10 hours per week (two hours per day on three week days and four hours on the weekends). *Tr 501 - 03*. The parents asked A.A. to tutor her brother because T.A. was very resistant to working with a stranger (a tutor he didn’t know) and Ms. A. was too exhausted to continue providing all of the help T.A. needed. Ms. A. continued to help T.A. with his biology and English and A.A. did the rest. *Tr 1197*. A.A. made a contract with T.A. under which he agreed to keep track of his assignments, talk to his teachers and know what he had to do, and come to their tutoring sessions prepared and willing to work. A.A. agreed to keep in touch with T.A.’s teachers so she would also know what T.A. was supposed to do. A. A. tutored T.A. until February 2002. She ended the contract because T.A. was breaking it. But at her mother’s request she continued to tutor T.A. in math and Spanish, for around six hours each week, until April 2002. *Tr 502-06*. A.A.’s main function was helping T.A. with his homework by keeping him focused. Sometimes she could maintain his attention by having him talk about what he was doing. Sometimes she taught T.A. material he did not understand. Among other tasks T.A. worked with A.A. on completing work sheets he should have finished in class. A.A. saw that T.A. sometimes could not rearrange information in his head. He had to write things on paper, tear the paper apart, and physically reorganize the information. *Tr 508*

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<sup>15</sup> T.A. failed 9<sup>th</sup> grade English but after credit recovery passed the class and got credit for it in his sophomore year. *Ex A21*.

– 09. A.A. thought T.A. was learning better one on one with her than he was in the classroom, as long as he tried to follow their contract. *Tr 510.*

(39) When A.A. began working with T.A. he was far behind in his school work, and they mainly did makeup work. By the 12<sup>th</sup> week of school T.A.'s intermediate grades had greatly improved. *Tr 510.* T.A. was really happy and proud of himself. *Tr 515.* But thereafter T.A. stopped following the contract and became disorganized, he fell behind and his grades went down again. *Tr 510.*

(40) Mr. or Ms. A. contacted Ms. Kaufman, the counselor, about T.A.'s difficulties again and she suggested they talk with the FGHS Options counselor, Gordon Garlock. Mr. A. and T.A. met with Mr. Garlock asking for help with T.A.'s continued poor school performance, desire to do well, and frustrations. Mr. Garlock recommended that T.A. look into the Portland Community College (PCC) Partnership Program.<sup>16</sup> He also suggested taking T.A. out of his Career Ed class and letting him spend the time in Biology, making up work in that class so he would not fail in the second term (as he had in the first). This was accomplished. *Ex A28.*

(41) T.A. dropped the Career Ed class, *Ex 28*, and he and Ms. A. met with Ms. Garcia, T.A.'s Biology teacher, and arranged for T.A. to make up labs and tests during the free period. With this opportunity and help from his parents, T.A. passed Biology with a C. T.A.'s English teacher called Ms. A. more than once to discuss T.A.'s lack of progress and his concerns that T.A. did not do his work in school. Ms. A. went to school and got a project from the teacher which she helped T.A. complete over Christmas break. In history Mr. A. helped T.A. go over the class work and how to read the textbook. T.A. and Ms. A. met with the teacher because T.A. was not doing the work or passing his tests. The teacher told them of opportunities for T.A. to retake the tests. Ms. A. had a lot of contact with T.A.'s pre-algebra teacher to help ensure that T.A. turned in his homework and to find out what he needed to be studying to pass the next test or a retest. *Tr 1263 - 68, 1356 – 60.* At the end of the second semester T.A. earned a C in Math with four hours of tutoring weekly, and Ds in English, American Studies and Spanish. In art classes his grade were A and B. *Ex A28.*

(42) In a journal entry which T.A. prepared for his English teacher in Fall 2001 he wrote,

Sometimes i really get mad at myself for stuff that I do, but mostly stuff that i don't do. Like turning my work in. Studying for tests. I try so much to do good in school, last year they even gave me all these tests and everything to see if I have a learning disability, but they said I don't. I guess its just stubbornness. i really think I'm smart enough to be in all the advanced classes, theres just no way I could get myself to do my homework.

On February 20, 2002 he wrote:

Last night i read about the chaos theory, the superstring theory, T.S. Eliot, Einstein, Newton, art history and all kinds of stuff, in some books i found. I

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<sup>16</sup>The FGHS/PCC Partnership Program enables FGHS students to earn credit at PCC toward high school graduation, with FGHS paying part of the cost. *MTr 22.*

am so interested in all this stuff, but i do so horrible in school you'd never guess it.

*Ex A25.*

(43) When T.A. was tested in eighth and tenth grades, his composite scores did not meet the State benchmarks for math or reading and literature. *Tr 1062 – 63.*

*FGHS: 11<sup>th</sup> Grade*

(44) T.A. began 11<sup>th</sup> grade in Fall 2002 determined to do better. *Ex A28.* His parents believed that, after the previous summer, when he acknowledged he had been trying marijuana, he really wanted to change things. *Tr 1157.* His first progress report was his best at FGHS, with four As, two Bs and one C/D. Although he had been becoming more and more reclusive, he began to take guitar lessons from his uncle and joined a choir and the yearbook staff. By November, however, his progress report indicated he was not turning in work and was falling behind in school. He was having angry outbursts and big mood swings at home again. He dropped the choir and the guitar lessons. *Ex A28, Tr 1160.* He was again using marijuana, with increasing frequency. See Findings of Fact no. 52 *et seq, below.* His teachers recorded a number of “tardies” and missed classes from September 2002 to February 2003. *Ex B4.* In the Fall 2002 semester, other than helping T.A. keep track of his assignments and making sure he was doing homework, Mr. and Ms. A. did not provide much help to him. *Tr 1363.* T.A. had much less homework than he had had in the past, and the assignments were not lengthy. *Tr 1363.* Also, he could receive help with math after school (from his teacher or her assistant) three times a week. See Finding of Fact no. 47, *below.*

(45) Lee O'Banion was T.A.'s English teacher in Fall 2002. When Mr. O'Banion called on T.A. during class discussions, or to read his part in a play, T.A. was always ready to respond. Mr. O'Banion never had any concerns about T.A. being “on task.” T.A. never had any behavior problems and always knew what to do in class. *Tr 481 – 84.*

(46) In Fall 2002 T.A. wrote in his journal for Mr. O'Banion:

I feel a lot of stress every day, more than a lot of other people probably. I don't know why, but I just stress over small stuff. \* \* \* I should be happy, it's Friday, but all I can think about is how much homework I have. I don't have big stressed out days every now and then but it's more like the entire school year is one big long stressful time for me, and I don't have the endurance sometimes to keep my grades up. I don't know how my friends find time for everything they do, and have a lot of free time.

*Ex A25.* Mr. O'Banion did not consider these sentiments unusual for a high school student, *Tr 497 – 99,* nor did the assistant principal at FGHS, Ms. Voigt. *Tr 251 – 52.* T.A. also commented, in a journal entry on September 25, 2002, that the students he hung out with at school, whom he had met about three years earlier, weren't really his friends. *Ex A25.*

(47) Shelly Reikofski taught T.A.'s Algebra 1 class in Fall 2002. T.A. had done a lot of the same work in his pre-algebra class, at a little bit lower level, and on occasion he told Ms. Reikofski he had done the same kinds of problems before. *Tr 156*. T.A. had a grade average of 76 and received a C (70 – 79%) in Algebra 1 based on his test scores, homework, quizzes, projects and class participation. *Tr 138 – 39*. T.A. began well in that class, turning in all of his assignments on time in the first six week period. In the second six week period three of his six assignments were late (for which he got half credit). Thereafter T.A. started missing assignments, so Ms. Reikofski arranged for T.A. to come to after school help sessions with her or a college student on Mondays, Tuesdays and Thursdays from 2:45 (when school ended) until 4: 30 or 5 p.m. By end of the course T.A. failed to submit three assignments, submitted 11 late (including three he did not turn in when due in class, but completed later in the after school program and for which Ms. Reikofski gave him – as she did others - full credit), and submitted 15 when due. *Tr 141 – 44, 149 – 50*. During that semester T.A. turned in one math test paper blank, and when Ms. Reikofski gave him a retest after reviewing the material with T.A. in school, he scored 58. After school tutoring, allowing retests, and accepting late work were accommodations Ms. Reikofski offered to all of her students. *Tr 147 – 48*. T.A. was compliant and well-behaved in Ms. Reikofski's class. *Tr 151-54*.

(48) Ron Thompson taught in the District for 17 years before he retired in June 2003. In Fall 2002 T.A. was in Mr. Thompson's class in U.S. History. Students would pass the class if they were present every day and handed in all of the work. Students who, in addition, did pretty well on the test would probably get a B, which was T.A.'s grade in the class. *Tr 181 – 84*. A lot of the assignments were done in class. *Tr 186*. T.A. got his work done and was aware of what was going on when Mr. Thompson asked him questions during class. *Tr 186 – 87*. Mr. Thompson thought T.A. liked history, and Mr. Thompson did different things in each class period and tried to make the class fun. *Tr 190 – 91*. His class was well-organized with short, well defined and entertaining projects, rather than lengthy assignments T.A. would have to work on at home for weeks. The subject, 20<sup>th</sup> century American history, was especially interesting for T.A., who enjoyed reading his grandfather's diary about his combat experiences in World War II. There was very little reading outside class. *Tr 1059 – 60*. Mr. Thompson provided study guides for the students and outlined what they needed to be aware of, which helped them be prepared for tests. *Tr 1050 – 51*. T.A. was quiet and had no behavior problems. *Tr 186 – 87*. Mr. Thompson did not think T.A. was wandering (mentally) or daydreaming in class any more than anybody else. *Tr 189*.

(49) In Fall 2002 Ms. A. had two conversations with T.A.'s Spanish teacher, Ms. Gabriel. Ms. Gabriel reported that T.A. had failed his test and needed to retake it, and that he failed to turn in his assignments or turned them in late. Ms. A. did not help T.A. with his Spanish assignments but kept reminding him to work on his homework, asking him if he had finished, and inquiring about whether he had turned it in. *Tr 1250*.

(50) T.A. is talented in art. He took five different art classes at FGHS in his freshman and sophomore years with Philip Thias and got grades of A and B. He was in two classes with Mr. Thias in the first semester of the 2002 - 03 (junior) school year – independent study and advanced placement art, a college level course. Both courses were only open to students who had taken prerequisites and had the consent of Mr. Thias, and were for very serious minded, able students. T.A. did the independent study

in a classroom where Mr. Thias was teaching 40 students in a basic design class. T.A. was easily distracted during that time. The other students' work was unrelated to his independent study. Ultimately T.A. received grades of "incomplete" in both courses. *Tr 454-5*. Until the Fall 2002 semester T.A. had always managed to finish his work in Mr. Thias' classes, although it was a challenge for him. *Tr 460 - 61*. But in Fall 2002 Mr. Thias found that T.A. was not as motivated as he had been in the past, and it was much more difficult to "just sort of get him rolling along." *Tr 459*. Mr. Thias felt T.A. had some problems with organization and procrastination. *Tr 462*. Mr. Thias became concerned about whether T.A. was involved with drugs, and reported this to Mr. A. in February 2003. *Tr 470 – 71, Ex A28*.

(51) In January 2003 Mr. A. and T.A. arranged with Mr. Garlock that T.A. would apply to the PCC Partnership Program in the hope that he could finish his high school requirements at PCC. On February 28, 2003 Mr. A. informed Mr. Garlock that T.A. was enrolled at PCC, had completed his placement tests and had met with an advisor. On March 3, 2003 Mr. Garlock responded that the District could place T.A. in the Partnership Program for the Spring term (beginning in April 2003). *Exhibit B12a*.

#### *Behavior Problems and Substance Abuse*

(52) T.A. behaved appropriately in high school, except that on one occasion (September 2001) he brought a butterfly knife to school. He did not display it or threaten anyone with it. He was suspended for three days. He said he had the knife to protect himself because he was going to Portland, but in fact he never went to Portland alone, and only once went there with another young person (his cousin). *Tr 1164*.

(53) When T.A. was 15 he secretly drank some champagne at a cousin's wedding. *Tr 1146*. At age 15 or 16 he also drank some Scotch his parents had, and he tried cocaine once. *Tr 1274 – 75*. T.A. began using marijuana sporadically early in the winter of 2002. *Ex B6, Tr 1147*. When he had it he used it, and when it was all gone he would abstain for weeks or months. *Tr 1147*. He used marijuana in the summer of 2002, on a camping trip with his cousins. *Tr 1163*. Although T.A. knew this wasn't a good idea for him, no later than November 2002 he was using marijuana again. Ms. A. was concerned that Fall that T.A. might be using marijuana again, but was more concerned that T.A. was very depressed and was getting behind in school again. *Tr 1252*. Eventually T.A. admitted to Ms. A. that he was using marijuana again. *Tr 1256 – 57*. He considered it a way of dealing with his depression, as it helped improve his "empty" and "melancholy" mood temporarily. *Ex 19 at 3*. T.A.'s family went to Alaska for Christmas and T.A.'s parents returned before T.A. did. Mr. A. found drug paraphernalia in T.A.'s room. T.A. said he had left it there for his parents to find because he was overwhelmed and needed help. *Tr 1165 – 66*. But T.A. continued to use marijuana until February 2003, and during that time his use escalated. He had a binge in January or February 2003. At times T.A. was using marijuana three or four times daily, sometimes before going to school; if he was home alone after school; or late at night. *Tr 1148, 1165 – 66, Ex B6 at 7*. At the time of the binge T.A. was sometimes notably incapacitated, and he began staying out late after school. *Tr 1165, Exs A19, A28*.

(54) A new semester at FGHS began around February 3, 2003. *Tr 209*. T.A. ran away from home on Tuesday, February 11, 2003, *Tr 206*, and stayed overnight at a

friend's house. He was picked up by the police and returned home on February 14. He confessed to his parents that he had been using marijuana on a fairly regular basis. He had last used marijuana on Tuesday before he ran away. In the weeks before he ran away T.A. had been very "spacey" and reclusive. On some days he was so drugged he could not get out of bed or speak. He had made over \$1000 worth of telephone calls to sex talk lines (which he accessed by spelling words on the computer keypad), and had scanned Internet pornography sites before his parents removed the computer from the home. *Exs A18, B8, Tr 1145 – 46, 1162 – 63, 1273.*

(55) When T.A. returned home on February 14, 2003 his parents brought him to see his therapist, Dr. Patchin. T.A. refused to stop using marijuana, control his angry outbursts, or comply with his parents' wishes. Mr. and Ms. A. then brought T.A. to a hospital emergency room, where he was evaluated and discharged to his parents' care. *Exs A18, A28.* Dr. Patchin noted, "[Ms. A.] does not feel safe bringing [T.A.] home and supervising him without additional supports." *Ex A18.* Ms. A. thought there was something very wrong with T.A., and that she and Mr. A. could not help him. She feared he might harm himself. *Tr 1273.*

### *Leaving FGHS*

(56) On Thursday, February 27, 2003 Mr. A. called Sue Voigt, an assistant principal at FGHS, and informed her that T.A. was undergoing medical testing, would enter a three week wilderness training program on "Sunday," and would be attending PCC in the Spring. T.A. would not be returning to FGHS. *Ex A3, Tr 206, 1304.* On February 27, 2003 Ms. Tsuchida, NP, faxed a note to Ms. Voigt stating that T.A. was currently in treatment for "medical & psych problems" which would necessitate an extended absence from school from February 12 to March 31, 2003. *Ex B6a.*

(57) On March 10, 2003 Mr. A. told Ms. Voigt that T.A. was registered at PCC (as previously arranged through Mr. Garlock), and T.A. was officially disenrolled from FGHS. *Tr 208, ExsA3, B9a.* Mr. A. never informed Ms. Voigt that he was dissatisfied with the District's planned placement of T.A. at PCC, and Ms. Voigt believed at the beginning of the Spring quarter (April 2003) that T.A. was attending PCC in the Partnership Program. *MTr 50 – 51, 150 - 51.* On April 1, 2003 Mr. Garlock enrolled T.A. (with several other students) at the District's Ellen Stevens Community Academy, meaning that he was enrolled in the District but not in the high school. *MTr 32.* Had T.A. remained at FGHS or gone to PCC, he would have been able to graduate on time, in June 2004. *Tr 219 – 20.*

(58) T.A. entered the Catherine Freer Wilderness Therapy Expeditions residential treatment program (Freer) on March 2, 2003. His parents anticipated that he would return home after the three week program ended and begin school at PCC. *Ex A19.* He was admitted to Freer due to substance abuse and oppositional behavior, following his marijuana binge and running away from home. *Ex B8.* On March 22, 2003 Mr. and Ms. A. picked up T.A. from the Freer Wilderness Trek and on March 24, 2003 they enrolled him by telephone in a residential program at Mt. Bachelor Academy (MBA). *See Finding of Fact no. 89.* The next day they took T.A. to Prineville, Oregon to begin attending MBA. *MTr 141.*

(59) On March 24, 2003 Mr. A. left a voicemail message for Mr. Garlock. He wanted Mr. Garlock to know that T.A.'s PCC slot was available because T.A. was enrolled in a

therapeutic boarding school. Mr. Garlock did not receive this message. *MTr 39*. For the same reason, on March 27, 2003 Mr. A. left two voicemail messages for Bob Sorrell, District Options program director, asking him to call back and saying it was very important. Mr. A. did not receive replies to these calls, which were made during Spring break at FGHS. *MTr 151*.

(60) Mr. Garlock first learned that T.A. was not attending PCC in a conversation with Ms. Flick in April 2003, several weeks after the spring term began at FGHS. *MTr 34 - 35*. He then (on April 21, 2003) disenrolled T.A. from the PCC Partnership Program. *MTr 35*.

(61) On March 28, 2003 Mr. A. hired counsel to find out what the parents' rights were, and to notify the District in writing of what the parents were doing. *MTr 141 - 142*. Mr. A. (and presumably Ms. A. as well) was not aware, before placing T.A. at MBA., that the school District could be responsible for paying the costs of sending T.A. to Freer and MBA. *MTr 144*.

#### *Dr. Patchin*

(62) Dr. Susan Patchin has been a licensed psychologist in Oregon since 1995. She received her Bachelor's degree in education and science and her Master's degree and Doctorate (Psy.D. in 1993) in psychology. *Ex A18*. She also has a postdoctoral Master's in clinical psychopharmacology. *Tr 604*. She spends 100 hours or more each year in continuing education studies. *Tr 604-05*. Her practice includes assessment and diagnosis of attention disorders, learning and academic disorders, and treatment of school age children, adolescents and adults. She has been an adjunct faculty member at Pacific University, George Fox University and Warner Pacific College and since 1998 has supervised Master's and Doctoral level interns and residents seeking licensure in the state of Oregon. *Ex A18*. She does contract work for school districts, and over the past five or six years has done approximately 50 parts of evaluations (the IQ test, the behavior survey, participating in the team, etc.) for the District. She also does disability assessments for Lewis and Clark College. *Tr 604 - 07*. From 1982 - 1993 she was a teacher or substitute teacher. *Ex A18*.

(63) Dr. Patchin began seeing T.A. and his parents in April 2000 and has since seen one or more of them approximately 16 times, including 12 hours with T.A. alone. Initially the parents explained that T.A. was having a lot of problems in school and had a history of some anger difficulties. Dr. Patchin has never observed T.A. in school or spoken to any of his teachers about him. *Tr 612 - 14, 723*. T.A. acknowledged to Dr. Patchin that he had trouble in school, especially with homework and staying focused, but he did not think he had a learning disability or ADHD; he believed that if he just applied himself he could do what was required. Dr. Patchin observed, on May 3, 2000, that T.A. appeared to be underestimating his struggles with school and planned to evaluate T.A. for patterns of learning disability (LD) or ADHD. She gave him a diagnosis of Major Depressive Disorder, moderate, single episode. *Ex A18*. T.A.'s difficulties with his schoolwork were a recurring theme in his therapy.

(64) On November 14, 2000 T.A. reported to Dr. Patchin he "did okay" at the end of the school year, and that he wanted to do better but found himself unable to get motivated to start a task and see it through to completion. He was feeling more depressed. Dr. Patchin noted that T.A. needed to be further evaluated for

antidepressant therapy and/or LD or ADHD. *Ex A18.*<sup>17</sup> T.A.'s parents did not follow this recommendation immediately. Among other reasons, there were financial considerations and they wanted to see what evaluations and services the District could provide. *Tr 617– 18.*

(65) Dr. Patchin administered the Behavior Assessment Scale for Children (BASC) to T.A. and his parents in December 2000. *Ex A118.* The BASC is designed to evaluate parent, teacher and self-perceptions of emotional/behavioral functioning of children aged 4 to 18 years. *Ex A17 at 6.* T.A. scored himself in the average range in all of the scales. His mother scored him in the clinical range for hyperactivity, depression, withdrawal and attention problems. His father scored him in the clinical range for attention problems. On December 19, 2000 Dr. Patchin diagnosed dysthymia. *Ex A18.* Dr. Patchin reported that as hard as T.A. was trying he was unable to work at a pace that fit his intelligence, estimated to be average, and that mood and focus were big factors. In January 2001 T.A. told Dr. Patchin that he anticipated receiving passing grades, having done a lot of make-up work to finish the semester. He complained that he hated school and it made him feel dumb. *Ex A18.*

(66) In March 2002 Dr. Patchin administered the Minnesota Multiphasic Personality Inventory Adolescent version (MMPI-A) to T.A., as his behaviors continued to increase in severity as did his school failure. T.A. obtained scores in the average range on all the clinical scales of the MMPI-A. *Ex A18.*

(67) Dr. Patchin observed that a lot of T.A.'s issues surrounded feeling really stupid and believing what people were telling him, which is that if he would just be a little more motivated and stop being so lazy he could get his work done. *Tr 620.* In April 2002 T.A. told Dr. Patchin he was feeling frustrated that he could not “pull it together” long enough to get his work done at school. He was taking Wellbutrin and began to have emotional outbursts at home again, with yelling, crying and sobbing for hours at a time. These spells were often precipitated by his lack of follow through on schoolwork, missing assignments, and getting failing grades. T.A. told Dr. Patchin he couldn't stand how badly school made him feel any more. In May 2002 he had a serious outburst at home aimed at Ms. A. He said about school, “I tried less and less hard because I just can't do it right. I don't learn from the work or by staying after school.” Dr. Patchin referred T.A. for a psychiatric evaluation in May 2002 but this was not pursued because of problems with insurance coverage. Also, cost was a concern for T.A.'s parents. *Tr 771.* In addition, T.A. repeatedly assured his parents he would do better in the future, and they believed him. See *Tr 777– 78.*

(68) In January 2003 T.A. told Dr. Patchin that focus had become a big issue for him in school and at home. *Ex A18.* T.A. could not sit down and focus to read an assignment, and he would get extremely frustrated. This was one manifestation of his impairment in executive function. Another was his difficulty initiating any action that he had any kind of anxiety about or that he found to be difficult. *Tr 624– 26.*

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<sup>17</sup> Dr. Patchin always referred a client to an outside evaluator, rather than conducting the evaluation, when she was doing therapy with the client and his/her family. *Tr 616, 649.*

(69) Dr. Patchin recommended (at the hearing) that at school T.A. have an opportunity, three times a day, to check in with a guidance counselor, teacher or another school staff person who would help him keep track of his assignments and make sure that things he needed to do were done and that appropriate materials were in his backpack. Although T.A. was receiving grades which allowed him to pass from one year of school to the next, Dr. Patchin thought this level of assistance was necessary because in high school T.A. was becoming more and more discouraged, less able to tolerate frustration, and was giving up more easily. At one point T.A.'s parents stopped helping T.A. with his school work but after about a week, although he was making a tremendous effort, he became so overwhelmed by his school work that he could not figure out how to start any more, so his parents intervened again. *Tr 636 – 38, 774 - 75.* Dr. Patchin opined that if the parents had not intervened the things that happened – substance abuse, unusual behaviors, running away – would have happened with more intensity and more quickly; and T.A. would have gotten more grades of D and F. *Tr 775 - 77.* In Dr. Patchin's view T.A. was not an average student who could go to school and pass his classes. For T.A. to achieve passing grades required tremendous effort on his part and the part of his family, and many concessions by his teachers. *Tr 750 - 51.*

(70) Dr. Patchin's chart notes were submitted to the District in response to a subpoena on September 19, 2003. They were not available to the MDT before or during the IDEA and Section 504 eligibility meetings in July and August 2003. *Tr 29 – 32.* The District received a one-page letter prepared by Dr. Patchin. *Tr 106 - 107.* That letter, dated May 3, 2003, *Ex A18 at 7*, was written at the request of T.A.'s parents, with restrictions on the information Dr. Patchin could release.<sup>18</sup> T.A. wanted help but he did not want the school personnel to delve into his emotional life. *Tr 642.*

(71) Dr. Patchin thought T.A. would benefit from coaching; having a card with the multiplication tables written on it that he could use when solving problems so he did not have to depend upon his memory; possibly having a study buddy or note taker in the classroom, with whom he could compare notes (to see if he had missed pertinent facts); being in a study group where other students would be repeating the main points of the lessons; and having as many of his senses involved in his education as possible (seeing, hearing, writing, speaking). *Tr 694 – 95.* She thought it would be hard for T.A. to remain focused in a block class lasting around 90 minutes (a typical class at FGHS), and that breaking the material into smaller chunks so he would not have to sit and do one kind of activity for a really long time would be helpful (as well varying the classroom activities and possibly giving him an outline he could fill in; or giving him the overheads for the class presentations). *Tr 699 – 700.* Dr. Patchin thought T.A. probably needed one on one remedial instruction in math and possibly reading comprehension and writing, and instruction in time management and organizational skills. *Tr 701 – 702.*

(72) Due to his ADHD T.A. needs to be taught how to identify the significant information in a text. He needs to be given instructions one or two steps at a time. He needs to be taught strategies for time management because, like many persons suffering from ADHD, he has not mastered the concept of time and the ability to realistically estimate the time required for an activity. *Tr 704 – 05, 782.*

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<sup>18</sup> T.A.'s parents had asked Dr. Patchin not to have contact with FGHS. *Tr 729 – 30.*

*Dr. Fulop*

(73) Dr. Michael Fulop is a clinical psychologist with a Master's degree in counseling psychology (1988) and a doctorate in psychology (Psy.D.) awarded in 1991. Since receiving his degree he has mainly worked in private practice, involving treatment and assessment of children, adolescents and some young adults and adults. *Tr 271 – 72, Ex B5.*

(74) Dr. Patchin referred T.A. to Dr. Fulop for an evaluation for emotional and learning disorders, ADHD and depression. *Tr 280.* Dr. Fulop saw T.A. and his parents for an initial diagnostic interview on January 27, 2003. He spent about four hours on February 21 and four hours on February 24, 2003 testing T.A. *Tr 916 – 18.*<sup>19</sup> He then drafted his report, saw the parents on March 14, 2003 to discuss his evaluation, possibly made some changes to the draft report, and issued the report on March 15, 2003. *Tr 918.*

(75) As part of the evaluation Dr. Fulop had T.A. and his parents complete BASC rating scales. As when Dr. Patchin administered the BASCs, T.A.'s did not reflect any concerns of clinical significance but his parents' did. Ms. A. gave T.A. clinically significant scores for hyperactivity, conduct problems, depression, attention problems, atypicality, withdrawal, externalizing and internalizing. Mr. A. gave T.A. clinically significant scores for hyperactivity, attention problems, withdrawal and externalizing. *Ex B5 at 7.* Such discrepancies between children and their parents were quite common among Dr. Fulop's patients. *Tr 381, 936.* Dr. Fulop typically sent BASC forms to a student's school but did not do so in this case. *Tr 281.* When he received BASCs from teachers some might show problems in school and some might not, possibly due to the relative difficulty of the subject for the student. For example, students with ADHD, might have more difficulty in math or a foreign language, where they have to pay attention or use working memory. *Tr 939.* Dr. Fulop felt he had sufficient information to evaluate T.A. without direct information from T.A.'s teachers. *Tr 318.* In addition to the information Dr. Fulop received about T.A.'s education from T.A. and his parents, the parents provided him with all of T.A.'s school records (that they had), including his transcript and report cards. *Tr 920- 21.*<sup>20</sup>

(76) Dr. Fulop gave T.A. diagnoses of ADHD, combined subtype,<sup>21</sup> and a dysthymic disorder, a form of depression with relatively long term symptoms such as

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<sup>19</sup> T.A. told Freer on March 2, 2003 that he had last used marijuana 10 days earlier – which would have been just before his evaluation by Dr. Fulop. *See Tr 932, Ex B8.* Dr. Fulop saw T.A. early in the morning on the evaluation days. He did not suspect T.A. was under the influence of marijuana. If he had suspected that he would have suspended the testing. *Tr 957.* Dr. Fulop was formerly an alcohol and drug counselor. *Tr 960.*

<sup>20</sup> Although the District, in its Post-Hearing Brief, attempted to discredit Dr. Fulop's evaluation, *District's Post-Hearing Brief at 20, note 1 and 26,* Dr. Neill, the District's witness and evaluator, described Dr. Fulop's evaluation as "very, very, very comprehensive," *Tr 63.* In addition the District stated in its Pre-Hearing Brief that "[B]ecause Dr. Fulop had done such a comprehensive work-up within the last six months, and since none of the parties disputed the validity of Dr. Fulop's results, there was no need [for Dr. Neill] to conduct additional formal assessments." *District's Pre-Hearing Brief at 4, n.1.*

<sup>21</sup> Under the previous version of the *Diagnostic and Statistical Manual of Mental Disorders, DSM III,* ADHD and ADD were listed separately. Under the current version, *DSM IV,* ADHD is the "main disorder" and there are three subtypes – inattentive, hyperactive, and combined. *Tr 272 – 73.* The main elements are attention problems, hyperactivity at times, motivational problems, and difficulty with executive functioning (including planning of any

sadness, pessimism, very little motivation at times, not a lot of excitement, and often tiredness and feelings of guilt. *Tr 286*. Concerning hyperactivity, Dr. Fulop reported that T.A. was constantly moving his hands and feet, but very subtly. *Tr 292*. Dr. Fulop also observed that T.A. exhibited lack of motivation, lack of social interaction and paucity of speech, and felt bad about himself. *Tr 288*. On IQ testing Dr. Fulop found that TA's full scale IQ score (102) on the Wechsler Adult Intelligence Scale (WAIS-III) was probably pretty accurate.<sup>22</sup> It was significant that there was a 24 point discrepancy between T.A.'s IQ score and his "working memory" score, indicating that TA's ability to attend to auditorily presented nonmeaningful information was quite poor. *Tr 293- 95*. T.A. told Dr. Fulop that it was difficult for him to do his homework because, although he wanted to do it in some ways, he did not seem to be able to get started very effectively. *Tr 301*. On testing T.A. exhibited difficulties with executive functioning. Such difficulties may result in students not bringing their homework home, bringing the wrong homework home, failing to bring home books necessary to complete homework, failing to remember the homework assignment, or failing to turn in completed homework. *Tr 306 – 07*. Dr. Fulop's impression was that unless T.A.'s parents compensated for T.A. difficulties with executive functioning by "kind of [functioning] \* \* \* as the frontal lobes," T.A. would not do his school work at home. *Tr 317 - 18*.

(77) Dr. Fulop found that T.A. had learning problems with auditory memory, auditory discrimination, expressive language, organization, and combinations of the foregoing. He identified T.A.'s academic functional limitations as: reading speed; timed tests; spells poorly; confusion with number sequencing (hearing 233 instead of 332); difficulty with equations; difficulty expressing himself, very slow in speech; organization skills; incomplete work, incomplete assignments; unorganized note taking; cannot use outline; poor recall of material. *Ex B5*. Dr. Fulop gave T.A. additional diagnoses of math disorder and cannabis abuse.<sup>23</sup> He also noted dependency features. *Ex B5*.

(78) Children with ADHD may be able to concentrate for long periods of time on activities they find interesting and stimulating but find it much harder to pay attention when engaged in activities they consider dull, rote and boring. *Tr 275 – 77 (Testimony of Fulop)*. They often have difficulty motivating themselves because they cannot anticipate the future and they cannot anticipate social consequences. *Tr 273*.

(79) Dr. Fulop referred T.A. to a physician for medication management to aid with his problems in inattention, disorganization, academics, working memory and depression. *Ex B5*. Dr. Fulop indicated T.A. was "most likely suffering from a primary alcohol and drug problem," *Ex B5 at 8*, meaning "that's the one we have to address now," although other issues might be as important or might be causative in some ways. *Tr 332 – 33*.

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type). *Tr 273*. Substance abuse and depression are comorbid disorders which occur more frequently among the ADHD than the general population. *Tr 278*.

<sup>22</sup> T.A.'s IQ scores were within the average range of intellectual functioning. *Ex B5*.

<sup>23</sup> One reason some young adults with ADHD use marijuana more often than others might be that, as all kids need a sense of acceptance and belonging, if a student is unsuccessful in school he or she might tend to gravitate toward a peer group in the same situation. That group might be more stimulus seeking and do things that are more out of control, one of which might be drug abuse. *Tr 952 – 53 (Testimony of Fulop)*.

(80) Dr. Fulop recommended that T.A. attend MBA to work on his academic and therapeutic challenges. He was somewhat familiar with MBA as several of his patients had gone there. *Tr 340 – 41*. Also, he had spent a few hours at MBA about a year earlier observing the treatment center. *Tr 928*. Dr. Fulop thought T.A. should be in an environment where he could work on drug issues and school related issues and address both his ADHD and his depression. *Tr 340–41*. He recommended a residential program for T.A. because of T.A.’s failure to live up to his potential in school; his difficulties at home; his attitude toward his school; his sense of hopelessness; and his drug and alcohol problem. *Tr 921 – 22*.

(81) Dr. Fulop recommended that the MDT at T.A.’s school consider him for special education services based upon eligibility criteria for his learning disability, ADHD, depressive disorder and drug and alcohol<sup>24</sup> problems. He recommended extensive “school accommodations” for T.A. including direct training in the SQ4R method<sup>25</sup> for test preparation and reading texts; direct instruction in note-taking; possibly a test taking course or computer program; having T.A. repeat and summarize information often; and time in the learning resource center (regular or special education). *Ex B5*.<sup>26</sup> Dr. Fulop believed these recommendations would be helpful for T.A. wherever he went to school “because otherwise it’s going to be very difficult for him to survive.” *Tr 346*. Dr. Fulop also concluded that T.A. needed a very structured and consistent academic and behavioral environment with consistent rules and expectations regarding homework and school. He recommended a program running between school and home designed to track and reward behaviors necessary for classroom success. *Ex B5*.

(82) In an Appendix to his evaluation Dr. Fulop explained that children with attention problems don’t spend much time thinking about how to get their work done and lack both the internal executive skills and the ability to be self-motivated. Therefore these tasks must be programmed externally when children are young so that they can learn ways to internalize these functions as they get older. He recommended that a supportive team, including T.A., his parents, key or all teachers, tutor, adviser, learning specialist, psychologist and physician, meet at least twice a year to review T.A.’s progress, identify areas of difficulty, and set goals for the future. Various members of the team would meet more frequently to monitor ongoing work. *Ex B5*.

(83) Concerning the evaluation by Vinny Martin, *Ex A2*, Dr. Fulop noted that Mr. Martin’s conclusion that T.A.’s difficulties were motivational did not result from use of

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<sup>24</sup> There was no evidence T.A. had a significant alcohol problem.

<sup>25</sup> Or another, similar method. *Tr 942*.

<sup>26</sup> Other recommendations included shortening homework assignments; sending home a week/month’s assignments in advance; grade on content, not appearance or spelling; making an organizational check of assignment sheet materials in school; permit extra time for tests; let T.A. take tests in non-distracting environment; permit short breaks during tests; adjust grading criteria; permit T.A. to retake tests; highlight main ideas in text; foreign language study waiver (due to T.A.’s difficulties with auditory memory and organizational skills); assign T.A. a low distraction work area; pause frequently during lectures to give T.A. a chance to take notes; write key points on board; give T.A. a copy of teacher outline/overheads; give T.A. feedback on his notes; break lectures or material into short segments; ask T.A. to repeat instructions often, and call on him often; provide special activities in school (computers, Internet, hobbies); case manager assigned to oversee plan outline for T.A. *Ex B5 at 10 – 11*.

any psychological evaluation tools, but seemed to be based solely on seeing lots of kids. *Tr 964 – 66*. One of the really important aspects of ADHD is that those who have it, even though they have appropriate intelligence, memory, etc., tend to have a hard time motivating themselves to get started. And once they get started, because of their executive functioning problems they don't plan very well. Consequently their projects tend to not be completed very well, and they get negative feedback, and then they probably get less motivated. *Tr 969*. Dr. Fulop considered T.A.'s report to Mr. Martin that if something was not interesting to him or too hard, he just started thinking about something else (*Ex A2*) an "almost perfect description" of certain types of distractibility affecting people with ADHD. *Tr 970 – 71*. By contrast, most high school students would probably say that when they had to pay attention in class they could do it, even if the subject matter was boring. *Tr 972*.

#### *Dr. Booth*

(84) Marilyn Booth, MD, is TA's doctor. She began a trial of anti-depressants with T.A. in December 2001, apparently at the recommendation of Dr. Patchin. In March 2002 she noted "ADD?" in T.A.'s chart. Although some medications he tried had had unpleasant side effects for T.A., in May 2002 he was doing well on his current medications (Wellbutrin and Zoloft), feeling good, was able to get school work done, and his grades were improving. *Ex B6*. T.A. stopped taking his medication in July 2002 and was "doing OK" for about two months, but in December 2002 decided to start taking medication again. After resuming the medication he told Dr. Booth he was getting As and Bs in school and participating in extra-curricular and social activities. *Ex B6*. This was no longer true. In January 2003 Ms. A. relayed to Dr. Booth that T.A. felt the antidepressant was not working as well as in the past. T.A. did not take medications consistently as required. *Exs A3 at 29, B6*.

#### *Catherine Freer Wilderness Therapy Expeditions*

(85) T.A.'s parents enrolled him at Freer after he binged on marijuana and ran away from his home. *Ex B8*. At an initial family meeting at Freer on March 2, 2003 T.A. said that he felt depressed most of the time at home. He had been smoking marijuana four or five times per week, often alone, and found marijuana helped improve his mood temporarily. *Ex A19*. He had last used marijuana around February 20, 2003. *Ex B8*. Freer gave T.A. the initial primary diagnosis of cannabis abuse and a secondary diagnosis of depression NOS. These diagnoses were in an unsigned evaluation apparently prepared by Danielle Koehn, "therapist," and Kevin Riley, LCSW. *Ex B8*. Initial interventions for T.A. at Freer were to include psycho-educational groups in various subjects including addictive characteristics, relapse prevention and recovery, anger management, and role playing and staying calm. Individual psychotherapy four times a week and group psychotherapy five times a week were also planned. *Ex B8*.

(86) On or before March 6, 2003 T.A. began a trek with other Freer students and Freer staff. He made good progress with camping and hiking skills although he completed tasks slowly. Freer staff observed that T.A.'s mood had improved but he was fearful his depression would return after the trek. Freer staff felt T.A. had fairly serious depression and by March 10, 2003 were recommending a structured,

therapeutic out-of-home placement that would address T.A.'s depression and his drug use. *Ex A19.*

(87) T.A. was discharged from Freer on March 22, 2003. Although he made a commitment to abstain from alcohol and marijuana at the time of his discharge, Freer staff questioned the sincerity of his commitment. With regard to his "recovery environment" the staff concluded T.A.'s peer group was almost entirely drug users and while his family was supportive, their work schedules made them incapable of providing the constant supervision he required. Upon discharge the Freer staff recommended that T.A. have 24 hour adult supervision; live in a structured environment with clear rules and expectations; participate in ongoing drug and alcohol, cognitive behavioral and family therapy; attend 12 Step meetings; develop a new peer group; and participate in regular physical exercise. The discharge report was written by Silas Halloran-Wright, BA, CADC (Certified Alcohol and Drug Counselor), Wilderness Guide, and reviewed by Mr. Riley, Clinical Coordinator. *Ex A19.* Mr. Halloran-Wright also prepared a "Multi-Axial Assessment" at discharge, reviewed by Mr. Riley, which again identified T.A.'s primary diagnosis as cannabis dependence and his secondary diagnosis as depression NOS. *Ex A19; see also Ex B9.*

(88) On Wednesday, March 12, 2003 Mr. Riley informed Mr. and Ms. A. that the Freer staff was recommending a structured, therapeutic out of home placement that would address T.A.'s depression and his drug use. One day later Mr. and Ms. A. were looking for an alternative home for T.A. in Oregon or Washington and were getting information from Mount Bachelor Academy (MBA). By March 14, 2003, when they met with Dr. Fulop to receive his preliminary test results, *Ex A19,* Mr. and Ms. A. had decided to send T.A. to residential treatment after he left Freer. *Ex A19.* The school they selected was MBA.

#### *Mount Bachelor Academy*

(89) Although FGHS staff believed T.A. had entered PCC at the beginning of April 2003, in fact his parents enrolled him at MBA on March 24, 2003 to continue his education. *Ex A13.* On what appears to be the application form Mr. A. wrote that he had heard about the program from Dr. Fulop, and that enrollment was precipitated by "inappropriate behavior, depression, opposition, drug use, runaway." His specific objectives for T.A. at MBA were "improved verbal processing skills, relationship ability, control depression, study habits." He noted that T.A. had been taking Zoloft for the past four weeks as prescribed, but his history with regard to taking medications was "irregular and resistive." *Ex A13.*

(90) MBA is a residential school which describes itself as providing a "well-rounded academic and emotional growth curriculum that is designed for children who may have academic, behavioral, emotional, or motivational problems." *Ex A13.* The emotional growth curriculum is the school's therapeutic component. *Tr 525.* Most of the 85 students at MBA have some type of learning disability and approximately 40%, or more, have ADHD. Many of the students have drug and alcohol abuse issues. *Tr 525, 528 – 9.* Academic classes at MBA are attended by up to 10 students. *Tr 527.* Many classes employ experiential, hands-on techniques to keep the subject matter exciting and interesting for students. Each student is assigned a mentor who works with the

student as the student progresses through the “emotional growth” component of the curriculum. Students live in dorms with three or four others and are expected to share housekeeping responsibilities. *Ex A13*. At least as of August 6, 2003 MBA has been approved by the State to provide special education programs and services for children with disabilities. *Ex A24*.

(91) An Educational Information form prepared at MBA stated that T.A. had the following specific learning problems: auditory memory; auditory discrimination; expressive language, organizational and time management skills; and processing speed, especially in math. Also low processing speed in reading when speed was required. It described T.A.’s academic limitations as reading speed; timed tests; poor spelling; confusion with number sequencing (i.e. hearing 233 instead of 332); difficulty with equations; difficulty with expressing himself, very slow speech; difficulty completing assignments; unorganized note taking; difficulty with outlines; and poor recall of material. This information came from psychoeducational evaluations (obviously including Dr. Fulop’s) and the Learning Needs Coordinator. It made the following recommendations (among others): all standard accommodations and modifications for ADHD; teach T.A. organizational skills and note-taking techniques; frequent check-ins with T.A. to help him break tasks down into smaller pieces; teach SQ4R method (or similar) for test preparation and reading textbooks; allow T.A. to choose projects and activities of interest to him, and discuss topics with him to “hook” his curiosity to learn about the subject. *Ex A13at 33 – 34*.

(92) T.A. completed an Academic Survey at MBA on which he identified his best subjects as history, English and art and his worst subject as math. *Ex A15*. On a scale of 1 (horrible) to 10 (excellent) he rated himself 0 in organizing a binder and staying caught up in classes; 2 in studying for a test and managing his time; and 5 in keeping track of assignments, solving basic math problems, and completing large projects. He identified his greatest strengths (10) as reading for pleasure; drawing, painting and/or other arts; music; and creative writing. He liked to learn best “by experiencing.” He reported, “I enjoy learning. I get very bored and wander sometimes.” *Ex A15*.

(93) T.A. has a Student Action Plan (Plan) at MBA with academic, social and other goals. His first academic goal is: “[T.A.] will develop self-management skills for ADHD to improve his academic performance and to help prepare for further education or a vocation.” His objectives include attending four Academic Seminars to help him learn about time management and study skills, among other subjects. The Plan also states, as objectives, that T.A.’s teachers and mentors will monitor his organization and time management and teach strategies within the context of the classroom and the dormitory; and that T.A.’s teachers and staff members will model time management and organizational strategies. A second goal is: “[T.A.] will improve his time spent on task during classes.” This goal is accompanied by the following objectives:

1. [T.A.’s] teachers will use multi-modality instruction to help engage him in class activities.
2. [T.A.’s] teachers will use natural consequences to help bring awareness to wasted time.
3. [[T.A.’s] teachers will help him prioritize, plan and estimate completion time for all assignments, along with setting daily class goals.

4. [T.A.'s] teachers will communicate weekly with [his] mentor and the learning needs staff about his progress in this area, so that they are able to provide additional support when needed.

(94) Lisa Fairman has been the learning aids coordinator (special education teacher) at MBA for four years. She has a Master's degree in education and some postgraduate course work toward receiving a special education teaching license. She has a transitional Oregon teaching license in English and special education. She has worked with children with ADHD and mental health issues since April 1997. *Tr 523-24, 550 – 51.* Ms. Fairman observed that T.A. “struggle[d] with education” – had an extremely difficult time focusing in class, being motivated to want to do well in class, sometimes to even get to the classroom. *Tr 529.* In October 2003 Ms. Fairman identified T.A.'s greatest need, academically, as learning how to keep himself engaged in a task even if it was not something he wanted to be doing, including setting up some self-motivators to help himself get through such tasks. *Tr 548.*

(95) T.A., like almost all of the children with ADHD with whom Ms. Fairman has worked, cannot anticipate how long it will take him to accomplish academic tasks and is not good at breaking such tasks down into segments. *Tr 537.* T.A.'s teachers have reported to Ms. Fairman that T.A. has a very difficult time attending to his work and needs a great deal of redirection. She has advised his teachers to set daily goals for each class (read this many pages, find this number of resources), to help him learn how to break large tasks into smaller parts. This is a strategy teachers use with other students who have ADHD. *Tr 539.*

(96) T.A. can come to Ms. Fairman for advice about how to do better in class, how to keep himself focused, and how to get caught up in class when he falls behind. Ms. Fairman has assisted T.A. with his school work and found that it was really difficult to get T.A. engaged in the subject matter at hand, and that he had a really hard time producing school work. She observed, helping him do research, that he would find a different topic that interested him and forget his goal. He needed a lot of redirection to return to his task. *Tr 530 – 31.* In the weekly teachers' meeting at MBA, if teachers raise concerns about T.A. she gives them advice and often follows up with resources they can use – for example, graphic organizers for a particular assignment. *Tr 531.*

(97) At MBA teachers do not assign homework. If students fail to complete class work they can work on their assignments at a study hall period on Sunday afternoons and during some free time in the evenings. T.A. usually did not get all of his work done in class, but his teachers were accommodating him by not giving deadlines and continuing to work with him to help him complete tasks (which Ms. Fairman described as “one of the ways that the teachers are giving him specially designed instruction”). MBA would not give T.A. a failing grade because of his (poor) time management skills. *Tr 575-76.* It was possible for T.A. to get help with his academic work from a peer tutor or a staff person during study hall, or from his mentor, but Ms. Fairman did not know whether he was receiving such help. *Tr 578.* Ms. Fairman thought T.A. was receiving coaching and therapy for his ADHD issues by being at MBA, from his class room teachers and the mentoring staff. The mentors had Bachelor's degrees and were not licensed counselors. *Tr 583 – 84.* Coaching would include assisting students with daily life skills such as keeping their living spaces and their backpacks organized and, by the

teachers, through the structure of the classrooms and helping students break larger tasks down into smaller pieces and setting short-term, rather than long-term, goals. *Tr* 586.

(98) At MBA grades for credit are usually issued in June and December, with progress reports at other times during the year based on the student's work to date. *Tr* 541. *But see Ex A13 at 1.* T.A. received a report card on June 19, 2003, after his teachers completed General Education Teacher Reports about him on June 11, 2003. His grades were A in Communication Skills, B in Dependency and Recovery, and B+ in Biology. He had spent insufficient time in his British Literature, Algebra and Physical Education (P.E.) classes to receive grades. *Ex A13.* Mr. Austin, his teacher for British Literature, reported that he was still getting acquainted with T.A. and his needs because T.A. had only been in his class for a couple of weeks; however, the strategies he used with T.A. included consultation with the special education teacher and individualized instruction. He observed that T.A. needed some one-on-one time to help him stay focused. Mr. Austin needed to check in with T.A. regularly to ensure that he was heading toward successful completion of his assignment. Mr. Austin remarked, "I see him getting lost in a large classroom, where he won't draw attention because he won't be acting out." *Ex A22.* Mr. Harris, the P.E. teacher, reported that he used adapted instructional materials with T.A., and the class was small enough to be able to adapt activities to each student for the most part. *Ex A22.* Mr. Miller, the Biology teacher, utilized strategies including consultation with the special education teacher and the counselor, adapted instructional materials<sup>27</sup> and individualized instruction with T.A. He found that to be successful T.A. needed lots of hands-on, interactive instruction, small class size and one-on-one instruction. *Ex A22.* He noted that T.A. needed to focus more on the class work. *Ex A13.* Mr. Creswell, who taught Dependency and Recovery, found T.A. easily distracted. *Ex A13.* He used strategies including consultation with the special education teacher, adapted instructional materials and alternative testing methods with T.A. He also allowed manual activity during non-writing activities. He felt T.A. needed hands-on activities in order to be successful in his classroom. *Ex A22.* T.A.'s Algebra teacher described him as "Detached and unwilling to participate." *Ex A13.*

(99) T.A. received a Student Progress Report at MBA on July 30, 2003. It noted, "So far this semester he has struggled with things like arriving on time, maintaining focus, and meeting deadlines – all things that have been problems in the past and are related to his diagnosis of ADHD \* \* \* . His classroom behavior and attention to tasks seem to be directly related to his overall mood and current emotional work – as emotional struggles increase, classroom problems increase." *Ex A13.*

(100) T.A. received an Academic Progress Report at MBA on August 7, 2003. His Chemistry teacher observed that T.A. was a very bright, capable student when he applied himself but he had difficulty getting motivated for chemistry. He was often late to class, did not engage well in assignments or labs with other students, and was easily distracted. She frequently put him in study hall to get work done but he had not been very productive. He currently did not have enough work done to earn a grade. In

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<sup>27</sup> Examples of adapted instructional materials in other subjects included video projects in history and sculpting geometric shapes in geometry (special education). *Tr* 533-34.

Political Science his teacher commented that T.A. enjoyed participating in class discussions but had some difficulty staying on task. He tended to “fade out” of the assignment he was supposed to be working on and had not handed in enough work to get a passing grade. In British Literature Mr. Austin, still his teacher, found T.A. very bright and curious but tough to keep on task. He tended to get distracted easily and needed to be refocused. He was passing. In General Art his teacher considered him very talented but easily distracted, commenting that he needed to learn to follow direction, even when he thought work was below his skill level, and do his projects at an advanced level. His approximate grade was B. *Ex A22*. In Applied Geometry, a specially designed instruction class with three students, *Tr 534*, his teacher – Mr. Miller again - found that T.A. seemed to do better with hands-on projects and was staying “reasonably on track” working on geometric sculptures. Mr. Miller reported, “[T.A.] is very easily distracted. Some of this can be attributed to the way his mind works but some of it is definitely within his control and I would like to see him exercise more of that control.” His approximate current grade was C. *Ex A22*. At the end of September 2003 T.A.’s grades on his progress report were incomplete in Chemistry, F in Political Science and incomplete in Applied Geometry (all due to failure to complete enough work to earn credit – possibly because he had been removed from some classes to work on the emotional growth curriculum); C- in British Literature, C in Communication Skills group, and B in Art. His teachers continued to comment that he was easily distracted and struggled to stay motivated and involved in class work. *Tr 541 – 42*. Nevertheless, it was anticipated T.A. would graduate at the end of his senior year, in June 2004. *Tr 545*.

(101) T.A. committed a number of serious rule violations at MBA. These included sneaking into a female student’s dormitory and having sexual intercourse with her; leaving his dormitory late at night and wandering around the campus; and one night leading a group of students to break into a “sacred” building on the campus and into locked closets and cabinets in the building. *Ex B25*. He worked on a “self-reflective study” from June 16 to July 14, 2003 to address the emotional issues which MBA staff believed had resulted in these behaviors. *Ex B25*.

(102) Monthly tuition at MBA is \$5200. In addition T.A.’s parents paid an application fee (\$50), admission interview fee (\$1500), linen fee (\$275), and “alumni services” fees (\$1200 in March and \$2000 in April and May 2003). They were charged \$320.50 for wilderness clothing (presumably for T.A.) and \$680 on April 2, 2003 for a psychological evaluation by Dr. Conway. *Ex A13 at 14*.

### *Hearing Request*

(103) Mr. and Ms. A. requested a hearing on April 18, 2003, seeking (among other remedies) an order requiring the District to evaluate T.A. in all areas of suspected disability (Other Health Impaired (OHI) and Emotionally Disturbed (ED)). *Ex A4*. The District then initiated the evaluation process. *Exs A5, A6*.

### *Dr. Neill’s Assessment*

(104) Dr. Patricia Neill is a school psychologist who was engaged by the District in June 2003 to visit MBA and assist in determining whether T.A. had a disability that

significantly interfered with his educational performance in the general education program. *Tr 65*. She has earned a Bachelor's degree in psychology; a school psychologist certification and a Master's degree in educational psychology (1976 – 79); and a Ph.D. in educational psychology (1981). *Ex B21*. She has participated in many continuing education programs, and has conducted a number of trainings and workshops in her field. *Tr 54*. A majority of her career has been working directly with public schools and school-based programs, or training people to work in such school and programs. *Tr 53*. She has been employed for many years as a school psychologist, and has also worked as a special education facilitator; the chair of the school psychology department at a university; a research therapist; and an evaluation specialist. She has taught courses in many subjects at the college level. *Ex B21*. While employed by the Beaverton School District several years ago she wrote a paper describing how to assess students for special education. *Tr 49*. She is currently employed with the Northwest Regional Education Service District to provide support to school age special education programs. *Tr 39, 47 – 48*.

(105) Dr. Neill has assessed well over 1000 students for eligibility for special education. She believes that “special education is designed to service kids with very significant disabilities that interfere a great deal with their ability to benefit from the education program.” *Tr 52*.

(106) Although Dr. Neill would have preferred to do her own assessment of T.A., as he had just had a “very, very, very comprehensive evaluation done by Dr. Fulop” (*Tr 63, Testimony of Neill*) and MBA was just finishing administering the Kaufman Test of Educational Achievement (K-TEA) to T.A. when she arrived there, she relied upon the prior testing. *Tr 63 - 64*. Another reason Dr. Neill did not retest T.A. is that certain tests are not supposed to be repeated in less than one year. *Tr 64 – 65*.

(107) As part of her assessment Dr. Neill reviewed T.A.'s records from the District, reports from Freer, MBA records, Dr. Fulop's report and Dr. Patchin's report (presumably the letter of May 3, 2003). She spoke briefly with Dr. Patchin and interviewed FGHS staff. *Ex A17, Tr 976 – 77*. She informed Ms. A. that she would be going to MBA to do some testing but did not ask Mr. or Ms. A. for any information about T.A. *Tr 978, 1219*.

(108) Dr. Neill saw nothing in T.A.'s middle school grades which would have “raised a red flag” in terms of referral for special education. However, if T.A.'s parents (or teachers) had been contacting her at that time and expressing concerns, she would have begun working with the parents and T.A. to find out what was going on, and begun to intervene. *Tr 89 – 90*. Dr. Neill concluded T.A.'s high school grades for two and one-half years indicated that it was very likely he had the skills to do the work but was not getting the work in, or was having a problem getting the work in. *Tr 91 – 92*.

(109) Dr. Neill visited MBA on June 10 – 11, 2003 to observe T.A. and speak with him and MBA staff. She conducted an informal academic assessment of T.A. and had Behavior Rating Scales for Children (BASCs) completed by T.A. and by his teachers, Mr. Miller, Mr. Austin, Mr. Creswell and Mr. Harris. None of these – nor a BASC completed by Mr. Thias on June 3, 2003 - showed problems in the clinically

significant range. *Exs A17 at 7 – 8, B15.* At that time one or more of the MBA teachers had only been teaching T.A. for a few weeks. *See Ex B15 at 1.*

(110) When Dr. Neill observed T.A. in his science class at MBA he appeared to be focused and fully engaged with the academic tasks, attentive to the teacher and the directions. He also seemed task oriented during his math class, where he was completing a test. *Ex A17, Tr 979.* The classes where Dr. Neill observed T.A. at MBA had approximately five to seven students, while classes at FGHS have approximately 30. *Tr 974.* During lunch, free and passing times at MBA Dr. Neill observed that T.A. appeared to associate with small groups of students or he stayed alone, appearing comfortable in all situations. *Ex A17.* He was able to sit through lunch, with a couple of other students. *Tr 1037.* Although T.A.'s schedule at MBA was very fluid he understood how to find out where he was supposed to be and go there. *Tr 100.* He knew where to get the materials he needed. *Tr 1038.* T.A. was open and forthcoming with Dr. Neill. *Ex A17.* He told her that he liked school and learning and enjoyed reading and writing. *Tr 101.* He said his main difficulty with school was getting his work done, and that was very much tied to his interest and whether he was bored with it. *Tr 100.* Because Dr. Neill saw T.A. after he had been at MBA for several months time, it is possible he was doing better than he had been initially due to the effects of the treatment program there. *Tr 959 (Testimony of Fulop), 979.*

(111) MBA assessed T.A.'s academic skill development using the K-TEA in June 2003. The examiner observed that T.A. was distracted very easily. *Ex B10.* T.A.'s composite scores, based on age norms, were in the 77<sup>th</sup> percentile for reading (above average – grade equivalent above 12.9) and the 25<sup>th</sup> percentile for mathematics (average – grade equivalent 7.9). *Ex B10.* Dr. Neill came to the following conclusion:

These scores indicate a relative (to himself and his age-mates) weakness with fractions, advanced computations, and algebraic equations. During informal math assessment and observation in his math class, there were no indications of math processing deficits or specific disabilities in the area of math. There appear to be some holes in his skill development rather than a math learning disability.

Dr. Neill also commented that “[T.A.’s] assessed academic skill acquisition and overall classroom performance (with the exception of work completion) are commensurate with his assessed potential for learning. Maintaining interest, focus and attention to task are reportedly (teachers and self-report) problems for [T.A.]” *Ex A17.* She acknowledged that the staff at MBA were well versed in ADHD and would be “more hypersensitive to noting attention and focus and distractibility.” *Tr 120.* She recommended that a meeting be held to review the evaluation results to determine whether T.A. was eligible for and in need of special education services. *Ex A17.*

*Ms. Flick and FGHS*

(112) Betty Flick became the Assistant Student Services Director in the District ten years ago, and when the Director retired in 2003 she was promoted to his position. She has a Bachelor's degree in child development with standard elementary, standard severely handicapped, and standard learning disability certifications. She also has a

Master's degree in counseling and an administrative certification through the State of Oregon. She has worked as an instructional assistant; a learning disability specialist for two years at a time when children with ADHD were identified as learning disabled; and a resource room teacher for three years with emotionally disturbed, learning disabled and other students. She also taught in a regular education classroom, although approximately 10 of the 38 students had various handicapping conditions. Thereafter, for eight years, she worked as a child development specialist in the District, providing counseling and evaluation for special education services. The majority of the students she saw as a counselor at the elementary level had attention problems. She was responsible for testing and evaluation for special education services for about half of the students in the District (she conducted about 50 evaluations each year). *Tr 354 – 58.*

(113) Ms. Flick estimated that throughout the District there might be 285 to 570 students (five to 10 percent of the student population) with ADHD, with 27 on 504 plans for ADHD and at least 27 eligible under the IDEA as OHI due to ADD or ADHD. *Tr 361 - 64.* In Ms. Flick's opinion, the difference between those who did and did not qualify for services under the IDEA or 504 plans was "definitely the severity of the behaviors that they demonstrate within the school setting." *Tr 364 - 65.*

(114) Reviewing T.A.'s grade record before the IDEA meeting, Ms. Flick concluded that T.A.'s ADHD was not having an adverse impact on his educational performance because he was not having academic difficulties "across the board in all classes," and had gotten B's or C's in some of the more challenging academic classes (for example, world studies). *Tr 419-20.* Although T.A. had received some failing grades he was not "flunking out" of school, and was advancing with his class at FGHS at the end of each semester until he left the school.

(115) At FGHS many students did not turn in their homework. Ms. Flick related this, at least in part, to the fact that the District had a very high proportion of students whose families were not wealthy, and who were eligible for free and reduced lunch; quite a few of the students were holding down jobs as well as attending school. Ms. Flick also noted that there were many students in the District for whom English was a second language. *Tr 1341 – 43.* The number of failing grades T.A. received at FGHS was not unusual. In the Fall semester of 2002 approximately 210 of the 504 freshman students in the District had grades of F in one or more classes. *Tr 366.* In Fall 2003 FGHS had a new plan to assist students who had three or more grades of F (out of 8 classes) on a progress report. *Tr 1309.*

(116) At FGHS there was some instruction in study skills in career education classes; the school sold notebooks with dividers and a calendar which students could use for their A and B block days; one of the health teachers and a lot of the teachers of freshmen helped the students get their notebooks organized and write down their assignments, and many of the teachers helped the students with note-taking. *Tr 215 – 217.* Some of Dr. Fulop's recommended academic adjustments for T.A. were implemented routinely by some of the teachers at FGHS. Some teachers gave out assignments in advance; teachers might make modifications (such as reducing homework assignments) for students when necessary in special circumstances; and teachers might have a variety of activities in 85 minutes of block time rather than having the students sit and take notes throughout the block. *Tr 229 – 33.*

*MDT: IDEA Meeting*

(117) An MDT met on July 7, 2003 to determine whether T.A. met the disability criteria in the IDEA for a learning disability, ED or OHI. The following MDT members participated in the July meeting: Ms. Flick, Mr. and Ms. A., Dr. Patchin, Mr. Garlock, Ms. Voigt, Ms. Reikofski, Dr. Neill and Ms. Pappelis. Ms. Nancy Hungerford and Ms. Broadhurst, attorneys, were also present. *Ex B20.*

(118) As part of the evaluation process Dr. Patchin submitted a statement indicating that health conditions that affected T.A.'s educational performance were major depressive disorder, dysthymic disorder, and ADHD, combined type. *Ex B16.* Dr. Booth submitted a statement the next day identifying the conditions affecting T.A.'s educational performance as ADHD and a math learning disorder. *Ex B17.*

(119) Mr. and Ms. A. had the opportunity, at the MDT meeting, to describe T.A.'s struggles and behaviors; the amount of work they did throughout his school career to enable him to complete his homework and school work; and the fact that he brought an inordinate amount of school work home that he could not complete in class. They explained the extra efforts they (mostly Ms. A.) made throughout T.A.'s high school years to contact teachers, gather missing work and provide T.A. a structured environment at home in which to do his school work. *Ex A26.* When A.A. tutored T.A. she taught him a lot of study skills. *Ex B20.* Nevertheless, the parents related that they typically spent two to four hours most week nights and significant time on the weekends helping T.A. with school work. They said T.A. particularly had trouble at FGHS with projects, reports, and completing school work and turning it in. He was given numerous opportunities to redo work, turn in late and missing assignments, retake tests, etc. One or more of the MDT members said T.A.'s school record did not show an adverse affect on his school performance since he was not completely failing school, although his grade point average had dropped significantly since middle school. *Ex A26.* When the parents brought up incidents in T.A.'s school history that required parent visits to school and conferences with teachers, T.A.'s depression and anxiety issues, his daily struggles with homework, etc. Dr. Neill and possibly one or more of the other District MDT members responded that that information was not in the school records and should have been brought up earlier. *Ex A26, Tr 1005, 1283 – 86, 1292 -95, 1299 - 1300.*

(120) Mr. A. did not feel the District representatives (with the possible exception of Mr. Garlock) considered the parents' information, because of the repeated comments that the information was not in the record and could not be considered at the meeting, and that the District had no control over what happened in the home and it could not be considered, etc. *Tr 1052; see also Tr 654 (Testimony of Patchin).* Mr. A. did not believe all or most of the District representatives took into account the fact that a lot, or most, of the school work T.A. completed to get passing grades was accomplished at home. *Tr 1054.*

(121) Dr. Neill identified "specially designed instruction," in the context of the IDEA, as the need "to modify, very significantly change, the method that we're using, the techniques that we're using, the delivery system, the level of it, significant changes in how and what we're teaching order for the student to benefit and learn." *Tr 130.* She

thought all of the suggestions in Dr. Fulop's report were accommodations which were provided in the general education process (although they could also be provided through special education or a 504 plan). *Tr 130*. Dr. Neill did not believe that, if a student was eligible for special education services and the District did not offer an appropriate education including those services, the District could be responsible for paying for a residential placement for the student. *Tr 1019 – 1021*. She thought a child with severe ADHD would "tend to have the activity level, \* \* \* hyperactivity level, impulsivity, jumping mentally and physically from thing to thing to thing to thing, a great deal of difficulty staying with task and with thought and maintaining that kind of intact processing." *Tr 111 – 12*.

(122) Dr. Neill related that MBA staff reported T.A. was very on task and very engaged in his studies. *Ex B20. But cf Findings of Fact nos. 95, 98, above*.

(123) At the IDEA and 504 meetings Dr. Patchin had an opportunity to offer comments and information about T.A. from her past experience. *Tr 32*. She explained at the IDEA meeting, and earlier to Dr. Neill, why she believed T.A. met the eligibility criteria for special education services. She had also explained to Dr. Neill previously why she thought the District made an error in their original assessment of T.A. *Tr 657 – 58*.

(124) The MDT acknowledged that T.A.'s emotional or behavioral problems had existed over an extended period of time, but all members except Mr. and Ms. A. and Dr. Patchin agreed that T.A. did not qualify for special education in the area of ED. (Also, all members of the MDT except Mr. and Ms. A. agreed that T.A. did not qualify for special education in the area of learning disability (Dr. Patchin did not vote)). In the area of OHI the MDT concluded T.A.'s condition, ADHD, was permanent or expected to last for more than 60 calendar days, but the majority declined to find that his disability had an adverse impact on his educational performance. *Ex A14*. Dr. Neill commented that the IDEA was intended to serve only those students whose disabilities had a "very severe, significant impact" on their education, and who had "tremendously significant disabilities." *Tr 897 (Testimony of Pappelis)*. When the District representatives of the MDT discussed the question of whether T.A.'s disabilities – OHI and depression - had an adverse impact on his educational performance, they considered whether they had a "severe, significant impact," and concluded it was not severe enough. *Tr 660*. All voting members of the MDT (Mr. Garlock left early and did not vote) except Mr. and Ms. A. and Dr. Patchin agreed that T.A. did not qualify for special education in the area of OHI. *Ex A14*.

#### *MDT: 504 Meeting*

(125) The District conducted a Section 504 eligibility meeting for T.A. on August 26, 2003. Participants included Mr. and Ms. A., Dr. Patchin, Ms. Flick, Mr. Thias, Ms. Reikofski, Ms. Voigt and Dr. Neill. *Ex B24*. Ms. Nancy Hungerford and Ms. Broadhurst also participated. Mr. and Ms. A. took notes at the meeting and reported the following:

We described life with [T.A.] and how his depression and anxiety made it so difficult for everyone at home. We had worked hours each evening for years to focus [T.A.] on his 'homework' (which also was make-up

schoolwork which he couldn't get done in class). Tears, tirades, constant refocusing and arguing were the norm at home. Many assignments were done two or three times because [T.A.] would forget to turn them in or would lose them the next day. He had many test retakes over the years. His Spanish teacher \* \* \* offered that if [T.A.] would draw him a cartoon in Spanish he would pass him. All this means that without the special help at home (including tutoring by his college-age sister) and allowances by his teachers, he would not have been able to progress as far as he did in his school career.

*Ex A27.* The parents also reported that T.A. had difficulty following directions for building models, playing board games and executing simple recipes; could not sit still during meals; was unable to monitor his own time and needed timers or reminders; couldn't follow through and execute tasks and had other difficulties coping with daily life. *Ex A27, Tr 1055.*

(126) On the Section 504 Action Plan for T.A. the MDT members concluded T.A. had a physical or mental impairment (identified on the form as mild depression and ADHD). Ms. Flick explained that "substantially limits" means can't do it at all. *Tr 1215.* Dr. Neill thought 504 plans were more typically developed for kids that are on medications that have a significant impact in terms of work production, or movement through the halls, passing in class. *Tr 1001.* Ms. Voigt, Ms. Flick, Dr. Neill and Ms. Reikofski thought T.A.'s impairments did not substantially limit a major life activity; consequently he was ineligible for services/accommodations. *Ex B24.* Mr.A., Ms. A., Mr. Thais and Dr. Patchin disagreed. *Ex B24.* Dr. Patchin believed T.A.'s disability substantially limited his ability in the major life activities of learning, working and caring for himself. In the area of learning she observed that he had limitations in (at least) getting his materials together and sitting down and focusing. *Tr 691.* Ms. A. felt her input at the meeting was not valued, as the problems she and Mr. A. described were met with such comments (at this and the IDEA eligibility meeting) as, all kids do that; it's not in the school records; and, it can't be considered if it happens outside of the school day. *Tr 1215.*

*Dr. Callum*

(127) Dr. L. Martha. Callum received her B.S. in biology and psychology (1978), her M.S. in interdisciplinary counseling psychology (1987), and her Ed.D. (1997) concentrating on neuropsychology. She also has postdoctoral training in neuropsychology. She has been employed in the past as a school psychologist/neuropsychologist and a teaching associate in educational psychology. *Ex B22.* She has been employed from 1999 to the present as the District Behavioral Specialist in the Hillsboro, Oregon school district. In that position she is a consultant in 26 schools for the teachers, principals, psychologists and others who deal with children with disabilities. She consults about behavior, attention deficit, learning disabilities and anything else that impedes a child's performance significantly. *Tr 786.* She related that in her previous work in other states, over the course of 10 years she conducted over 250 student evaluations annually to identify 13 disabilities that are federally regulated, including ADHD, and she served on eligibility teams for all of the students she evaluated. *Tr 787-88.*

(128) Dr. Callum reviewed the reports of Drs. Fulop, Neill and Patchin; the reports from Freer; and all of T.A.'s grade reports starting with kindergarten. She also reviewed the testimony of four of the teachers who testified at the hearing (Ms. Vieth testified after Dr. Callum). *Tr 798*. She did not meet any of the psychologists or teachers or T.A. or his parents; she only had written information. *Tr 810 – 11, 862*. She found no information in T.A.'s educational history (that was available before the parents placed T.A. at MBA) which would have indicated to her that T.A. should have been referred for an assessment for eligibility under the IDEA or 504. *Tr 798 – 99, 845*. *But see Finding of Fact no. 21, above*.

(129) Dr. Callum noted, from comments on T.A.'s grade reports, that in 7<sup>th</sup> and 8<sup>th</sup> grade he had missing assignments and indications of issues with time management and following instructions, but observed that he had no failing grades and concluded he eventually got his work in. She stated,

So the big crux in the 7<sup>th</sup> and 8<sup>th</sup> grade were the missing assignments, but yet an – a true ADHD child with no other difficulties surrounding it would not be able to do that. They just don't have the ability to say, I've got to get organized and I've got to get my assignments in in order to get my grade in. \* \* \* [T.A.] knew exactly what he had to do and he got his assignment turned in to turn his grades around.

*Tr 804 – 05*. When asked how – based on the information she had reviewed – T.A. differed from the students with ADHD who were found eligible as OHI under the IDEA, or eligible under 504, Dr. Callum said, "He has a lot of things going for him. For whatever reason, he always managed to get his work done." *Tr 810*. Reviewing the parents' description of the assistance they provided for T.A., in Exhibit A26 at 2, she said,

[L]ooking at this paragraph, it's nothing different than what I've dealt with students in the high school setting where parents come to me and say they're very concerned, that they also have missing assignments and that they spend six hours a night with their kids, that they have to, you know, literally ground them to get them to do work.

This is nothing that again stands out significantly different from the average high school student. Some kids require parents to just be on top of them and provide that structure at home.

*Tr 812*. Dr. Callum also concluded, "[L]ooking through all the records, [T.A.'s] ADHD had nothing really to do to impede his academic performance, while what's seeming to be the cause here is the substance abuse causing the deterioration in family relationships and also the educational performance, which goes along with what happens when you have substance abuse in cases like that." *Tr 817 – 18*.

(130) Dr. Callum observed, based on the records she reviewed, that T.A. was focused in class, in contrast to students on whom ADHD had an adverse impact. But she acknowledged that "[i]f students with ADHD have a connection, if they have a

relationship, if they have an interest in the subject matter or in the teacher or in the particular environment that they're in, they will then be able to concentrate and be able to do it." *Tr 822 – 25*. Although, according to Dr. Callum, even with those favorable circumstances a student with ADHD might not necessarily continuously be able to follow what is going on in class when the class lasts for 90 minutes. *Tr 875*. Her theory – not shared by the other psychologists involved in the evaluation – was that “the oppositional behavior type of diagnosis \* \* \* [seemed] to be more what’s going on here than just attention deficit. Attention deficit seems to be more of a secondary, possibly, tertiary. *Tr 826*.

(131) To Dr. Callum “adverse impact” as used in the IDEA, and “significantly impaired” meant a child’s disability did not allow the child to be able to meet minimum course requirements. *Tr 827*.

(132) Dr. Callum thought FGHS was like many other high schools in allowing students 20 to 30 minutes of class time (out of a class period of approximately 85 to 90 minutes) to work on class work and homework, with the teacher available for assistance. One of the reasons for this was that a lot of students did not have support at home. *Tr 838*. She thought many high school students worked with their parents at home for two to four hours to complete their homework and class work, but it was not the expectation of the high schools that parents would be involved to that extent. *Tr 836 – 38*. Based on her document review she believed the time T.A. had to do his work in school (20 to 30 minutes during a class period) was sufficient to meet the requirements of his classes. *Tr 839 - 40*. She assumed he got his class work done during that time and wondered what work he did at home and why it took so much time. *Tr 839 - 40*.

### **CONCLUSIONS OF LAW**

- (1) The District had the burden of proving that it offered T.A. a free appropriate public education (FAPE) under the IDEA, including an appropriate evaluation. The District failed to meet that burden.
- (2) T.A. is eligible for special education under the IDEA as a student with an Other Health Impairment.
- (3) T.A. is eligible for services under Section 504 of the Rehabilitation Act of 1973 as a qualified handicapped person.
- (4) The District is not responsible for reimbursing the parents for the cost of the evaluation by Dr. Fulop.
- (5) The District is not responsible for reimbursing the parents for the cost of Freer.
- (6) Until the District offers T.A. a FAPE, the District is responsible for reimbursing the parents for their necessary expenses to send T.A. to MBA.

## OPINION

The Individuals with Disabilities Education Act (IDEA, or Act), as amended effective June 4, 1997, is a response to a finding by the Congress that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 *United States Code* (USC) §1400(c). One purpose of the Act is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living. 20 USC §1400(d).

To receive financial assistance from the federal government under the Act a State must ensure, among other requirements, that a FAPE is available to all children with disabilities residing in the State between the ages of 3 and 21 (with certain exceptions irrelevant here) 20 USC §1412. Federal regulations implementing the IDEA are found at 34 *Code of Federal Regulations* (CFR) part 300, and apply to each state that receives payments under Part B of the IDEA. 34 CFR §§300.2, 300.4. The federal regulations are for the most part mirrored in Oregon Administrative Rule (OAR) 581-015-005 *et seq.*

### *Burden of Proof*

In an administrative hearing the school district has the burden of proving compliance with the IDEA including the appropriateness of its evaluation and its proposed placement for a student. *Seattle School Dist. No. 1 v. B.S.*, 82 F3d 1493, 1498 (9<sup>th</sup> Cir 1996). The District has the burden of proof on the issue of whether it offered T.A. a FAPE, and in particular whether its determination that he was not a child with a disability, and was not eligible for special education services, met the requirements of the IDEA.

Furthermore, I conclude that although at least under the IDEA the parents do not have the burden of proof, they have shown by a preponderance of the evidence that T.A. is a student with a disability – ADHD, an Other Health Impairment - who is eligible to receive special education services, and who is entitled to the benefits of Section 504 as a qualified handicapped person. See 34 CFR §§104.3,104.33.

### *The Disability at Issue*

Mr. and Ms. A. initially claimed that T.A. had a specific learning disability in the area of math but they later withdrew that contention. At the hearing they took the position that T.A. should be considered a child with a disability under the IDEA due to an OHI resulting from his ADHD, or due to an emotional disturbance (ED). In their closing brief the parents, in setting forth proposed ultimate findings of fact, no longer allege that T.A. suffers from an ED. *T.A.’s Closing Brief at 7 – 8*. They request that if T.A. is determined to be a student with an OHI, there be no finding as to whether he also meets the criteria for ED. *T.A.’s Closing Brief at 31*. Consequently I consider that issue withdrawn and do not address it.

*Other Health Impairment (OHI)*

School districts shall identify, locate and evaluate all resident children who may have a disability and who may need special education services. OAR 581-015-0037. "Children with disabilities" includes children who require special education because of other health impairments. OAR 581-015-005(4); 34 CFR §300.7. OHI is defined in OAR 581-015-005(4) as follows:

(h) "Other Health Impairment" means limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that:

(A) Is due to chronic or acute health problems (e.g. a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, attention deficit disorder, attention deficit hyperactivity disorder, leukemia, or diabetes); and

(B) Adversely affects a child's educational performance.

See 34 §CFR 300.7(c).

The criteria for evaluation and for an eligibility determination for OHI are provided in OAR 581-015-0051(8):

(8) Other Health Impairment:

(a) If a child is suspected of having another health impairment, the following evaluation shall be conducted:

(A) A medical statement or a health assessment statement, indicating a diagnosis of a health impairment or a description of the impairment, and a statement that the child's condition is permanent or is expected to last for more than 60 calendar days;

(B) Assessments to determine the impact of the suspected disability:

(i) On the child's educational performance for a school-age child; or

(ii) On the child's developmental progress for a preschool child; and

(C) Additional evaluations or assessments that are necessary to identify the child's educational needs.

(b) For a child suspected of having another health impairment, the child shall meet all of the minimum criteria:

(A) The child exhibits limited strength, vitality or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment;

(B) The child's limited strength, vitality or alertness is due to a chronic or acute health problem; and

(C) The child's condition is permanent or expected to last for more than 60 calendar days.

(c) For a child to be eligible for special education services as a child with another health impairment, the eligibility team shall determine that:

(A) The child's disability has an adverse impact on the child's educational performance; and

(B) The child needs special education services as a result of the disability.

#### T.A.'s Disability

T.A. has a chronic health problem - ADHD – which has lasted for more than 60 days. Due to ADHD T.A. has a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment. Because he is extremely distractible it is very difficult for him to remain focused on school work, in class or in other locations where he is doing school work, unless the material is of special interest to him or something else in the situation – the personality or techniques of the instructor, for example – enables him to concentrate.

The symptoms and functional limitations imposed by T.A.'s disability were readily apparent to Mr. and Ms. A. and A.A., who worked with him individually, and to his teachers at MBA, who saw T.A. in small classes and were well acquainted with ADHD. At FGHS Mr. Austin's predication that T.A. would get lost in a large classroom (where he would not draw attention because he would not be "acting out") was fulfilled. In some classes where the subject matter, instructor or style of instruction was particularly compelling (for example, Mr. Thompson's class at FGHS ) T.A. could maintain his focus, as is typical of many students with ADHD. In other classes such as math and Spanish, which Dr. Fulop identified as particularly difficult for students with ADHD, T.A. had a particularly hard time.

#### *T.A.'s Disability Has an Adverse Impact on His Educational Performance*

T.A.'s disability adversely affects his educational performance by limiting his ability to keep track of, begin, concentrate on, complete and submit school assignments without frequent reminders and assistance.

The District asserts that because at FGHS T.A. had a C- average and was passing from grade to grade, was not a behavior problem, did not demonstrate stereotypical hyperactive behavior, and was "on task" when called on in certain classes his educational performance was not adversely affected by ADHD. *District's Post-Hearing Brief at 4 – 7, 10.* The District states, "[A]dverse impact exists only when a student is unable to access the regular education program; that is, when a student is not able to understand and participate in the regular classroom curriculum. Evidence of such inability could be failing grades, achievement test scores indicating a lack of knowledge of the regular curriculum, or anecdotal information from the

classroom teachers.” *District’s Post-Hearing Brief at 4.* But the District’s argument ignores the enormous effort by T.A. and his family which made it possible for him to continue to progress with his grade. Furthermore, OAR 581-015-0053(3) states that a child shall be found eligible as a child with a disability under the criteria in OAR 581-015-0051 if the child has a disability and needs special education and related services, even though the child is advancing from grade to grade.

Ms. A. credibly described how, during T.A.’s years at FGHS, she spent hours on school nights and on weekends either helping T.A. with his specific assignments or redirecting his attention to his homework. She tried to teach T.A. how to read a book for information, to find the important points, to organize a paper. She sent e-mails and made visits to T.A.’s teachers to find out what he was supposed to be doing and whether he had done it. She collected T.A.’s assignments from his teachers when necessary and told a number of teachers and other staff members at FGHS of her concerns about T.A.’s academic performance.<sup>28</sup> T.A.’s father and his sister were involved to a lesser extent with assisting T.A. with his school work.

T.A.’s problem was not just that he could not get his homework done independently. He was consistently behind in his class work as well. Ms. A. recounted the allowances some of T.A.’s teachers made for him over the years to enable him to pass his classes – by drawing a cartoon instead of passing a Spanish test; using a free period to catch up in Biology; and giving him (as well as many others) passing grades although he failed to submit a significant portion of his homework. FGHS also allowed T.A. (and other students) to turn a failing grade into a passing grade through credit recovery, but it took T.A. almost three times longer than other participants in the credit recovery class to complete his work. *Ex A28.*

Ms. Flick observed that many students at FGHS had difficulty getting their work done, and it appeared that the school was not seriously concerned about a student’s achievement (or lack thereof) until he or she had earned at least three Fs in one grading period. *See Finding of Fact no. 115, above.* Ms. Flick explained the FGHS students’ overall poor performance as related to the fact that many of the students spoke English as a second language, or came from poor families and had to work as well as attend school. But T.A. was not subject to these disadvantages. In addition, until T.A. began seriously abusing marijuana in Fall 2002 he had almost no social life outside school except with his family, and during his years at FGHS he almost never participated in extra-curricular activities. His after school life, sometimes late into the night, was mostly devoted to doing school work, and he liked to learn and wanted to do well in school. T.A. was not unwilling, or too busy, to do his school work independently – he was, due to his disability, unable.

#### *T.A. Needs Special Education Services as a Result of His Disability*

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<sup>28</sup> Ms. A.’s testimony about her numerous contacts with T.A.’s teachers and other FGHS staff, in which she discussed T.A.’s difficulties and made efforts to help him keep abreast of his school work, was not refuted by the District. Nor was there any rebuttal of A.A.’s testimony about her communications with FGHS staff while she was tutoring T.A. Furthermore, although the District attempts to discount the parents’ testimony as to the assistance they gave T.A., *see District’s Closing Brief at 7 – 8,* I find their testimony credible and note that Ms. A. acknowledged that T.A. needed, and received, less help with his school work in the Fall 2002 semester than in previous terms because his classes were less demanding. *Finding of Fact no.44.*

“Special education” means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. “Specially designed instruction” means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child’s disability; and to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. OAR 581-015-005(30), (31), 34 CFR §300.26.

Due to T.A.’s ADHD and accompanying deficits in executive functioning it was extremely difficult for him to remain focused on material that was not intrinsically interesting. He did not understand how to find the significant points in a book. In addition he had major organizational problems, resulting in a failure to do school work, failure to submit work he had done, loss of school work, and duplication of assignments. He was able to pass from grade to grade only because of the extraordinary efforts of his family, especially Ms. A. to compensate for his deficits, and the accommodations offered by his teachers and FGHS which enabled him to get passing grades in most of his classes.

The District argues that “The sum total of the evidence will be that T.A.’s educational problems are not severe, in the context of the general education population at Forest Grove High School, and that there is no evidence that these problems – time management, organization, and work completion – cannot be sufficiently addressed with the accommodations and assistance available to all regular education high school students.” *District’s Pre-Hearing Brief 12*. To the contrary the sum total of the evidence is that whatever “accommodations and assistance” were available to all regular education high school students at FGHS, and to the extent such “accommodations and assistance” were provided to T.A., they were inadequate to remedy T.A.’s deficiencies and relieve his family of the need to provide him with, in effect, daily special education services at home so that he could continue to pass from grade to grade in school.

The provision of specially designed instruction to a student with academic difficulties and achievements similar to those of T.A. was discussed in a recent complaint resolution decision by the Oregon Department of Education, *In the Matter of the Education of M.J. and The Dalles School District*, Final Order, Case No. 02-054-043 (December 30, 2002). The student, M.J., was found eligible for special education services in 1999, when he was in sixth grade, as a student with an OHI due to Tourette’s. M.J. was a very bright student who for several years after he was identified as having an OHI was in danger of failing most of his academic classes, primarily because of not completing and returning assignments on time. Because of his impairment M.J. was to receive specially designed instruction and supportive services (described in an IEP) which were directed toward improving, and ameliorating the educational impact of, his weak organizational skills. *Final Order at 3*. M.J.’s eighth grade IEP (2001) provided for specially designed instruction in study skills for twenty minutes twice a week in the regular classroom. His annual IEP goal in study skills was to improve his organizational skills such that he would be handing in completed assignments independently. The time allotted for instruction in study skills was temporarily decreased, but in November 2002 the IEP team increased M.J.’s specially

designed instruction in study skills to 45 minutes per week, to be provided in the resource room. His IEPs described supplemental aids/services, modifications and accommodations related to achieving this goal.

Although M.J., unlike T.A., was found eligible for special education by his school district, he did not in fact receive the specially designed instruction required by his IEP. The distinction between services made available as needed to regular education students (which the District contends, in this case, were adequate for T.A.) and specially designed instruction for students with disabilities such as M.J. and T.A., is illustrated in this comment by the Department of Education in responding to the complaint filed by M.J.'s parent:

Because organizational skills are an important focus for all students in the middle school, all of M.J.'s middle school teachers had various systems in place \* \* \* to help keep all the students organized. \* \* \*

However, the Department did not find convincing evidence that District staff provided M.J. with specially designed instruction specifically directed toward helping him achieve independence in completing and turning in assignments. \* \* \* So, although District staff provided a variety of accommodations and a generous amount of support to help M.J. catch up after he failed to turn in the assignments on time, they did not provide specially designed instruction that would allow him to progress toward independence in organizational skills.

The same is true for the beginning of the 2002-2003 school year, until early November 2002, when M.J.'s special education teacher started using a specific instructional curriculum with M.J. that is directed toward improving organizational skills for students with disabilities. In addition, the special education teacher and M.J.'s parent instituted a new notebook system and a reward system designed to increase M.J.'s independence in keeping current with assignments.

*Final Order at 14– 15.*

As illustrated in the case of M.J., the fact that assistance is available to all regular education students at a school, and with that assistance (and parental help) a student with a disability is passing his or her classes, does not automatically eliminate the need for specially designed instruction for the student.<sup>29</sup> As Ms. Flick acknowledged, even if a school district made specially designed instruction available to all students in the regular education setting, the District would still be required to identify children with disabilities under the IDEA. *Tr 437-38.* When a student is eligible for special education services and is in need of specially designed instruction, the school district must

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<sup>29</sup>“M.J. was able to pass all of his classes, generally with a grade of C or better, despite the lack of specially designed instruction in organizational skills. The combination of M.J.'s strong academic skills, his parent's persistence in seeking out information about his status and getting extra help for him as each quarter ended, and his teachers' willingness to go the extra mile to get his assignments in at the end of the quarter resulted in M.J. passing all of his classes.” *Final Order at 15.*

respond with an appropriate IEP. Two functions of the IEP are to identify the assistance an individual student needs and provide tools for measuring its success. OAR 581-015-0064, -0065. FGHS neither identified T.A.'s educational needs adequately nor provided appropriate resources for addressing them.

Like M.J. T.A. requires specially designed instruction to address his compromised organizational abilities, as well as other deficits related to his ADHD. Examples of the services which could be considered are those described in T.A.'s Student Action Plan at MBA; some of the methods and tools identified by Dr. Fulop, including the SQ4R method; one on one remedial instruction in certain areas and direct instruction in organization and time management, as suggested by Dr. Patchin; and the "specific instructional curriculum" directed toward improving organizational skills for students with disabilities which was provided to M.J. It is the responsibility of the District, and not T.A.'s parents, to provide T.A. with a FAPE, including the special education he requires as a result of his disability.<sup>30</sup>

#### *FGHS Assessments*

The assessment of T.A. conducted by Mr. Martin and others in 2001 failed to address all areas of suspected disability (specifically, ADHD) and was therefore legally inadequate. In addition, the MDT in 2001 noted, but failed to follow up on, the possibility that T.A. might be eligible for services under Section 504.

The IDEA and Section 504 eligibility determinations in July and August 2003 came to the wrong conclusions, perhaps in part perhaps because some of the educators participating in the MDT meetings 1) were unfamiliar with the legal eligibility standards; 2) were given inaccurate information about those standards; 3) had stereotypical ideas of hyperactivity and were unaware of the recent reclassification of various forms of attention deficit as subtypes of ADHD<sup>31</sup>; 4) and did not consider

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30 A student (Chad C.) who in many respects was quite similar to T.A. was described in *West Chester Area School District v. Bruce and Suzanne C.*, 36 IDELR 154 (ED Pa 2002). When Chad C., 14 years old, was in fourth grade, an evaluation disclosed that he had multiple symptoms of ADD including weaknesses in auditory memory, organizing skills and concentration. Throughout his school career his performance and placement varied, declining from seventh to ninth grade. But his grades ranged from As to Cs, and although he had previously been in more challenging classes, in ninth grade he was still placed in one or more Honors classes. The Court commented:

\* \* \* Chad's class placement and grades fail to tell the whole story. Throughout much of Chad's schooling, Chad's mother has worked with him on a daily basis, typically two or three hours each school night plus additional time on the weekends, to ensure assignments were complete and Chad was prepared for tests. In an effort to enhance Chad's sense of independence, Chad's mother became less involved with his studies during his eighth grade year. Tellingly, without his mother's extensive efforts, Chad's grades dropped considerably.

36 IDELR 154, at 674. The Court concluded that in light of the totality of the evidence, including the extensive amount of time Chad spent out of class receiving remedial and supplemental assistance from his mother, and Chad's potential as evinced by the District's testing, he was entitled to an IEP.

31 So that the diagnosis applied to T.A. although his main symptom was inattention and his hyperactivity consisted only of very subtle, constant movements of his hands and feet. *Testimony of Fulop*

relevant the effort required outside of school to enable T.A. to pass enough classes to move from grade to grade on schedule.

*Reimbursement for Evaluation by Dr. Fulop*

OAR 581-015-0094, addressing independent educational evaluations, provides, in relevant part:

(1) A parent of a child with a disability or suspected disability has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school district.

(a) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the child.

(b) "Public expense" means that the school district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

\* \* \* \* \*

(4) If a parent requests an independent education evaluation at public expense, the school district shall, without unnecessary delay, either:

(a) Ensure that an independent educational evaluation is provided at public expense unless the school district demonstrates in a hearing under OAR 581-015-0081 that the evaluation obtained by the parent did not meet school district criteria \* \* \* ; or

(b) Initiate a due process hearing under OAR 581-015-0081 to show that its evaluation is appropriate.

\* \* \* \* \*

T.A.'s parents were clearly dissatisfied with the evaluation completed by Mr. Martin.<sup>32</sup> As indicated in the above rule, they had the option of asking that the District pay for Dr. Fulop's evaluation of T.A. and if the District refused, the District would have had to initiate a due process hearing to show that its evaluation was appropriate. Instead the parents arranged for the evaluation by Dr. Fulop without informing the District that it was taking place.

The parents, in their hearing request, did not seek reimbursement for the evaluation by Dr. Fulop. See *Ex C1*. This claim for reimbursement was not addressed in T.A.'s Pre-Hearing Brief. See *Brief at 9 – 11*. It was first presented in T.A.'s Closing Brief. See *Brief at 38 – 40*.<sup>33</sup>

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32 Mr. A. told Ms. Voigt in March 2003 that "Vinny" was "worthless." See *Ex A3*.

33 Cf *Student's Pre-Hearing Brief at 10*: "The third issue has two components: (1) Were the programs secured by T.A.'s parents reasonably calculated to provide educational benefit to T.A. and (2) When considering all of the actions and inactions of both parties, did the parents do anything or fail to do something which makes it inequitable

Because this claim for reimbursement was not made before the hearing there is no evidence as to whether the Notice of Procedural Safeguards (Notice) distributed by the District in 2000 and 2001 advised Mr. and Ms. A. of the need to request in advance that the District pay for an independent educational evaluation (IEE) as a condition of receiving reimbursement for Dr. Fulop's evaluation. If, as is more likely, that information was in the Notice, the parents failed to make such an advance request. Although the parents received the Notice long before they requested Dr. Fulop's evaluation, the information about IEEs was immediately and directly relevant in 2001 to their concern that Mr. Martin's evaluation was inadequate. If they read the Notice (which is doubtful, as they do not recall receiving it) they should have remembered this information, especially because their ability to get a private evaluation was limited by financial constraints.

As the parents did not follow the instructions in Notice, did not claim reimbursement for Dr. Fulop's evaluation until after the hearing, and did not present any convincing arguments that they are legally entitled to such reimbursement, see *T.A.'s Closing Brief at 39 – 40*, their request for reimbursement for Dr. Fulop's evaluation is denied.

#### *Parental Placement: Notice Issues*

OAR 581-015-0156 addresses reimbursement for private placement in some circumstances and provides, in relevant part:

(1) If a private school child with a disability has available a free appropriate public education and the parents choose to place the child in a private school, the public agency is not required to pay for the cost of the child's education, including special education and related services, at the private school.

\* \* \*

(2) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures under OAR 581-015-0080 through 581-015-0096.

**(3) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing**

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to reimburse them for costs they incurred?" and *T.A.'s Closing Brief at 39*: "The third issue has three components: (1) Should the cost of Dr. Fulop's evaluation be reimbursed; (2) Were the programs secured by T.A.'s parents reasonably calculated to provide educational benefit to T.A. and (3) When considering all of the actions and inactions of both parties, did the parents do anything or fail to do something which makes it inequitable to reimburse them for costs they incurred?"

officer or a court even if it does not meet the State standards that apply to education provided by public agencies.

(4) The cost of reimbursement described in paragraph (3) of this section may be reduced or denied if:

\* \* \* \* \*

(b) At least ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school or ECSE program, the parents did not give written notice to the public agency of the information described in paragraph (4)(a) of this rule.

(5) The cost of reimbursement described in paragraph (3) of this section may also be reduced or denied if:

\* \* \* \* \*

(b) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(6) Notwithstanding the notice requirement in paragraph (4), the cost of reimbursement may not be reduced or denied for failure to provide the notice if:

\* \* \* \* \*

(d) The parents had not received notice of procedural safeguards under OAR 581-015-0079 informing them of this notice requirement.

(Emphasis added.) See 34 CFR §300.403(d).

OAR 581-015-0156 and 34 CFR §300.403 do not apply where, as in this case, a child has not received special education services before the parents request reimbursement for a unilateral placement. That situation was addressed by the United States Department of Education in a response to public comments about 34 CFR §300.403 at the time that regulation was proposed to be promulgated:

Another commenter requested that the Department clarify that the provisions of § 300.403 (c), (d), and (e) apply only in situations in which the child previously has received special education and related services under the authority of a public agency. In other situations, where the child has not yet been provided special education and related services, the Department should recognize that hearing officers and courts still retain broad equitable powers to award relief, and will continue to apply the reimbursement standard in *Burlington*.

\* \* \* \* \*

As a commenter noted, hearing officers and courts retain their authority, recognized in *Burlington* and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) (*Carter*) to award “appropriate” relief if a public

agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii)<sup>34</sup> in instances in which the child has not yet received special education and related services. This authority is independent of their authority under section 612(a)(11)(C)(ii)<sup>35</sup> to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

64 *Federal Register* 12602 (March 12, 1999). Parents have an equitable right to reimbursement for the cost of providing an appropriate education when a school district has failed to offer a child a FAPE. The conduct of both parties must be reviewed to determine whether relief is appropriate. *W.G. and B.G. v. Board of Trustees of Target Range School District*, 960 F2d 1479 (9<sup>th</sup> Cir 1992).

As T.A. was not receiving special education services his parents had not received notification of their rights under the special education laws since T.A. was evaluated in 2001. At that time the parents had no plans to remove T.A. to a private school, so any information in the Notice regarding reimbursement for private placements would have been irrelevant to their concerns. In addition the Notice provided by the District in 2000 or 2001 did not address their situation, as it stated such reimbursement would be available *only if a student was receiving special education* before the parental placement. Mr. and Ms. A. first learned that the District might be obligated to reimburse them for the cost of Freer and MBA when they consulted an attorney (initially on March 28, 2003). By that time T.A. had left Freer and was enrolled at MBA.

Mr. and Ms. A. in effect notified the District of their claim for reimbursement when they filed their hearing request on April 18, 2003, three weeks after they learned they might be entitled to such reimbursement. Three weeks is not an unreasonable amount of time for the parents to work with their attorney to determine what, if anything, they might do about T.A.'s situation. The District was aware no later than April 21, 2003 (when T.A. was disenrolled from the PCC program) of the parents' claims; this is not a situation in which the parents return years after enrolling their child in a private school and request compensation. Nothing in the timing of the parents' notice should cause their right to reimbursement to be limited.

#### *Reimbursement for Freer*

T.A. was sent to Freer due to substance abuse and oppositional behavior, after he binged on marijuana and ran away from home for several days. Although the stress and failures resulting from his untreated ADHD (as well as his ineffectively treated depression) may well have contributed to his substance abuse there is no indication that his ADHD was addressed in any way at Freer. Therefore, although the District did not provide a FAPE for T.A., the placement at Freer was not appropriate to meet his educational needs and Mr. and Ms. A. are not entitled to reimbursement for that placement.

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<sup>34</sup> See 20 USC §1415(i)(2)(B)(iii).

<sup>35</sup> See 20 USC §1412(a)(10)(C)(ii).

## *Reimbursement for MBA*

### *- MBA was an Appropriate Placement*

MBA was an appropriate placement for T.A. Forty percent or more of the students there had ADHD and the staff were well acquainted with T.A.'s disability. T.A. had a Student Action Plan which offered him special education. It gave the initial academic goal of developing self-management skills for ADHD, with requirements that he attend seminars on time management and study skills; that his teachers and mentors monitor his organization and time management and teach strategies in the classroom and the dormitory; and that his teachers model time management and organizational strategies. In addition, there were expectations that his teachers would use multi-modality instruction to engage him in activities (for example, he was producing a video to meet a requirement in political science, and sculpting geometrical figures in a special education math class); help him prioritize, plan and estimate completion time for his assignments; set daily class goals; and provide other assistance. Many of his teachers consulted with Ms. Fairman for advice on how best to teach T.A., and she made suggestions and provided resources they could use in particular situations. Also, help was available through peer tutoring, although whether T.A. received tutoring is not known. Coaching at MBA included helping students break large tasks into smaller pieces and setting short-term goals – skills which T.A. needed to benefit from his education.

That T.A.'s grades did not immediately and dramatically improve at MBA is not surprising and does not indicate the placement was inappropriate. First, as MBA expects students to participate in the emotional growth as well as the academic curriculum, T.A. probably missed some of his academic classes when they coincided with the emotional growth program. More important, at MBA T.A. no longer had the daily one on one support of his parents to keep him on task, assist him with completing his schoolwork and intervene with his teachers. Rather, he was in a much more appropriate situation, where T.A.'s education was provided by his teachers and he was being taught and coached to develop the skills he needed to be an independent student. It is unrealistic to assume that he could quickly acquire those skills.

### *- When Should Reimbursement Begin?*

Mr. and Ms. A. do not claim that T.A. requires residential placement because that is the least restrictive environment in which he can receive an appropriate education. Their claim for reimbursement is based on the fact that the District failed to identify T.A. as OHI and offer him the special education services he requires. On this claim they prevail. They are entitled to reimbursement for T.A.'s education at MBA until the District offers T.A. a FAPE. The likelihood that, absent depression and marijuana abuse, T.A. would not have suffered the severe deterioration which ultimately led to his placement in a residential treatment program does not excuse or mitigate the failure of FGHS to provide T.A. with the FAPE mandated by law.

The District notes that in class T.A. was much like many other FGHS students – his academic performance was similar to or better than that of many of his classmates, and his behavior was consistently appropriate. *District's Post-Hearing Brief at 6.* That information is relevant to the remaining issue relating to reimbursement, which is when should the District have known T.A. was eligible for special education as OHI due to his ADHD.

The District argues that one reason T.A.'s parents are not entitled to reimbursement for MBA is that they consistently withheld information from school staff and prevented private service providers from communicating with school staff. If the parents were pursuing their initial claim that T.A. was eligible for services as a child with ED, that might be relevant in balancing the equities. Information about T.A.'s diagnoses of depression or dysthymia by Dr. Booth, Dr. Patchin and Dr. Fulop, as well as T.A.'s escalating use of marijuana, might have indicated to the FGHS staff that T.A. was experiencing emotional difficulties not readily apparent to his teachers. But as the parents have withdrawn that claim those concerns are not relevant.

Concerning OHI, and particularly T.A.'s ADHD, FGHS had ample information about T.A.'s struggles in school due to his disability beginning with his first semester at FGHS and his initial evaluation in 2001. In fact, the District could have had much additional information had the 2001 evaluation addressed the deficiencies indicated on the Referral. The information on the Referral would have caused Dr. Neill to evaluate T.A. for OHI at that time. The reference to "maybe ADD/ADHD" would have caused Dr. Callum to evaluate T.A. for that disability. The e-mail Ms. A. sent to Mr. Martin, Ms. Shofner and others in August 2001, requesting tutoring in math for T.A., was apparently ignored by FGHS staff. The reference in Mr. Martin's note of September 2001 to "possible 504" was ignored by FGHS staff. Because of Mr. and Ms. A.'s frequent contacts many of T.A.'s teachers, as well as Ms. Kaufman, Ms. Shofner and Mr. Garlock, were aware of T.A.'s difficulties and the effort Ms. A. (and for a time, A.A.) was investing in helping T.A. keep track of and complete his class requirements. The District's failure to evaluate T.A. adequately from 2001 to the present militates against their claim that reimbursement should be denied.

The parents claim they are entitled to reimbursement from the beginning of T.A.'s enrollment at MBA. They argue that, even when the District had available (in addition to the school records) Dr. Fulop's report, a summary of Dr. Patchin's therapy and Dr. Patchin herself, and a description from Mr. and Ms. A. of everything the family had done to allow T.A. to progress in school, the District still found T.A. ineligible for services under the IDEA or Section 504 (at the meetings in July and August 2003), and consequently there is no (additional) detriment to the District in authorizing reimbursement for all of T.A.'s schooling at M.B.A., rather than reimbursement to begin after those decisions were made. *Student's Pre-Hearing Brief at 12.* In this particular case – without suggesting it is a principle of general applicability – that is an appropriate consideration in weighing the equities, as it appears that no amount of relevant information would cause the District to acknowledge the severity of T.A.'s disability and T.A.'s need for special education.

I conclude the District is responsible for reimbursing T.A.'s parents for the necessary costs of his education at MBA, including the admission (\$50), interview (\$1500) and linen (\$275) fees, the monthly tuition payments (\$5200), and the "alumni services" fees (\$5200 from March to May 2003) which were apparently required. The parents presented no evidence as to why MBA charged them over \$300 for wilderness clothing (or that T.A. could not use the clothing after leaving MBA), or why there was a need for T.A. to have another psychological evaluation in April, costing \$680. The parents shall not be reimbursed for the cost of the clothing and the evaluation.

Section 504 of the Rehabilitation Act of 1973

Regulations implementing section 504 are found at 34 CFR Part 104. 34 CFR §104.3 includes the following definitions:

(j) Handicapped person—

(1) Handicapped persons means any person who

- (i) has a physical or mental impairment which substantially limits one or more major life activities,
- (ii) has a record of such an impairment,
- or
- (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)

(1) of this section, the phrase:

- (i) Physical or mental impairment means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

- (ii) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. \* \* \* \* \*

\* \* \* \* \*

(l) *Qualified handicapped person means:*

\* \* \* \* \*

(2) *With respect to public preschool elementary, secondary, or adult educational services, a handicapped person*

- (i) of an age during which nonhandicapped persons are provided such services,
- (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or
- (iii) *to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act [now the IDEA]; \* \* \* \* \**

(Emphasis added.) See OAR 581-015-0109.

34 CFR §104.33 provides:

(a) General.

*A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.*

(b) *Appropriate education.*

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that

(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(ii) are based upon adherence to procedures that satisfy the requirements of Secs. 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

\*\*\*\*\*

(c) Free education-- \* \* \* \* \*

(4) Placement of handicapped persons by parents. If a recipient has made available, in conformance with the requirements of this section and Sec. 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of Sec. 104.36.

\* \* \* \* \*

(Emphasis added.)

OAR 581-015-0109 provides:

(1) The parent or guardian of a qualified student with a disability under section 504 may file a written request for a hearing with the State Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be

in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent shall conduct a hearing.

(2) The school district involved in the hearing shall be responsible for the costs of the hearing.

T.A. has an impairment, ADHD, which substantially limits his major life activity of learning. See 34 CFR §104.3(j). He is a qualified handicapped person under Section 504 because he is a student with a disability to whom the state is required to provide a FAPE under the IDEA. See 34 CFR §104.3(l). The District may meet the obligation to provide T.A. with a FAPE by implementation of an Individualized Education Program (IEP) developed in accordance with the IDEA. See 34 CFR §104.33

### ORDER

1. T.A. is eligible for special education services as a student with a disability under the IDEA in the area of Other Health Impaired.
2. T.A. is eligible for services under Section 504 as a qualified handicapped person.
3. Mr. and Ms. A. are not eligible to receive reimbursement from the District for the cost of the evaluation of T.A. by Dr. Fulop or for the services T.A. received at Freer.
4. The District shall reimburse the parents for the necessary costs incurred in sending T.A. to MBA until the District offers T.A. a FAPE. Those costs include the initial application and interview fees; linen fee; monthly tuition charges; and "alumni services" fees.

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Betty Smith, Administrative Law Judge  
Office of Administrative Hearings

### APPEAL PROCEDURE

**NOTICE TO ALL PARTIES:** If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(e)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

**ENTERED** at Salem, Oregon this 26 day of January , 2003 with copies mailed to:

Darlene Hendrickson, Oregon Department of Education, Public Services Building, 255  
Capitol St. NE, Salem, OR 97310-0203.