

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

SAN MATEO UNIFIED HIGH SCHOOL
DISTRICT and SAN MATEO COUNTY
MENTAL HEALTH.

OAH CASE NO. 2007110023

AMENDED DECISION¹

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in San Mateo, California on April 27-30, May 10-11, and July 16-18 and 21, 2008.

Student's Father was represented by Susan Foley, Attorney at Law, and by her assistant Linda Hughes. Father was present throughout the hearing except on occasions when his health did not permit attendance. On those occasions his presence was waived.

The San Mateo Unified High School District (District) was represented by Summer D. Dalessandro, Attorney at Law. Barbara Picheny, the District's outgoing Director of Special Education, was present on April 27-30 and May 10-11, 2008. David Richer, the

¹ This Decision has been amended solely to fix a factual error in the first paragraph of the decision concerning the hearing dates. The hearing was held in the month of July, not June, and was heard only on July 16-18 and 21.

District's incoming Director of Special Education, was present on June 16-18 and 21-22, 2008.

San Mateo County Mental Health (CMH) was represented by Eugene Whitlock, Attorney at Law. Roxanne Dean, CMH's Coordinator of Chapter 26.5 Services, was present throughout the hearing.

Parent filed an amended due process hearing request (complaint) on March 5, 2008. On April 7, 2008, OAH granted a continuance of the dates for hearing. At the conclusion of the hearing and at the parties' request, a continuance was granted to August 13, 2008, for the filing of closing briefs. On that date briefs were submitted and the record was closed.

ISSUES²

1. When the District offered Student placement in the Baden Therapeutic Day School (TDS) for the 2006-2007 school year, did it deny him a free appropriate public education (FAPE) because:

- A. The District did not permit Father to observe the TDS and therefore denied him meaningful parental participation in the decisional process concerning the provision of a FAPE to his son;
- B. The length of the school day that the District offered Student at the TDS was less than the length of the regular school day of Student's chronological peers;
- C. The written offer was not clear because it failed to include the start and end dates, duration and frequency of offered services;

² For clarity the ALJ has re-ordered, re-numbered, re-worded and consolidated the issues.

- D. The IEP Team failed to consider a continuum of options for Student and offered instead a pre-determined placement at the TDS;
- E. The TDS placement offer was not in the least restrictive environment, and did not include any opportunities for mainstreaming;
- F. The offer included a pre-determined behavior plan that was not tailored to Student's unique needs and that had previously proven not to be effective for him;
- G. The offer did not include any goals or services to address Student's weaknesses in fine and gross motor skills; or
- H. The goals proposed by the District did not include any baselines, thereby denying Parent meaningful parental participation in the decisional process since Parent could not have determined whether Student made progress in the offered placement?

2. Did the District's December 2007 and January 2008 IEP offers of placement for the 2007-2008 school year in a general education classroom on a comprehensive high school campus, and its February 2008 IEP offer of placement in Middle College for that school year, deny Student a FAPE because:

- A. The District failed to timely hold an Annual IEP team meeting to assess Student's needs, draft appropriate goals, and offer a placement; or
- B. Student could not have benefited from his education under either offer without placement in a residential facility that addressed Student's mental health needs?

3. Should Father be reimbursed for tuition and transportation costs for enrolling Student in Mid-Peninsula High School for the 2006-2007 school year and the first semester of the 2007-2008 school year?

4. Should Father be reimbursed for the unilateral placement of Student in the residential drug treatment facility Intermission House from December 2007 through June 2008?

BACKGROUND

1. Student is a 15-year-old male who resides with Father within the geographical boundaries of the District.

2. Student suffers from emotional disturbance and from dyspraxia, a developmental disability that interferes with his motor coordination, writing and drawing. He is highly intelligent; on a test taken in the second grade he was found to be reading at an 11th-grade level. He has a history of emotional outbursts in and out of class that began in the third grade. He has engaged in self-injurious behavior such as cutting himself and attempting suicide. He began taking prescription and street drugs at age 13 and became addicted to them. His grades range from very high to very low.

3. Student's parents are divorced, and Father is the custodial parent. In recent years, Student has alternated living in San Mateo County with Father and in Santa Clara County with his Mother. In the school year (SY) 2005-2006, his eighth grade year, he lived with Mother and attended Martin Murphy Middle School (Martin Murphy) in the Morgan Hill Unified School District. At Martin Murphy, in the spring of 2006, he was first found eligible for, and began receiving, special education and services because of emotional disturbance. That spring he returned to San Mateo County to live with Father, and has resided there since except for some weekends.

THE 2006-2007 SCHOOL YEAR

DENIAL OF PARENTAL RIGHT TO PARTICIPATE

4. A school district may refer a special education student suspected of being in need of mental health treatment to the local county mental health agency for that

treatment. The county mental health agency is responsible for the provision of mental health services to the student if required in the IEP of the student. These services are commonly known as "Chapter 26.5 services" or "AB 3632 services."

5. Before the summer of 2006, while Student was living with his mother in Santa Clara County and attending the eighth grade at Martin Murphy, he received Chapter 26.5 services from Santa Clara County Mental Health. On June 30, 2006, San Mateo County Mental Health (CMH) obtained Santa Clara's records on Student in order to consider his eligibility for Chapter 26.5 services in San Mateo County.

6. On July 11, 2006, Father's attorney Susan Foley wrote to the District, announcing that Student was an incoming ninth grader eligible for special education because of emotional disturbance. She requested the immediate scheduling of an IEP meeting so that an offer of placement including mental health services could be made before the beginning of SY 2006-2007. This was the District's first exposure to Student as a potential recipient of special education and services. The District scheduled an IEP meeting for August 10, 2006, and began collecting information about Student from CMH and elsewhere.

7. On August 9, 2006, Glenda Baker of CMH produced a report finding that Student's emotional disturbance interfered with his ability to benefit from his education, thus making him eligible for Chapter 26.5 services from CMH. When the District IEP team met on August 10, 2006, Ms. Baker presented her report, which was the team's principal source of information about Student as it considered where to place him. Ms. Baker's report showed that that Student's emotional disturbance could be traced back to the third grade. It also showed that Student's eighth grade year in middle school had been seriously disrupted by his disability. He had attempted suicide, been hospitalized three times for depression, anxiety, and suicidal ideation, missed months of school and flunked most of his eighth grade classes.

8. The District and CMH members of the IEP team recommended placing Student in a therapeutic day school (TDS) operated by CMH. Student would have been offered placement at Skyview TDS in the District if there had been space for him. Since there was not, Student was offered a 30-day diagnostic placement at the Baden TDS on the campus of Baden High School, a continuation high school in San Mateo County within the South San Francisco Unified School District. The offer contemplated another IEP meeting in 30 days to assess Student's adjustment to the new placement and to modify his program if necessary.

9. For students who need intensive mental health treatment, CMH operates several TDSs in San Mateo County, including Baden, that are licensed as intensive day treatment programs as well as schools. The Baden TDS provides integrated mental health and special education services under Chapter 26.5 for adolescents who are at risk of psychiatric hospitalization, residential placement, or school failure. Baden provides them a "continuous therapeutic milieu" in which education is supplemented by a behavior management system and individual, group, and family therapy. It is operated by a multidisciplinary staff from CMH and local high school districts. The TDS teaches all subjects required for obtaining a high school diploma. Educational staff regularly consult with clinical staff about a student's behavior and treatment goals, and each student is pulled out of class for individual therapy at least once a week, and more often if needed. On-site psychiatric services are available during school hours, and crisis intervention is on call. The class is taught jointly by an educator and a therapist. Other staff include an occupational therapist, a child psychiatrist, and a teacher's aide. The ratio of staff to students is at least one to eight, and there are never more than 12 students in the class.

10. According to the August 10, 2006 IEP documents, Father stated at the IEP meeting that, while the offer of placement at Baden looked good on paper, its value

depended upon its staff and students. He wanted to visit the school in operation before committing his son to placement there by accepting the IEP offer. District staff gave him the Baden TDS telephone number and told him to call it to arrange a visit. In the space for "[a]ctivities to support transition," the IEP listed "intake w/ TDS team, visitation to program." The notes of the meeting state that the team encouraged Father to visit Baden.

11. A parent of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to the child, including the development of the child's educational plan. If a district offered a placement for a student but did not allow the parent to view the proposed placement, in some circumstances that action could violate the parent's right to participate in the development of the program by prohibiting the parent from making an informed decision. Father contends that the District deprived him of information required to make an intelligent decision because it frustrated his right to view the placement offered his son for SY 2006-2007 before he was required to accept or reject his son's placement there.

12. Father contends that he was not allowed to visit a class in session at Baden. The District contends that Father was never told that he could not visit such a class, and that he was offered such a visit but declined to take advantage of it. The evidence is in conflict, and requires an understanding of the procedures under which a parent may visit Baden.

Baden's intake and visiting procedures

13. Tracy Loum is a marriage and family therapist (MFT) for CMH. She is the coordinator and full-time therapist of the Baden TDS and has held that position for 13 years. She is essentially the chief executive of the facility. She coordinates the multidisciplinary team, oversees the mental health and academic staff, and is

responsible for arranging the intake of new students, including visits by them and their parents.

14. Ms. Loum established that students come to Baden by referral from school districts. The referring district reserves a place at the TDS, if available, which remains open until the candidate's parents make a decision whether to enroll the student at Baden. Ms. Loum receives contact information from the referring district and calls parents to arrange the intake of the student. The parents and the student first participate in a lengthy intake meeting so that the family may become familiar with the program, see the site, meet the staff, and learn of the services the facility provides, and the staff may learn about the student and his or her parents.

15. Ms. Loum testified that she would never refuse a parental request to visit the facility in operation, but that a family would have to start with the intake meeting. Baden is a highly desirable placement and maintains a waiting list, and many people are curious about the program. She receives many calls from people who just want to "sit in the milieu" with the students and observe. Ms. Loum testified that the facility is small, the students can easily be unsettled by the presence of visitors, and the faculty wants to devote its full attention to the students. So after years of experience with such requests, Baden requires that a visitor complete the intake process first, in order not to interrupt the milieu or disturb the students. That process begins with the intake meeting. A day or two later, the student has an opportunity to visit. He is given a desk and takes part in the first two class periods of the day. After the student has visited the class, and if the family is still interested in the program, a parent is allowed to visit the class on request. Outsiders are not permitted to visit the class in session.

16. Ms. Loum testified that a student need not be committed to enrollment at Baden, nor must a parent commit a student to enrollment at Baden, before visiting the class in session. On a few occasions in the past a family has decided, after the intake

process, that the program was not suitable. On rare occasions the staff has decided during or after the intake process that a student was not suitable for enrollment.

17. Jay Issler is Ms. Loum's supervisor at CMH and has 26 years of experience with the County's TDSs. He supervises all the TDSs for CMH and coordinates their activities with high school districts. He trained Ms. Loum in the intake and visiting procedures for Baden and believes that she would have followed them in Student's case. He testified that the intake process is the same at each TDS. The first step is the lengthy meeting that Ms. Loum described. No visit would be allowed until that meeting had been completed. Then the student visits the class, and after that a parent may also visit the class. The intake process does not require a commitment by anyone that the student will enroll in the program; that is an IEP issue.

18. If after the meeting and the visits the family wishes to enroll the student, another IEP meeting is held to offer the student a 30-day diagnostic placement. Mr. Issler testified that meeting is the final act of the intake process, and takes place after the rest of the intake process has been completed. He testified repeatedly and persuasively that a 30-day diagnostic placement is not generally offered before the intake process. The offer ends, rather than begins, the intake process.

19. The testimony of Ms. Loum and her supervisor Mr. Issler established that the normal procedures for enrollment in Baden begin with an IEP at a school district offering a student a referral for an opportunity to undergo the intake process. Then there is a preliminary meeting between the Baden staff and the family; then a student visit to a class; then a parent visit to a class, if requested; and finally, an IEP meeting at which a 30-day placement is offered and accepted.

The District's understanding of Baden's procedures

20. The District places students at Baden infrequently, and the IEP offer of August 10, 2006, shows that the District members of Student's IEP team did not

understand or follow the usual procedure for offering a placement at Baden. Instead of offering Father and Student an opportunity to go through the intake process at Baden and then decide on the placement, the IEP skipped that step and offered the 30-day diagnostic placement instead. The IEP team recommended that Father visit Baden and gave him its telephone number. But Father's visit was listed on the IEP merely as a transitional activity, not as a predicate to acceptance of the placement.

21. The testimony of Marvin Meyers, then the District's Director of Special Education and the chair of the August 10, 2006 IEP meeting, confirmed that the District misunderstood the intake process at Baden. Mr. Meyers testified that parents were not allowed to visit the TDS program "prior to the student beginning" there. Parents are not allowed to "walk through the program" when other students are present. However, a parent may visit once a student is "at" the TDS.

Father's efforts to visit

22. The day after the IEP meeting, Father and CMH became embroiled in a disagreement about Father's ability to visit the Baden classroom. On August 11, 2006, Father testified, he called the Baden number in the IEP and spoke to "whoever answered the phone there." That person is not identified in the record and did not testify. Father did not recall the details of the conversation³ but believed at the end of the conversation that, because of concern for the confidentiality of other students, Baden would never allow him to visit its classroom in session.

23. In the following days Father had two lengthy telephone conversations with Tracy Loum. He testified that they discussed at some length whether he could visit a

³ Father recently suffered both a stroke and physical trauma. It was apparent at hearing that these events had lessened his memory for details.

class in session at Baden, and that she stated adamantly that for privacy reasons Baden never allowed parents to see other people's children in the classroom. Ms. Loum testified she did not remember the specifics of those conversations, but she did not think it likely that she would have told Father that he was not welcome to visit at all, because for 13 years she has been contacting families to arrange for intake.

24. The documentary evidence of the calls was also in conflict. On August 23, 2006, Ms. Loum faxed a description of the Baden program to Father at his request, and added in handwriting on the cover sheet: "Let me know if you wish to schedule an intake." On August 23, 2006, Ms. Loum spoke on the telephone with Jo Anna Costa, Student's case manager at CMH, about Father's request to visit Baden. Ms. Costa wrote a memorandum of that call noting that Ms. Loum had said that Father was reluctant to undertake the intake process. The memorandum also stated that "Father wants to observe the classroom while in session with his lawyer and advocate, [but] Tracy said that for confidentiality reasons that would not be an option." When shown Ms. Costa's memorandum of their conversation, Ms. Loum testified she had no memory of that conversation either. She stated the memorandum was generally accurate but incomplete, as it did not express her willingness to allow Father to visit as part of his participation in the intake process. She also testified that Father's request to be accompanied by a lawyer and advocate was no obstacle to such a visit; she would permit a visit by all of them. In the past she had allowed such visits and invited the attorney and the advocate to the intake meeting.

25. This evidentiary conflict cannot be resolved with any confidence from the record. The participants' memories of their conversations were poor, and the documentary evidence ambiguous. There was no evidence that either Father or Ms. Loum deliberately misrepresented the content of the conversations. Before his retirement, Father was an experienced and well-regarded attorney, and his testimony,

though complicated by poor health and memory loss, appeared at all times to be carefully stated and not exaggerated. Ms. Loum was equally professional and precise, never overstating the extent of her memory or her expertise. The demeanor of each while testifying was persuasive, and supported the conclusion that each believed in the truth of his or her testimony. The cause of the conflict lies elsewhere.

26. On this record, the most likely cause of these conflicting perceptions was that Baden allowed visits (after the intake meeting and student visit) only by parents who were committed to the intake process by an IEP. From Baden's point of view, Father was an outsider who had signed no IEP and would not begin the intake process. From Father's point of view, he had an IEP offer which encouraged his visit and which, if signed, would immediately place his son in Baden, so he was entitled to visit the facility before he decided to sign it. Thus the parties likely talked at cross-purposes and misunderstood each other. Baden's use of the term "intake" to describe a preliminary process probably worsened the confusion, since it suggested a degree of commitment the process did not actually require.

27. On September 6, 2006, Father's attorney wrote to the District announcing that Father rejected the IEP offer, would place Student in the private Mid-Peninsula High School (Mid-Peninsula), and would seek reimbursement for tuition and expenses. Among the reasons given for these decisions was the District's failure to permit Father to visit a class at Baden. On September 22, 2006, one of the District's attorneys responded by letter, refusing reimbursement. In the letter the District rejected Father's claim that he had been denied access to Baden:

The intake process allows the parents to tour the facility, and meet and confer with the teacher, therapist and occupational therapist. In addition, the student has the opportunity to

shadow the program. All of these activities were available to [Student] and his father. His father chose not to access them.

Nowhere in this response was there a recognition that Father could have visited a classroom before committing his son to the placement. There was no evidence that the District actually understood Baden's procedures, made any investigation of Father's complaint, contacted Baden, or did anything else to resolve the dispute.

28. Although not explicitly stated in any statute, a parent's right to participate in the IEP process generally includes the right to visit a proposed placement when possible. Such visits are common and are usually encouraged and facilitated by school districts. It was the District, not Baden, which was required to ensure that Father participated fully in the decision about the placement of his son. At the outset the District misunderstood the Baden process, skipped a step in the IEP process, encouraged a visit, and offered Father an IEP which required the immediate commitment of his son to a 30-day placement. It should have merely required commitment to the intake process. And when the District learned that Father believed he could not visit Baden, the District apparently did nothing but reject his claim. The District could likely have resolved the dispute simply by calling Ms. Loum and Father's attorney, but it chose not to.

29. Thus the District was ultimately responsible, because of the terms of its offer, for causing the initial breakdown in communication between Father and Baden, and also responsible for failing to repair that communication when it could easily have done so. By these failures the District frustrated Father's attempt to visit Baden before he committed his son to the placement, deprived him of information necessary for his informed decision-making, and denied him the same right to visit Baden before committing his child to placement there that was enjoyed by other parents similarly

situated. The District thereby impeded Father's right to participate in the decision-making process.

30. A procedural violation of IDEA results in a denial of FAPE if it impedes the Student's right to a FAPE, significantly impedes a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to his child, or causes a deprivation of educational benefits.

31. Father has a bachelor's degree in psychology and did some graduate work in that subject. Because of his work in Denver as an orderly on a closed psychiatric ward, he was skeptical of a mental health treatment facility that would not allow itself to be examined by outsiders. Baden was both a comprehensive educational placement and a comprehensive mental health treatment facility. If Student had enrolled there, it would have been the sole source not just of his education but also of all his individual, group, and family therapy. Student was deeply troubled and suicidal. Father was concerned that the behavior management plan implemented at Baden was similar to one that had previously failed with Student. Father reasonably believed it was extremely important that he visit a class in session at Baden before he committed his son to placement there. The District's frustration of that desire deprived Father of information about the placement that was critical to his decision, and therefore significantly impeded his right to participate in the decision-making process regarding the provision of a FAPE to his son, and constituted a denial of a FAPE.

LENGTH OF THE REGULAR SCHOOL DAY

32. The IEP of a student placed in a special class must provide him a program for at least the same length of time as the regular school day for his chronological peer group, unless the IEP team determines he cannot function for that period of time and so specifies in the IEP.

33. The August 10, 2006 IEP offered to place Student in the Baden TDS for a school day starting at 8:30 a.m. and ending at 1:30 p.m.

34. If Student had not been offered placement in a special class, he would have begun his ninth grade year in August 2006 at the District's Hillsdale High School (Hillsdale), the comprehensive high school closest to his home. His chronological peer group consisted of students beginning the ninth grade at Hillsdale in August 2006.

35. The District argues that there were so many variations in a high school's schedule at Hillsdale in the relevant years it is impossible to determine the length of a regular school day. The evidence showed, for example, that some of the District's high schools had block periods (extended class sessions) two days a week; that some students took seven periods a day; that some took six; that some took fewer than six; and that the schedule of seniors was different from that of younger students. However, the District's interpretation would make the regulation unenforceable. The regulation does not require that a regular school day must be identical for all students. It only requires identification of the school day that was usual, or normal, or typical for Student's chronological peers. The District overstates the difficulty of making that identification.

36. District witnesses testified that the majority of Student's chronological peers took either six or seven periods a day. Barbara Picheny, the District's Director of Special Education during SY 2007-2008, testified that while each high school student in the District had an individual schedule during the relevant period, most students attended at least six periods of 51 minutes each. The school day, she testified, was "usually" six periods. For most high school students, a minimum of six periods was required.

37. Matt Biggar, the District's associate superintendent for instruction and a former high school principal in the District, testified that in SY 2006-2007 about 40

percent of high school students took seven periods of 50 minutes each, and the rest took "six periods or less." The seventh period was optional. Although his testimony addressed practices throughout the District's high schools, Mr. Biggar testified that all the high schools had similar schedules and he had no reason to believe Hillsdale's schedule was any different. Mr. Biggar also testified that the typical school day included a 30-minute lunch period, a 10-minute morning brunch period, and five minutes of passing time between each class.

38. Mr. Biggar further testified that the students who took six periods would normally attend either from 8 a.m. to 2:05 p.m. or from 8:30 a.m. to 3 p.m. When asked how many high school students, in the years in question, took either six or seven periods, he was unable to respond.

39. Father introduced bell schedules for Hillsdale stating the hours of the regular school day. Most were from the current school year, although no witness identified a significant difference in the regular school day between SY 2006-2007 and SY 2007-2008. The schedules set forth in the bell schedules were not fully consistent, but they tended to show that the regular school day was somewhat in excess of six hours.

40. Three students who were part of Student's chronological peer group testified about the regular school day at Hillsdale in SYs 2006-2007 and 2007-2008. Student #1 entered ninth grade at Hillsdale in SY 2006-2007. He took seven periods, so his day started at 7:45 a.m. and ended at 3:15 p.m. He was informed by the counselor that he could take no fewer than six periods. In his tenth grade year at Hillsdale, Student #1's schedule was the same.

41. Student #2 also entered Hillsdale as a ninth grader in SY 2006-2007. She took six periods, began her school day at 8:40 a.m. and ended it at 3:15 p.m. In her sophomore year she took seven periods, began her day at 7:45 a.m., and ended it at

3:15 p.m. She signed up for classes on a form given her by her counselor. The form stated that she could take no fewer than six periods.

42. Student #3 also entered Hillsdale as a ninth grader in SY 2006-2007. He took seven periods, began his day at 7:45 a.m., and ended it at 3:15 p.m. In his sophomore year he took six periods, began his day at 7:45 a.m., and ended it at 2:10 p.m.

43. The preponderance of evidence showed that a student in Student's chronological peer group typically attended Hillsdale in SYs 2006-2007 and 2007-2008 for at least six class periods a day, as well as for lunch, recess, and passing time between classes. For those who took the minimum of six classes, the usual school day was either 7:45 a.m. to 2:10 p.m. or 8:40 a.m. until 3:15 p.m., with minor variations. Thus the regular school day among Student's chronological peers in SYs 2006-2007 was approximately six and one half hours long for students who took six periods, or seven and one half hours long for students who took seven periods. Since the seventh period was optional, the regular school day, with minor variations, normally or usually involved six periods of class, brunch, lunch, and passing time between classes, for a total of approximately six and one half hours.

44. The evidence therefore showed that the District's IEP offer of August 10, 2006, would have provided student a regular school day of five hours, while his chronological peers enjoyed a regular school day of six and one half hours. The District's offer constituted approximately 77 percent of a regular school day, almost one-fourth less than the day required of Student's chronological peers.

45. The District argues that the Baden TDS is not a "special class" within the meaning of the regulation. Witnesses had varying opinions when asked whether the TDS was a "special day class." The IEP team apparently thought it was, because it placed responsibility for seeing that two of Student's proposed goals were met in the "SDC

teacher” and “SDC staff.” However, the regulation applies to a special class, not a special day class, and the meaning of that term is a question of law.

46. A special class within the meaning of the regulation is a class addressing any particular course, subject or activity for pupils with exceptional needs who have disabilities of such severity that they cannot be educated satisfactorily in regular classes with the use of supplementary aids and services. Substantial uncontradicted evidence showed that the students in the Baden TDS were taught all the standard academic subjects required to obtain a high school diploma, such as math, English, history, science, living skills, and physical education. All of them had disabilities of such severity that they could not be educated satisfactorily in regular classes with the use of supplementary aids and services. The Baden TDS therefore was a special class.

47. The District argues that the August 10, 2006 IEP properly specified a shorter school day in compliance with the regulation. It claims that the statement in the IEP that Student would attend school from 8:30 a.m. to 1:30 p.m. was by itself sufficient specification. However, that interpretation would also render the regulation meaningless, since any statement of shorter hours would be valid. The regulation does not require specification of the shorter hours; it requires specification of the IEP team’s conclusion that the student cannot function for a full school day.

48. The District also argues that the IEP demonstrates that “after careful consideration of his needs and challenges, the District and CMH concluded that initially, [Student] was only able to tolerate 300 minutes of instruction.” The evidence does not support that claim. The IEP contains nothing approximating such a statement. It does contain the opinion of Dr. Rashmi Garg, a psychiatrist who treated Student from February 2006 to April 2008, that mainstreaming “is not indicated at this time.” However, that is a recommendation about placement, not the length of a school day.

49. The August 10, 2006 IEP contains information about Student's recent emotional difficulties in the form of a CMH report finding him eligible for Chapter 26.5 services. The District argues that this description of his disability constitutes a sufficiently specific finding that Student needed a short school day. However, the evidence does not establish any correlation between Student's mental health in August 2006, and the length of a school day he could tolerate. Student had received mostly F grades in the latter part of his eighth grade year, largely because he had barely attended school for seven to eight months. He had attempted to commit suicide in December 2005, and had been hospitalized three times in the following months. The CMH report showed that Student's emotional difficulties were serious and persistent in and out of school. However, its data did not lead to any particular conclusion about the length of the school day Student could tolerate, and the IEP team drew no such conclusion from the report. Since the Baden TDS offered immediate, on-site psychiatric assistance and close staff attention that would have discouraged or prevented drug activities, it could have been argued that Student might have benefited from a longer school day. The IEP team did not consider such issues.

50. The District argues that its witnesses at hearing proved a short school day was appropriate for Student in August 2006. However, its witnesses stopped short of that statement. Dr. Garg testified that in her opinion it would have been "problematic" in August 2006 for Student to attend for an hour more than the TDS schedule required. Nancy Littlefield, a licensed clinical social worker for the County, was familiar with Student's CMH file and had supervised his admission to Chapter 26.5 services. She testified that it would be "hard to say" whether a longer school day would have been appropriate for Student at the time, but that the TDS schedule was a reasonable place to start. Neither Dr. Garg nor Ms. Littlefield was on Student's IEP team in August 2006, and the evidence did not show that the IEP team would have agreed with them. Moreover,

whether a shorter school day would have been appropriate for Student is not the same as the substantive determination required by the governing regulation, which is whether a student "cannot function" for a full school day.

51. Among other requirements, an IEP must be designed to allow the student to be involved in and make progress in the general educational curriculum. A significantly shortened school day undercuts and could defeat that purpose. Here the District's offer was the equivalent of offering Student approximately three-fourths of a FAPE, and was a significant failing by any measure. Over the 180-day school year the shortfall would have cost Student 41.4 school days, or approximately two calendar months of instruction. The District's failure to offer Student a full school day, therefore, was a substantive denial of a FAPE.

52. The same result obtains if the District's violation is regarded as procedural. A procedural violation of IDEA results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. Here, the District's failure to offer Student a full school day denied him a FAPE because the loss of an hour and a half a day, or 41.4 school days in a year, would have impeded Student's right to a FAPE and caused a deprivation of educational benefits.⁴

CLEAR WRITTEN OFFER

53. An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. Father's contention

⁴ In light of these conclusions, it is unnecessary to reach Father's argument that the District's violation was a "per se" denial of a FAPE.

that the August 10, 2006 IEP offer failed to contain those elements is not supported by the evidence.

54. The IEP offer stated that the Baden TDS began on August 23, 2006; that its hours were from 8:30 a.m. to 1:30 p.m.; and that the placement was for 30 days, after which it would be reviewed. Only the mention of family therapy was less specific; family therapy was offered "as needed." However, this was Student's first IEP meeting with the District, and CMH had not previously served Student or his family. Family therapy was part of the Baden TDS package, and the Baden staff who would be delivering that package had not yet met Student or Father, so it was not possible for the offer to be more specific in these circumstances. In any event, Father's claim that he was unable to weigh the offer intelligently without knowing the frequency of family therapy before he contacted Baden had no support in the evidence. On these facts, the term "as needed" did not violate IDEA's requirement for specificity, but if it did, the evidence did not show any harm arising from its use.

PREDETERMINATION OF OFFER / CONTINUUM OF OPTIONS

55. An IEP team may not predetermine its offer. Moreover, a special education local plan area (SELPA) must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. Father argues that on August 10, 2006, the IEP team failed to consider a continuum of options for Student and offered instead a pre-determined placement at the Baden TDS. His argument is based solely on the claim that Marvin Meyers, the then-Director of Special Education, testified that he made the decisions, and that he did not need permission to place a student somewhere. However, Father takes Mr. Meyers' testimony out of context. Mr. Meyers was discussing the fact that he did not need permission to place a student in a TDS within the District or outside of the District. His

statement had nothing to do with making a decision for an IEP team. Mr. Meyers testified credibly that the offer was not predetermined.

56. The testimony of Mr. Meyers and Ms. Picheny established that the IEP team did consider a continuum of options. It rejected a mainstream option because of Student's failure in that setting in the eighth grade. It rejected a resource room program because it would not give him sufficient support, and it rejected a special day class because he was too intelligent to benefit from it. The evidence showed that the August 10, 2006 offer was not predetermined, and was made only after consideration of a continuum of other options.

LEAST RESTRICTIVE ENVIRONMENT / MAINSTREAMING

57. A student must be placed in the least restrictive environment (LRE) in which he can be educated satisfactorily. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Whether a student can be mainstreamed in a regular education class is determined by balancing the educational benefits of full-time placement in a regular class, the non-academic benefits of the placement, the effect the student would have on the teacher and children in the regular class, and the costs of mainstreaming the student.

58. Father argues that the TDS placement offer was not in the least restrictive environment, and did not include any opportunities for mainstreaming. His argument fails to analyze any of the factors that identify the LRE. It is based instead on the unsupported assertion that the District was obliged to offer Student placement in a mainstream class because he had no previous IEP in the District. That assertion has no relation to governing law.

59. The evidence before the IEP team on August 10, 2006, showed that Student had failed to benefit from being in a mainstream class in his previous eighth grade year. He was absent most of the time, exhibited behavioral difficulties when he was present, failed most of his classes, and was hospitalized three times for treatment of his emotional difficulties. There was no evidence he could have benefited either academically or socially from a mainstream placement. Dr. Garg, his psychiatrist, recommended to the IEP team that Student not be mainstreamed at that time. There was no evidence that disputed her opinion. The Baden TDS offer included the prospect that Student, after a period of adjustment, could be mainstreamed for part of the day. There was no evidence that showed he could have profited from mainstreaming when the offer was made. The evidence did not show that the District's August 10 IEP failed to offer a placement in the LRE.

APPROPRIATENESS OF BEHAVIOR PLAN

60. An IEP must be tailored to address a student's unique needs in all aspects of his disabilities. Father argues that the August 10, 2006 IEP offer included a predetermined behavior plan that was not tailored to Student's unique needs and that had previously proven to be ineffective for him. The evidence did not support that claim.

61. Tracy Loum, the administrator of the Baden TDS, described its behavior management system as involving three levels. All students start on the lowest level. Students get points every day for tasks and behavior, and get rewards based on their points, including advancement to higher levels. As a student moves up levels he gets more rewards; if he goes down he loses them.

62. Father testified that from what he had learned of the way Baden staff managed student behavior, it was "similar to" a system used at Fremont Hospital (Fremont) when Student was hospitalized there. Student found the Fremont plan

demeaning and insulting, and it aroused his defiance. No other witness testified, and no documentary evidence was introduced, in support of Father's claim.

63. The evidence showed that Fremont also used a system of levels of increasing privileges and responsibilities obtained by good behavior, although the record contains no details of that system. However, Student's exposures to the Fremont system were brief and unusual. Student was involuntarily committed to Fremont under section 5150 of the Welfare and Institutions Code for three days on December 11, 2005, and for four days on January 22, 2006, both times for suicidal ideation. The first commitment arose because his mother found him in the garage with a rope around his neck, apparently about to hang himself. The conditions of his commitment were apparently strict; he was operating under a plan called a "Seclusion/Restraint Reduction Plan" that eased the conditions of his confinement according to his behavior. On both occasions, hospital staff thought that his behavior was a protest against being forced to live temporarily with Mother.

64. Student's reaction to his brief commitments to Fremont was not persuasive evidence that Baden's behavior management procedures were inappropriate for him. At Baden he would not have been involuntarily confined because of a suicide attempt, and he no longer lived with Mother.

65. The Baden system of levels and privileges was also similar to the system used at Intermission House, a drug treatment program where Student resided for six months in SY 2007-2008 and where he adjusted well. Student's experience there was longer and more stable, and therefore a better indicator of whether Student would have adopted to Baden's methods.

66. The preponderance of the evidence did not show that the August 10, 2006 IEP offered a system of behavior management inappropriate for Student's unique needs.

ABSENCE OF AN OCCUPATIONAL THERAPY GOAL AND SERVICES

67. Father argues that the August 10, 2006 IEP offer denied Student a FAPE because it contained no goal or service for occupational therapy (OT). He testified that Student had always had difficulty writing and drawing.

68. The only other evidence of Student's OT needs was a report of test results completed in November 2005 by occupational therapist Sarah Zimmerman. Ms. Zimmerman found that Student had weak motor skills and slow processing speed for motoric and visual spacial tasks. Ms. Zimmerman stated, however, that "[a]lthough motoric weaknesses are apparent ... clinic based [OT] would not be appropriate due to [Student's] age and physical stature." Instead she recommended that Student see an educational therapist⁵ and that he receive "continued school accommodations in terms of written output including keyboarding, and additional time to complete written tasks."

69. The August 10, 2006 IEP team accepted Ms. Zimmerman's recommendations that Student not receive OT but receive accommodations instead. The IEP offer listed fine and gross motor skills as areas to be addressed, and provided accommodations in the form of "extended time for exams and writing assignments" and "use of computer, alternate test format (verbal responses), [and] multi-sensory approach to instruction." There was no evidence that these accommodations were not sufficient to address Student's OT needs, or that his needs should have been addressed by inclusion of a goal and OT services rather than by accommodations. There was no evidence that the offer failed appropriately to address Student's OT needs.

⁵ At some point after Ms. Zimmerman's report, Father privately obtained for Student some kind of occupational therapy. Its nature is not clear from the record. Father makes no claim here for reimbursement for that service, or for any kind of educational therapy.

ABSENCE OF BASELINES FOR MEASURING PROGRESS TOWARD GOALS

70. An annual IEP must contain a statement of the student's present levels of academic achievement and functional performance (PLOPs), which essentially create a baseline for designing educational programming and measuring future progress. The IEP must also contain measurable annual goals designed to allow the student to be involved in and make progress in the general educational curriculum.

71. Father contends that the goals proposed in the August 10, 2006 IEP offer denied Student a FAPE because they did not contain baselines from which performance could be measured. While the IEP elsewhere contains earlier test scores as PLOPs, the goals themselves contain no starting points for measurement. Three of the five goals list the baseline as "unknown"; the other two leave that portion of the form blank. The test scores were therefore the only measurements that could have been used to assess progress toward the goals. The IEP states that goals will be further developed at another IEP meeting in 30 days based on Student's progress in his 30-day placement at Baden.

72. The record does not reveal how the IEP team on August 10, 2006, could have been more specific in writing Student's goals. Father had approached the District for the first time during summer break demanding an IEP meeting and offer within 30 days. The District diligently collected the information it could. Student's eighth grade year had been marked primarily by absences, hospitalizations, and failure. There was no evidence his previous school year produced any data from which later performance could be measured.⁶ The District therefore correctly characterized the baselines of most of the goals as "unknown," and Father does not challenge that characterization. Father did not suggest at the IEP meeting, and does not suggest now, how the goals could

⁶ Father makes no claim that the District should have conducted assessments to determine Student's PLOPs.

have been made more measurable until Student had at least some experience in the entirely new environment at Baden.

73. The evidence therefore showed that the District made the goals measurable to the limited extent it could, and thereby substantially complied with the IDEA's requirement. In the alternative, if the District did technically violate that requirement, the violation did not impede Student's right to a FAPE or cause a deprivation of educational benefits, and did not significantly impede Father's right to participate in the decision-making process. The violation would have been cured at the next IEP meeting 30 days later, and no better measurements were available in the meantime.

THE 2007-2008 SCHOOL YEAR

THE ANNUAL IEP MEETING

74. Once a student is receiving special education and services, a district must conduct an IEP meeting at least annually (unless a parent agrees otherwise) to review the student's progress and the appropriateness of his placement, and to make any necessary revisions in the IEP. Father correctly contends that the District failed to conduct a timely annual IEP meeting for SY 2007-2008.

75. The District held an IEP meeting for Student on April 13, 2007, at the request of CMH, for the sole purpose of reviewing CMH's obligation, if any, to provide mental health services to Student under Chapter 26.5 of the Government Code. Since the meeting did not review Student's progress or the appropriateness of his placement, or contemplate making any changes in his IEP, it was not an annual meeting.

76. The District's August 10, 2006 IEP offer had indicated that Student's next annual IEP meeting would be held on May 11, 2007. For reasons not in the record, that meeting was not held.

77. The District did not hold another IEP meeting for Student until December 4, 2007, after Student had been required to leave Mid-Peninsula and while he was hospitalized. No offer of placement and services was made at that meeting. The IEP team convened again on December 12, 2007, at which time the District offered Student placement at one of its comprehensive high schools, with supports and services including mental health services. The December 12, 2007 meeting was in substance an annual IEP meeting.

78. The District failed to conduct the required annual IEP meeting for SY 2007-2008 until December 12, 2007, which constituted a procedural violation of its obligation to convene an IEP meeting at least annually. The District's failure to hold the annual meeting left outstanding its inadequate offer of August 10, 2006, and thus interfered with the provision of a FAPE to Student and deprived him of educational opportunity. It also significantly impeded Father's right to participate in the decisional process, because for several months it deprived Father of any opportunity for involvement in further placement decisions regarding his son. It therefore deprived Student of a FAPE from the beginning of SY 2007-2008 until December 12, 2007.

CMH'S RESPONSIBILITY FOR STUDENT'S DRUG TREATMENT AT INTERMISSION HOUSE

79. In November 2007, Student left Mid-Peninsula High School because he was found to have furnished drugs to other students,⁷ and was soon confined in Mills

⁷ Mr. Thompson, Mid-Peninsula's Head of School, testified that it was a family decision to remove Student from the school. Father testified that Student was suspended. The difference does not matter here.

Peninsula Hospital because of drug abuse, severe emotional disturbance, and suicidal ideation. He was released in early December 2007.

80. On December 4, 2007, while Student was still hospitalized, his IEP team met to discuss placement, but did not make an offer. The next day Father announced that he would unilaterally place Student in Intermission House, an adolescent substance abuse treatment facility that is part of Project 90, a treatment facility in San Mateo. Father also stated he would seek reimbursement for the expenses of that placement.

81. On December 12, 2007, and January 7, 2008, the IEP team met again. After each meeting, the District offered to place Student in a comprehensive high school with services, including outpatient mental health services. Father declined the offers.

82. During December 2007 and early January 2008, Father and the District explored the possibility of placing Student at Middle College High School, a collaborative program operated by the District and the College of San Mateo (CSM) on the CSM campus for about 60 high school juniors and seniors interested in going beyond high school. Students at Middle College simultaneously take the high school classes they need for graduation and some college classes as well. On January 16, 2008, by consent of the parties in the absence of an IEP, Student was enrolled in Middle College so he could start the semester with his classmates.

83. At an IEP meeting on February 11, 2008, the District offered Student placement at Middle College and two hours a week of individual tutoring. As a related service under Chapter 26.5, the District and CMH offered outpatient services consisting of 50 minutes a week each of individual and family therapy, and one hour a month of medication management. CMH offered to coordinate these services with Intermission House. Father accepted the Middle College placement and the tutoring, but rejected the outpatient mental health services, and chose to continue Student's residential

placement at Intermission House, which contracted with outside providers for similar mental health services.

84. After some early difficulties, Student was academically successful at Middle College. He was also successful in refraining from drugs while living at Intermission House. According to the most recent information in the record, Student was due to graduate successfully from Intermission House when his six month commitment ended in June 2008. He had also arranged with his counselors at Middle College that he could graduate from high school in the summer of 2009.

Student's need for residential substance abuse treatment

85. Substance abuse is a mental disorder. In SY 2007-2008, Student had a dual diagnosis of depression and substance abuse, which is in psychiatric terms a co-occurring disorder. Professionals who testified for both sides agreed, and the evidence showed, that Student's substance abuse was intertwined with his anxiety and depression. Based on that diagnosis and testimony, Father argues that because Student needed residential treatment for the substance abuse aspect of his disorder, he needed residential treatment for all his mental health problems. The evidence did not support that claim.

86. In the period between December 2007 and June 2008, Student needed residential treatment for substance abuse. By that time, his drug abuse had become extreme. When Student left Mid-Peninsula, for example, he tested positive for three illicit drugs and possessed several more. He had previously attended an outpatient drug treatment program without lasting success. Most of the professionals who testified agreed, and the evidence showed, that Student's substance abuse was sufficiently serious and chronic that it could only be properly addressed by confinement in a facility that could provide close supervision around the clock to keep him away from drugs. Intermission House provided that supervision. Father could not provide it at home.

87. The primary purpose of Student's commitment to Intermission House was to keep him from drugs while he received treatment for his chemical dependency. As Father stated at the February 11, 2008 IEP meeting: "24 hour supervision is necessary to keep [Student] out of the drugs at this point. That is why he was transitioned directly from the hospital to Intermission House."

Student's need for residential mental health treatment

88. Intermission House takes part in Project 90's Co-occurring Disorders Program and addresses both substance abuse and the related mental health needs of its residents. However, it has no full-time mental health professionals on its staff and is not licensed as a mental health facility. In order to serve the related mental health needs of its residents, it enters into contracts with mental health professionals in the community who essentially provide outpatient services.

89. Ordinarily, Intermission House would have contracted for off-site psychiatric services for Student. However, since February 2006 Student had been receiving psychotherapy from Dr. Rashmi Garg, a psychiatrist certified in child and adolescent psychiatry, who saw Student once a week in her office. Dr. Garg works for CMH. Intermission House decided to continue that relationship rather than contract with a new psychiatrist. Dr. Garg testified that in December 2007 Student did not need residential mental health placement.

90. While at Intermission House, Student received off-site therapy from MFT Carmelina Borg, who met Student once a week in her office under a contract with Intermission House. Ms. Borg provides similar services to other adolescents under contract to CMH. She testified that in December 2007 Student needed residential treatment for his substance abuse problem, but if he had not had that problem, he would not have needed residential treatment for his other related mental health issues. She was not asked directly whether Student needed all his mental health treatment in a

residential setting, and she did not so testify. Since she testified that Student had made considerable progress on his anxiety and depression by visiting her in her office, it is unlikely that she would have believed Student needed residential treatment for all his mental health needs.⁸

91. Professionals called by CMH also refuted Father's claim. In April 2006 and November 2007, while in Mills Peninsula Hospital, Student was treated by Dr. Yelene Koss, a psychiatrist. In December 2007, Dr. Koss recommended that Student receive residential substance abuse treatment, but did not recommend residential mental health treatment. Kristin Dempsey is an MFT who started working on the dual diagnosis team of CMH in 2001. Since 2006, she has been working on the Co-Occurring Initiative, a project of CMH designed to integrate treatment of substance abuse with treatment of other mental health problems. She testified credibly that it is not necessary that the same person treat both aspects of a co-occurring disorder. It is common that the treatment is delivered by two or more people or agencies. Roxanne Dean, a clinical social worker, is the Coordinator of Chapter 26.5 Services for CMH. She testified persuasively that it is possible to provide inpatient chemical dependency treatment and outpatient treatment for related mental health needs. She established that the credentials of the professionals who treat chemical dependency are different from the credentials of those who treat other mental health needs.

⁸ MFT Glenda Baker, who originally decided for CMH in August 2006 that Student was eligible for Chapter 26.5 services, wrote an addendum to her earlier report for attachment to the IEP of February 11, 2008. Ms. Baker, who did not testify, stated in that addendum that Student did not require residential mental health treatment to benefit from his education.

92. James Simmons, the group home administrator of Project 90 and the administrator of Intermission House, agreed that an adolescent's substance abuse problem could be addressed in a residential setting while his other mental health needs were addressed elsewhere.

93. Father testified that Dr. Steve Partlow of Mills Peninsula Hospital had recommended residential mental health treatment for Student, but no documentary evidence supported that claim, and Dr. Partlow did not testify.

94. Some of Student's substance abuse treatment at Intermission House addressed anger management and coping skills. However, those services were not delivered by licensed mental health professionals. Student's professional mental health treatment for the non-substance-abuse aspects of his disorder was delivered by Ms. Borg and Dr. Garg on an outpatient basis. Nonetheless, Student made substantial progress in controlling his emotional disorders and depression, as well as in refraining from drug abuse, while being treated in this bifurcated fashion.

95. The evidence therefore showed that by December 2007, Student's substance abuse was sufficiently serious that he needed residential drug treatment as part of his mental health treatment. It also showed that his substance abuse and other mental health difficulties were intertwined and had to be treated simultaneously. However, it did not show that all those difficulties had to be addressed by the same people or in the same place. To the contrary, the evidence showed that Student could be, and was, successfully treated for chemical dependency in a residential treatment program and for his related mental health needs as an outpatient. Had Father accepted the Chapter 26.5 services offered in the February 10, 2008 IEP, Student would have received virtually the same outpatient mental health services, probably from Dr. Garg and from Ms. Borg or someone like her. The only service he would not have received under that IEP was residential substance abuse treatment.

Student's need for drug treatment to succeed in school

96. Father also argues that he should be reimbursed for his Intermission House expenses because Student was incapable of making any academic progress without residential drug treatment. However, the evidence showed otherwise. Gregory Quigley, the principal of Middle College, and Douglas Thompson, Mid-Peninsula's Head of School, both testified persuasively that some students are capable of some academic progress even while abusing drugs. The only contrary opinion was expressed by Rebecca Fletes, the education coordinator of Intermission House. Ms. Fletes has a bachelor's degree in Chicano Studies but no educational credentials or public school experience. The record does not reveal the basis for her opinion or that she has any expertise that would give it weight.

97. The most persuasive evidence was that Student frequently made some academic progress when he was attending school and also abusing drugs. He was generally academically successful between September 2006 and November 2007 at Mid-Peninsula, although he abused drugs periodically during that time. For example, in his last semester at Mid-Peninsula, while abusing drugs, he received mostly As and Bs in his classes.

98. The preponderance of evidence thus showed that by December 2007, Student's drug abuse degraded his academic progress in school but did not prevent him from making some progress. His enrollment in a residential drug treatment program was therefore not necessary to ensure that he made progress in school.⁹

⁹ Father argues in his closing brief that by December 2007 Student needed residential placement for educational as well as mental health reasons, and that Intermission House was such a placement. However, Father did not make that contention in his Amended Complaint or his Prehearing Conference Statement, and

99. In sum, the evidence showed that Student was placed in Intermission House primarily to treat his substance abuse, not for educational reasons. It showed that he needed residential treatment for substance abuse, but not for the other, related aspects of his co-occurring mental disorder. It showed that residential mental health services were not, and were not required to be, a related service in his IEP in order to provide him a FAPE.

REIMBURSEMENT

Mid-Peninsula as a private placement

100. Parents may be entitled to reimbursement for the costs of placement or services they have provided their child when the school district has failed to provide a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. The parents' unilateral placement is not required to meet all requirements of the IDEA or of state statutes governing public schools.

101. Because Student was procedurally and substantively denied a FAPE in the August 10, 2006 IEP offer, Father enrolled him in September 2006 in Mid-Peninsula in Menlo Park, California, where Student remained until late November 2007. Father seeks reimbursement for his expenses for that placement. The District argues that the placement was inappropriate.

102. Douglas Thompson, Mid-Peninsula's Head of School, testified without contradiction that Mid-Peninsula is a four-year private high school that offers both general secondary education classes and college preparatory classes. It is not certified

sought no relief from the District for SY 2007-2008. As a result, the issue was not included in the Order Following Prehearing Conference, and is not addressed here.

by the state as a non-public school, but it is accredited by the Western Association of Schools and Colleges and the California Association of Independent Schools. Its curriculum and course descriptions are approved by the University of California and the California State University for purposes of admission to those systems. Ninety percent of its students go on to college, half to four-year colleges and half to community colleges.

103. Student took college preparatory classes at Mid-Peninsula such as English, Science, Mathematics, Social Science, Spanish, and various electives. Although Student's grades were frequently erratic, they were mostly As and Bs, and demonstrated that Student made academic progress and received educational benefit at Mid-Peninsula.

104. Although the District introduced no evidence about Mid-Peninsula, it now claims that Father's evidence was an insufficient showing that Mid-Peninsula was an appropriate private placement. Its criticism that Mr. Thompson was only familiar with Student's academic progress through his examination of Student's records is unconvincing; his grades at Mid-Peninsula were not in dispute, and every District witness who testified about Student's earlier academic history in the public schools used the same method. Its assertion that Student had behavioral difficulties at Mid-Peninsula is irrelevant; Student would have presented behavioral challenges anywhere. There was no evidence that Mid-Peninsula handled his outbursts inappropriately.

105. The District's argument that reimbursement should be denied because Mid-Peninsula did not provide all the special education services Student required is both legally irrelevant and factually incorrect. Mid-Peninsula provided Student an accommodations plan for each of his school years there. Both plans were written by Deborah Quinn, a learning specialist at Mid-Peninsula who evaluates students with special learning needs, tutors and assists students with learning difficulties, works with assistive technology, and trains teachers in working with students with special needs. Although Mid-Peninsula does not provide mental health services beyond counseling,

the evidence showed that its counselor refers students to those services when needed. It also showed that during the time Student was attending Mid-Peninsula, his mental health was being addressed by weekly sessions with his psychiatrist, Dr. Garg, so it would have been duplicative for Mid-Peninsula to offer or coordinate that service. Since Student did not need OT, its absence at Mid-Peninsula has no bearing on the appropriateness of the placement.

106. The preponderance of the evidence showed that Mid-Peninsula was an appropriate private placement for Student. It met his academic needs, assisted him in his special needs, and provided him substantial educational benefit.

The 10-day notice of unilateral placement

107. Reimbursement for private school expenses may be reduced or denied if a parent fails to give the district written notice of unilateral placement at least 10 business days prior to the removal of the child from the public school. The Baden TDS began SY 2007-2008 on August 23, 2007. On September 6, 2007, Father's attorney faxed to the District a notice of unilateral placement in Mid-Peninsula. The District argues that reimbursement should be reduced or denied because the notice was tardy.

108. The timing of Father's notice to the District that he would place his son in Mid-Peninsula does not justify reduction or denial of reimbursement. The notice was given within ten business days of the start of school at Baden and before the start of school at Mid-Peninsula. Much of Father's efforts in August had been directed to his unsuccessful attempt to visit Baden. To the extent that such a notice gives a district a chance to make, or persuade a parent to accept, an offer of FAPE, the District had already had ample opportunity to do so. The District identifies no way in which its interests were prejudiced by the timing of the notice. In any event, the regulation on which the District relies applies only when a parent withdraws a child from a public school, which was not the case here.

Reasonableness

109. Reimbursement for private school expenses may also be reduced or denied if the parent behaved unreasonably with respect to the placement. The District argues that Father behaved unreasonably because he had decided before the August 10, 2006 IEP meeting to enroll Student in Mid-Peninsula and only "played" at considering the Baden offer. Before the IEP meeting he made statements suggesting that he intended, or at least was seriously considering, placing Student in a private school. However, in light of his later conduct, those statements probably evidenced nothing more than contingency planning. The evidence showed that Father did considerable investigation of Baden in the days leading up to the IEP meeting, insisted at the meeting that he wanted to visit Baden, and attempted repeatedly after the meeting to make that visit. He requested and received a written description of the Baden program. As late as August 23, 2006, according to the memorandum of CMH's case manager Jo Anna Costa of her telephone conversation with Baden administrator Tracy Loum that day, "Father ... has asked many questions over the phone including directions to their school site, the behavior mod system, and class dynamics." The weight of evidence showed that Father seriously considered the Baden offer.

110. The District argues that the timing of Father's enrollment of Student in Mid-Peninsula showed he never intended to enroll Student anywhere else. Father investigated Mid-Peninsula as a possible placement in the spring of 2006, when Student returned from Santa Clara County to live with him, and obtained recommendations Mid-Peninsula would require. On August 13, 2006, three days after the IEP meeting, Father paid Mid-Peninsula a \$500 registration fee, a \$750 student activity fee, and \$2,381 for one month's tuition. However, Father testified without contradiction that he paid those sums to comply with Mid-Peninsula's payment deadlines; otherwise his son could not have been enrolled in the fall. Mid-Peninsula's invoice shows that the first month's

payment was due on August 1, and by August 13 was already overdue. Father had no choice except to make these payments in order to preserve the option of placing Student at Mid-Peninsula. Since Father was paying by the month, his commitment was not for an entire year. He could still have chosen Baden and lost only the first month's tuition payment and related fees. It is not evidence of bad faith in considering a district offer that a parent makes contingency plans for the education of his child.

111. The evidence did not show that Father only pretended to consider the District's offer of placement at Baden on its merits. To the contrary, it showed that he sincerely considered it. Evidence that he reserved a place for his son at Mid-Peninsula and made payments necessary to preserve his option to enroll his son there did not demonstrate bad faith. Father acted reasonably in considering the Baden placement.

Expenses

112. The uncontradicted evidence showed that between September 2006 and November 2007 Father spent \$38,360.00 for registration, student activity fees and tuition at Mid-Peninsula. It also showed that he spent \$2,501.60 for transportation of Student to and from Mid-Peninsula. His total expenses, therefore, were \$40,861.60.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

ELEMENTS OF A FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state

educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education.(Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

4. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

5. *Issue 1.F.*: Based on Factual Findings 1-3 and 60-66, and Legal Conclusions 1-4, the District did not deny Student a FAPE, in the August 10, 2006 IEP, by offering a predetermined behavior plan that was not suited to his unique needs.

6. *Issue 1.G.*: Based on Factual Findings 1-3 and 67-69, and Legal Conclusions 1-4, the District did not deny Student a FAPE, in the August 10, 2006 IEP, by failing to include in its offer any goal or services to address his weaknesses in fine and gross

motor skills. The District adequately addressed Student's OT needs by providing him accommodations.

PARENT'S RIGHT TO VISIT PROPOSED PLACEMENT

7. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a special education student is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

8. Visits by parents to a proposed placement are common and usually encouraged and facilitated by districts. (See, e.g., *Student v. Anaheim City School Dist.* (as amended July 22, 2008) OAH Case No. 2007080932; *Student v. Simi Valley Unified School Dist.* (July 18, 2008) OAH Case No. 2007120033; *Student v. Capistrano Unified School Dist.* (June 6, 2008) OAH Case No. 2007070438; *Student v. Coronado Unified School Dist.* (May 28, 2008) OAH Case No. 2007120415; *Capistrano Unified School Dist. v. Student* (May 12, 2008) OAH Case No. 2006070729.) If a district proposed a placement but did not allow the parent to view it, this could in some circumstances violate the parent's right to participate in the development of the program by prohibiting the parent from making an informed decision. (*Student v. Capistrano Unified School Dist., et al.*, OAH Case No. N2007070429 (Jan. 7, 2008); cf. Ed. Code, §56329, subd. (b)[parent's right to equivalent opportunity for observation by independent assessor]; *Benjamin G. v. Special Educ. Hearing Office* (2005) 131 Cal.App.4th 875, 879)[same].)

9. A procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

10. *Issue 1.A.*: Based on Factual Findings 1-31, and Legal Conclusions 1 and 7-9, the District denied Father meaningful parental participation in the decisional process concerning the provision of a FAPE to his son by misunderstanding Baden's intake and visiting procedures; by failing in its August 10, 2006 IEP offer to require Father's commitment only to the intake process at Baden rather than to the 30-day placement of his son there; by thus creating a breakdown in communication between Father and Baden; by failing to resolve that breakdown in communication when it came to the District's attention; by failing to facilitate a visit by Father to Baden before Father was required to commit his son to placement there; and by failing to accord to Father the same right to visit Baden before committing his child to placement there as was enjoyed by other parents similarly situated. Those failures significantly impeded Father's participation in the decision-making process and thereby denied his son a FAPE.

LENGTH OF SCHOOL DAY FOR STUDENTS IN SPECIAL CLASSES

11. Section 3053 of title 5 of the California Code of Regulations (section 3053) provides in pertinent part:

(b) The following standards for special classes shall be met: [¶ ... ¶]

(2) Pupils in a special class shall be provided with an educational program in accordance with their individualized education programs for at least the same

length of time as the regular school day for that chronological peer group: [¶
... ¶]

(B) When the individualized education program team determines that an individual cannot function for the period of time of a regular school day, and when it is so specified in the individualized education program, an individual may be permitted to attend a special class for less time than the regular school day for that chronological peer group.

12. Evidence that at some time during the SY 2006-2007 the IEP team might have added a period of mainstreaming to Student's schedule is irrelevant to compliance with the regulation. Subsection (b)(2) of section 3053 specifies that it is the IEP which must set forth the required number of hours. Evidence that the instructional minutes in Student's program in the Baden TDS might have equaled his instructional minutes at Hillsdale is also irrelevant. The regulation's measure is the "length of time" of the "regular school day," which included lunch, brunch, and passing times, all of which involve interaction with other students and are important parts of a regular school day.

VALIDITY OF SECTION 3053

Vagueness

13. Because section 3053 does not define special class, regular school day, or chronological peer group, the District argues that it is void because it is too vague to put the District on notice of its obligations. However, those terms are easily defined and understood in light of familiar rules of statutory construction, which also apply to regulations. (*County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, 1586; *Blumenfeld v. San Francisco Bay Conservation etc. Com.* (1974) 43 Cal.App.3d 50, 59.) The interpretation of a regulation is a matter of law. (*Culligan*

Water Conditioning v. State Bd. of Equalization (1976) 17 Cal.3d 86, 93; *Richard Boyd Industries, Inc. v. State Bd. of Equalization* (2001) 89 Cal.App.4th 706, 712.)

14. A term in a statute or regulation may be understood by reference to its use in laws concerning the same subject matter. (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1506; *County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1698.) A "class" is defined by section 51016 of the Education Code as "an organized group of pupils within a school who are pursuing a particular course, subject or activity." Special classes are established by section 56364.2 of the Education Code, which provides:

- (a) Special classes that serve pupils with similar and more intensive educational needs shall be available. The special classes may enroll pupils only when the nature or severity of the disability of the individual with exceptional needs is such that education in the regular classes with the use of supplementary aids and services, including curriculum modification and behavioral support, cannot be achieved satisfactorily

The term "special class" is then used in the Education Code to describe a wide variety of classes by subject matter or disability. (See, e.g., Ed. Code, §§ 44265.6, subd. (d)[hearing impairments]; 44267.5, subd. (d)[health]; 52552 [citizenship]; 56364.1 [low incidence disabilities].) It follows that a special class within the meaning of section 3053 is a class addressing any particular course, subject or activity for pupils with exceptional needs who have disabilities of such severity that they cannot be educated satisfactorily in regular classes with the use of supplementary aids and services.

15. The words of a regulation are the primary source for identifying the drafters' intent. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) The words are to be given their usual and ordinary meaning where possible. (Code Civ. Proc., § 1861; *Trope v. Katz* (1995) 11 Cal.4th 274, 280.) The meaning of "school day" is too

obvious to require interpretation in this context.¹⁰ The adjective "regular" means usual, ordinary, normal, or typical. Something that is regular, ordinary, normal or typical need not always be the case; it must only be the case the greater part of the time. (*Webster's 3d New Internat. Dict.* (1966) p. 1913.) Thus, a "regular school day" within the meaning of section 3053 is the school day ordinarily, normally or usually required of a student's chronological peers.

16. In interpreting a regulation, the tribunal must ascertain the intent of the drafters so as to effectuate the purpose of the regulation. (*Moyer v. Workmen's Comp. Appeals Bd., supra*, 10 Cal.3d at 230.) The manifest purpose of subsection (2) of section 3053 is to ensure that a special education student assigned to a special class receives no shorter a school day than he would if he were among his typically developing peers, unless he "cannot function" for the entire length of that school day. Thus the term "chronological peer group" was intended by the drafters to mean the typically developing peers of the same age among whom the student would have been educated had he not been placed in the special class. Those peers, like the special education student, would routinely be assigned to the school closest to their homes. (See, 34 C.F.R. § 300.116(c)(2006).) The few decisions applying section 3053 all appear to use, without discussion, the chronological peer group at the student's neighborhood or home school to measure the length of the regular school day. (*Student v. Tamalpais Union High School Dist., et al.* (Aug. 3, 2001) SEHO No. 2001-107; *Student v. Tamalpais Union High School Dist.* (Aug. 3, 2001) SEHO No. 2000-2089; *Student v. Cabrillo Unified School Dist.*

¹⁰ In a section addressing suspensions and expulsions, "school day" is defined as "a day upon which the schools of the district are in session or weekdays during the summer recess." (Ed. Code, § 48925, subd.(c).)

(Feb. 21, 2001) SEHO No. 2000-1073; *Student v. Santa Barbara Elementary School Dist.*
(Nov. 30, 2000) SEHO No. 1998-1370.)

17. The terms "special class," "regular school day," and "chronological peer group," as used in section 3053, are readily understandable by a school district. The regulation is not void because of vagueness.

Statutory authority

18. The Government Code requires that a regulation "shall be within the scope of authority conferred." (Gov. Code, § 11342.1.) A regulation must also be "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

19. Section 3053 cites as authority for its adoption Education Code sections 56100, subdivisions (a) and (i), and makes reference to Education Code sections 56001 and 56364, as well as to sections 300.550 through 300.554 of the Code of Federal Regulations.

20. The District argues that section 3053 is void because "its statutory authority may not exist." It points out that one of the two statutes cited by the regulation as a reference, Education Code section 56364, was repealed in 2004, and the federal regulations it refers to are now simply "reserved" and do not contain substantive rules. However, ample statutory authority still supports the regulation.

21. Part 30 of the Education Code (§§ 56000 et seq.) is dedicated to special education. Section 56100, subdivision (a), cited as authority for the adoption of section 3053, provides that the Board of Education (Board) shall "[a]dopt rules and regulations necessary for the efficient administration of this part." The District dismisses this authority because it "does not directly address the substance [of] any specific regulation ... " But there is no requirement that it must; section 56100, subdivision (a), is a typical grant of regulatory authority to implement a broad statutory scheme. Part 30 is

intended generally to implement the IDEA. (Ed. Code, §§ 56000, subd. (c); 56040, subd. (a).) The IDEA is a guarantee of equality for disabled students. Its first finding is: "Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity ... for individuals with disabilities." (20 U.S.C. § 1400(c)(1).) To that end the IDEA requires that a disabled student receive an IEP that enables him "to be educated and participate with other children with disabilities and nondisabled children," that enables him to have "full educational opportunity," and that provides him "an equal opportunity for participation" in nonacademic activities and services. (20 U.S.C. §§ 1414(d)(1)(A)(IV)(cc); 1412(a)(2); 34 C.F.R. § 300.107(a); Ed. Code, § 56345.2, subd. (a).) Since the regulation at issue serves these statutory goals of equality by ensuring that a disabled student has as full a school day as a nondisabled student if possible, it is supported by statute on these grounds alone.

22. The IDEA and state law also require that a disabled student's IEP "enable the pupil to be involved in and make progress in the general education curriculum." (20 U.S.C. § 1414(d)(1)(A)(II)(aa); Ed. Code, § 56345, subd. (a)(2)(A).) Since a shortened school day makes it harder for a student to be involved in and make progress in the general education curriculum, regulation of the length of the school day is reasonably necessary to implement this statutory requirement as well.

23. Education Code section 56100, subdivision (i), also cited as authority for the adoption of Section 3053, provides that the Board shall "adopt regulations for all individualized education programs ..." Section 3053 regulates IEPs by requiring, in an appropriate case, the entry on the IEP of the team's finding that a student "cannot function" for the entire length of a regular school day. Like many other IEP requirements, the regulation ensures that the IEP team actually consider an issue, because the result of its consideration must be preserved in writing. A shortened school day is tolerated under IDEA only when the reduction is contemplated by the IEP and is

linked to the child's developmental goals and unique needs. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1150 (citing *Doe v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1491.) Section 3053 is reasonably necessary to ensure compliance with those requirements.

24. Finally, the Board has specific statutory authority to regulate special classes. Although Education Code section 56364 was repealed in 2004, section 56364.2, subdivision (b), was in effect in 2004 and still is. It provides that "[s]pecial classes shall meet standards adopted by the board." Section 3053, subdivision (b), is an obvious exercise of that authority, since its preface is: "The following standards for special classes shall be met." The District suggests that this regulatory authority is limited to matters affecting the LRE, since section 56364, subdivision (b) elsewhere addresses the LRE. However, the amount of time a student spends with other students is a significant aspect of the LRE. Moreover, the language of the statutory grant of authority is not limited to matters affecting the LRE.

Conflict with another statute

25. The District argues that section 3053 is invalid because it conflicts with Education Code section 46141, which requires that the minimum school day for most high school students is 240 minutes, and with Education Code section 46307, which provides that for the purpose of apportioning money, a day of attendance is counted if a student either attends for the minimum school day or "for the number of minutes specified in that pupil's IEP ... whichever is less." From this the District reasons that section 3053, by requiring that a student in a special class be afforded a regular school day, conflicts with the statutory permission for a student to attend for 240 minutes or any lesser number of minutes required in his IEP.

26. There is no conflict between the regulation and the statutes. Section 46307 imposes no requirements on IEP teams; it simply addresses the allocation of money according to a formula. If a special education student is given the regular school day of

his chronological peers, he will automatically receive a minimum school day or more. And if an entire day is not appropriate, an IEP team need only follow the procedure in section 3053, subdivision (b)(2) by deciding that a student cannot function for a regular school day, and by noting that decision in the IEP. Then a student can attend for a minimum school day or less, in compliance with the regulation and in harmony with both statutes.

27. *Issue 1.B.*: Based on Factual Findings 45-46, and Legal Conclusions 11, 13-14 and 17, the Baden TDS was a special class. Based on Factual Findings 33-44, and Legal Conclusions 11-13, 15 and 17, the length of the school day that the District offered Student at the TDS was approximately one and one half hours less than the length of the school day of Student's typically developing chronological peers. Based on Factual Findings 48-51, and Legal Conclusions 1, 11-12 and 22, the failure of the District to offer Student a full school day in compliance with Section 3053 substantively denied him a FAPE. Based on Factual Findings 48-51, and Legal Conclusions 1, 11-12, and 22, the failure of the District to offer Student a full school day in compliance with Section 3053 because the loss of an hour and a half a day, or 41.4 school days in a year, would have significantly impeded Student's right to a FAPE and caused a substantial deprivation of educational benefits

REQUIREMENT OF CLEAR WRITTEN OFFER

28. An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

29. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what

additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526.)

30. *Issue 1.C.*: Based on Factual Findings 1-3 and 53-54, and Legal Conclusions 1 and 28-29, the August 10, 2006 IEP offer was as clear as it could reasonably be in its statement of the proposed beginning of services and the anticipated frequency, location, and duration of those services. In the alternative, any violation was de minimus and did no harm either to Student's education or Father's right to participate in the decision-making process.

PREDETERMINATION OF OFFER/ CONTINUUM OF OPTIONS

31. School officials may not make a placement decision in advance of an IEP meeting. (*W.G. v. Board of Trustees of Target Range School Dist. #23, supra*, 960 F.2d at p. 1484.) A school district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 107 LRP 37880, 48 IDELR 31.)

32. A SELPA must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code, § 56360.)

33. *Issue 1.D.*: Based on Factual Findings 1-3 and 55-56, and Legal Conclusions 1 and 32-33, the District's August 10, 2006 IEP offer was not predetermined and was made only after consideration of a continuum of placement options.

LEAST RESTRICTIVE ENVIRONMENT

34. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

35. *Issue 1.E.*: Based on Factual Findings 1-3 and 57-59, and Legal Conclusions 1 and 34, the District's August 10, 2006 IEP offer did not deny Student a FAPE by failing to place him in the LRE or failing to include opportunities for mainstreaming.

PRESENT LEVELS OF PERFORMANCE / MEASURABLE GOALS

36. An annual IEP must contain, inter alia, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the regular education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i)(I).) The statement of present levels essentially creates a baseline for designing educational programming and measuring future progress. The IEP must also contain measurable annual goals designed to allow the student to be involved in and

make progress in the general educational curriculum. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(i)(II).)

37 *Issue 1.H.*: Based on Factual Findings 1-3 and 70-73, and Legal Conclusions 1 and 36, the District substantially complied with the requirement that the August 10, 2008 IEP offer contain measurable goals. In the alternative, if it did not, its failure to do so did not result in educational loss for Student and did not significantly impede Father's right to participate in the decision-making process, because it would have been cured at the next IEP meeting 30 days later and because no better measurements were available in the meantime.

ANNUAL IEP MEETING

38. A school district must conduct an IEP meeting for a special education student at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, § 56343, subd. (d); 20 U.S.C. § 1414(d)(4)(A)(i).) The statutes make no exception for the situation in which a parent has unilaterally placed his child in a private school and is demanding reimbursement because the District allegedly failed to offer or provide a FAPE. The duty of the District to hold annual IEP meetings continues during that period. (*Briere v. Fair Haven Grade School Dist.* (D.Vt. 1996) 948 F.Supp. 1242, 1254.)

39. The District's argument that it was no longer required to hold annual IEP meetings when Father placed his son in private school is based on a misinterpretation of section 300.148(c) of title 34 of the Code of Federal Regulations, which provides in pertinent part that district may be required to reimburse parents for the costs of a private enrollment if the hearing officer finds "that the agency had not made FAPE available to the child in a timely manner prior to that enrollment" The District argues that, because a District must offer or provide a FAPE prior to a private school enrollment,

it has no obligation to conduct an IEP meeting (or, impliedly, offer a FAPE) after that enrollment. The language of the regulation cannot be stretched that far. The regulation simply addresses tuition claims, not the timing of IEP meetings. The District cites no authority supporting its interpretation.

40. *Issue 2.A.*: Based on Factual Findings 1-3 and 74-78, and Legal Conclusions 1 and 38-39, the District failed to conduct the required annual IEP meeting for SY 2007-2008 until December 12, 2007. Its failure deprived Student of educational opportunity and significantly impeded Father's right to participate in the decisional process because, for the first half of the school year, it left outstanding the inadequate offer of August 10, 2006, and deprived Father of any opportunity for involvement in further placement decisions regarding his son. It thereby denied Student a FAPE during that period.

CHAPTER 26.5 SERVICES AND DRUG TREATMENT

41. Chapter 26.5 of the Government Code (§§ 7570 et seq.) sets forth a comprehensive system by which a school district may refer a special education student suspected of being in need of mental health treatment to the local county mental health agency for such treatment. The county mental health agency's responsibility is derivative of that of the school district; the county agency "is responsible for the provision of mental health services" to the student only "if required in the individualized education program" of the student. (Gov. Code, § 7576, subd. (a).)

42. A school district must include "related services" in an IEP if those services may be required to assist a child with a disability to benefit from special education. (20 U.S.C. §§ 1401(26)(A), 1414(d)(1)(A)(i)(IV); Ed. Code, §§ 56345, subd. (a)(4)(B), 56363, subd. (a).) Related services are:

transportation, and such developmental, corrective, and other supportive services (including speech-language

pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, *and medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) ...

(20 U.S.C. § 1401(26)(A)(emphasis supplied).) State law adopts this definition of related services, which are called "designated instruction and services." (Ed. Code, § 56363, subd. (a).) Neither definition includes substance abuse treatment. The regulation that defines "mental health services" for the purpose of Chapter 26.5 includes psychotherapy but not substance abuse treatment. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)¹¹

43. Substance abuse treatment is not a related service under state or federal law because it is a medical service, and thus is exempt from the definition above. (*Blickle v. St. Charles Cmty. Unit Sch. Dist. No. 303* (N.D.Ill. 1993) 1993 WL 286485, p. 9, fn. 10; *Board of Educ. of the Bedford Central School Dist.* (N.Y. SEA 2007) 48 IDELR 84, 107 LRP 33397; *St. Charles Community Unit School Dist. No. 303* (Ill. SEA 1992) 19 IDELR 552, 9

¹¹ CMH's obligation is determined by interpretation of these statutes and regulations, not (as Father argues) by the inclusion of substance abuse in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.

LRP 2173; *Brian M. v. Boston Public Schools* (Mass. SEA 1989) 401 IDELR 341, 401 LRP 9440.)

44. School districts are not responsible for the provision of substance abuse treatment to a disabled student even when the substance abuse interferes with the student's education and is intertwined with emotional disturbance or another disabling condition. (*P.K. v. Bedford Cent. School Dist.* (S.D.N.Y. 2008) 2008 WL 2986408, pp. 13-14; *Blickle v. St. Charles Cmty. Unit Sch. Dist. No. 303*, *supra*, 1993 WL 286485 at p. 9 fn. 10; *Field v. Haddonfield Bd. of Educ.* (D.N.J. 1991) 769 F.Supp. 1313, 1325-1328; *Board of Educ. of the Bedford Central School Dist.*, *supra*; *In the Matter of a Child with a Disability* (Conn. SEA 1994) 21 IDELR 753, 21 LRP 2919; *Letter to Scariano* (OSEP 1988) 213 IDELR 133, 213 LRP 9046.) Father does not cite, and research does not reveal, any decision, ruling, or administrative advice from any jurisdiction requiring the inclusion of a drug treatment program in an IEP.¹²

45. In *Clovis Unified School Dist. v. California Office of Administrative Hearings* (1990) 903 F.2d 635, the Ninth Circuit set forth the analytical framework for determining whether a residential placement under IDEA constituted an educational or mental health placement for which a school district was responsible, or a medical placement not within the definition of a related service. In *Clovis* the student was receiving residential mental health services for her emotional disturbance when her behavior became so bizarre that she had to be placed in an acute care psychiatric hospital. In finding that the District was not responsible for the hospital placement, the court rejected the same arguments made here. Parents argued that they were entitled to reimbursement because the

¹² Since no binding California decision interprets Chapter 26.5 as excluding drug treatment, CMH's argument that Father should be sanctioned for pursuing a frivolous theory is unpersuasive.

placement was "supportive" of the child's education, but the Court found that argument far too inclusive:

If a child requires, for example, ear surgery to improve his hearing, he may learn better after a successful operation and therefore in some respects his surgery is "supportive" of his education, but the school district is certainly not responsible for his treatment. Similarly, a child who must be maintained on kidney dialysis certainly cannot physically benefit from education to the extent that such services are necessary to keep him alive, but again, it is not the responsibility of the school district to provide such maintenance care.

(*Clovis, supra*, 903 F.2d at 643.)

46. In *Clovis, supra*, the Ninth Circuit also rejected the argument that since the student's medical, social and emotional problems that required hospitalization were intertwined with her educational problem, the school district was responsible for their treatment. "Rather," said the court, "our analysis must focus on whether [the student's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process." (*Clovis, supra*, 903 F.2d at 643.) The court found that because the student's placement was primarily for medical, not educational, purposes, it was not a related service, but instead was excluded as a medical service under IDEA. (*Id.* at 645; see also, *Kruelle v. New Castle County School Dist.* (3d Cir. 1981) 642 F.2d 687, 693.) The medical nature of the service does not turn on whether it may be provided by persons other than physicians, but on the nature of the service. (*Clovis, supra*, 903 F.2d at 643; *Field v. Haddenfield Bd. of Educ., supra*, 769 F.Supp.at 1327.) The

Clovis analysis is applicable to residential drug treatment programs. (*Board of Educ. of Oak Park & River Forest High School Dist. No. 200* (N.D. Ill. 1998) 21 F.Supp.2d 862, 878; *Field v. Haddenfield Bd. of Educ., supra*, 769 F.Supp. at 1326.)¹³

47. *Issues 2B, 4:* Based on Factual Findings 1-3 and 79-99, and Legal Conclusions 1 and 41-46, the residential drug treatment Student received at Intermission House was not a related service which was required to be a part of his IEP in order for him to receive a FAPE, and CMH was not responsible for paying for it. The primary purpose for Student's commitment to Intermission House was to keep him away from drugs while he received chemical dependency treatment. It was a response to medical and emotional problems that troubled Student whether he was in or out of school. Student's placement in Intermission House was not necessary to ensure that he made some progress in school. It was not necessary that Student's related mental health issues be treated in a residential setting. Treatment of the other, related aspects of his co-occurring disorder was given on an outpatient basis and has been successful. Father is therefore not entitled to reimbursement for his expenses in placing Student at Intermission House.

AVAILABILITY OF RELIEF

Reimbursement

48. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide

¹³ Father also claims entitlement to reimbursement for Intermission House under the Bronzan-McCorquodale Act (Welf. & Inst. Code §§ 5600 et seq.). However, OAH only has jurisdiction over a claim for reimbursement for mental health services based on Government Code Chapter 26.5. (Gov. Code, § 7586.)

a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c)(2006); Ed. Code, § 56175; *School Comm. of Burlington v. Dep't of Educ.* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].) Parents may receive reimbursement for the unilateral placement if it is in an appropriate private setting. (34 C.F.R. § 300.148(c)(2006); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 15-16 [126 L.Ed.2d 284].) The propriety of the private placement is governed by equitable considerations. (*Carter, supra*, 510 U.S. at pp. 15-16.) The placement need not provide the specific educational programming necessitated by the IDEA. (*Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.)

49. Section 300.148(c) of title 34 of the Code of Federal Regulations allows reimbursement for private school expenses in the case of a child "who previously received special education and services under the authority of a public agency." The District argues that this language impliedly excludes reimbursement for the private school expenses of a child who has not received such services. Although circuit courts differ (compare *Greenland School Dist. v. Amy N.* (1st Cir. 2004) 358 F.3d 150, 159-160 with *Board of Educ. v. Tom F.* (2d Cir. 2006) 2006 WL 2335239, *aff'd by equally divided court*, 128 S.Ct. 1, 169 L.Ed.2d 1 (2007)), in the Ninth Circuit parents of students who have not previously received special education and related services are nonetheless eligible to receive reimbursement for private school expenses in an appropriate case. (*Forest Grove School Dist. v. T.A.* (9th Cir. 2008) 523 F.3d 1078, 1087-1088.) The District's argument to the contrary ignores governing law. It also ignores the fact that Student previously received special education and services from the Morgan Hill Unified School District, a public agency.

50. Reimbursement may be reduced or denied, in the discretion of the ALJ, if a parent either fails to inform a district at the most recent IEP meeting "prior to removal of

the child from the public school" that he rejects the offered placement and will enroll his child in a private school, or fails to give the district written notice of that rejection and unilateral placement at least 10 business days "prior to the removal to the child from the public school." (34 C.F.R. § 300.148(d)(1)(i),(ii)(2006).) There is no comparable regulation in the case of a child not being removed from a public school. In such a case, "notice to the school district is a relevant equitable consideration." (*Forest Grove School Dist. v. T.A., supra*, 523 F.3d at 1089.) Reimbursement may also be denied if a parent has acted unreasonably. (34 C.F.R. § 300.148(d)(3)(2006).)

51. *Issue 3: Based on Factual Findings 1-52, 74-78, and 100-112, and Legal Conclusions 1, 10, 27, 40 and 48-50, Father is entitled to reimbursement for his expenses in placing Student in Mid-Peninsula from September 2006 through November 2007. The August 10, 2006 IEP offer substantively and procedurally denied Student a FAPE from the beginning of SY 2006-2007 to December 12, 2007. Mid-Peninsula was an appropriate placement, and Father acted reasonably with respect to it.*

ORDER

1. Within 45 days of the date of this Order, the District shall pay to Father the sum of \$40,861.60 to reimburse him for tuition, fees, and transportation expenses incurred between September 2006 and November 2007 in connection with the enrollment of his son in Mid-Peninsula High School.

2. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on issues 1.A., 1.B., 2.A., and 3. The District

prevailed on issues 1.C., 1.D., 1.E., 1.F., 1.G., 1.H., 2.B., and 4. CMH prevailed on issues 2.B. and 4.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: September 24, 2008

A handwritten signature in black ink, reading "Charles Marson", is written over a horizontal line. The signature is enclosed in a thin black rectangular border.

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings