BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. MARIN COUNTY MENTAL HEALTH YOUTH AND FAMILY SERVICES.	OAH CASE NO. 2011081106

DECISION

Administrative Law Judge Deidre L. Johnson (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 10, 2012, in Sacramento, California.

Colleen A. Snyder, Attorney at Law, Ruderman & Knox LLP, represented Student and his Parent (Student).[1] Neither Student nor his Mother was present during the hearing. Grandmother was present throughout the hearing on their behalf.

No one appeared on behalf of Marin County Mental Health Youth and Family Services (CMHS).[2]

[1] Christian Knox, Attorney at Law, was also present during the hearing.

[2] Evidence established that the agency refers to itself as "Community Mental Health Services" (CMHS), or CMH. At the outset of the hearing, the ALJ requested OAH staff to call Marin County Deputy County Counsel Stephen R. Raab to see if he intended

Student filed his request for a special education due process hearing (complaint) with OAH on August 26, 2011, naming both CMHS and the Novato Unified School District (District). On October 10, 2011, OAH granted a continuance of the case. On December 7, 2011, Student filed a notice of settlement and request for dismissal of the District from this case. On January 13, 2012, OAH dismissed the District from this action.

At the hearing, oral and documentary evidence was received. Student delivered an oral argument at the close of the hearing, and the matter was submitted for decision.

PROCEDURAL MATTERS

Hearsay information indicates that CMHS claims it was not properly served with Student's complaint in this case.

The purpose of the Individuals with Disabilities in Education Improvement Act (IDEA) (20 U.S.C. 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE). (20 U.S.C. § 1400(d)(1)(A), (B), and (C); Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).)

20 United States Code section 1415, subdivision (b)(7)(A)(i) requires that the procedural safeguards for special education due process hearings must include procedures to require the party requesting a due process hearing to provide due process complaint notice, in accordance with subdivision (c)(2), to the other party. The IDEA does not specify a method of delivery of the complaint notice. The complaint

---

to appear. Staff reached Mr. Raab, who indicated that CMHS would not attend the hearing.

notice "shall be deemed sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A)." (20 U.S.C. § 1415(c)(2)(A).) In addition, the notice of insufficiency procedure must be used within 15 days after receipt of the complaint. (20 U.S.C. § 1415(c)(2)(C); Ed. Code, § 56502, subd. (d)(1).)

In California, the party requesting a special education due process hearing must provide the opposing party with notice of the complaint by delivering a copy of the complaint to them at the same time that it is filed with OAH. (20 U.S.C. § 1415(b)(7)(A); Ed. Code, § 56502, subd. (c)(1).) Service of a *notice*, motion or writing pertaining to special education due process hearing procedures shall be delivered personally or sent by first class mail or other means, including *facsimile* transmission "if complete and without error," to OAH, or other persons or entities at their last known addresses, and, if the person or entity is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative. Service must be made by a method that ensures receipt by all parties and OAH in a comparable and timely manner. (Ed. Code § 56100, subds. (a) and (j); Cal. Code Regs., tit 5, § 3083, subds. (a)-(c).) The OAH due process complaint form, available on the OAH website (www.dgs.ca.gov/oah), contains a section entitled "Statement of Service" for the party requesting a hearing to indicate, by checking boxes, whether he or she provided a copy of the complaint to the other named party and OAH by first class mail, facsimile transmission, messenger service, or personal delivery, and to sign the statement. (Ed. Code, § 56502, subd. (b); Cal. Code Regs., tit 5, § 3083, subd. (b).)

In this case, Student's complaint contains a formal proof of service under penalty of perjury stating that the complaint was served on Bruce Gurganus, Director of CMHS, 20 North San Pedro Road, Suite 2028, San Rafael, California, via facsimile at (415) 473-3791. On August 31, 2011, OAH served a Scheduling Order and Notice of Due Process

Hearing and Mediation on CMHS at its address of record by United States (U.S.) Mail, with a courtesy fax copy, to the attention of CMHS Program Manager Ann Pring. Thereafter, the record reflects that all OAH orders in this case were duly served on CMHS by U.S. Mail with courtesy faxes.

On October 7, 2011, Student and the District filed a joint request for a continuance which contained a declaration from a paralegal at Ruderman & Knox, and a letter dated September 1, 2011, addressed to Ms. Knox from Deputy County Counsel Raab, on behalf of CMHS. Both in his phone call with the paralegal, and in the letter to the law firm, Mr. Raab acknowledged actual receipt of Student's complaint, but claimed that OAH did not have jurisdiction over CMHS because CMHS had been relieved of all "obligations and mandates pursuant to AB3632 for the fiscal year 2010-2011 and the fiscal year 2011-2012," and asserted that CMHS had not been properly served with the complaint. On October 10, 2011, OAH served CMHS with an order granting the continuance, in which Presiding ALJ Bob Varma noted that CMHS had not filed an appearance in the case and declined to file any response to the continuance motion.

On December 28, 2011, pursuant to an OAH scheduling order, ALJ Adeniyi Ayoade conducted a telephonic prehearing conference (PHC), and thereafter issued a written PHC order containing a summary of his telephone conversation with Mr. Raab, in which Mr. Raab declined to participate in the PHC on behalf of CMHS. In a letter dated December 30, 2011, addressed to attorney F. Richard Ruderman of Ruderman & Knox, Mr. Raab again asserted that CMHS had not been properly served with Student's complaint.

However, the OAH record in this case reflects that, during the pendency of this action, CMHS did not make any general or special appearance before OAH, through either a county representative or legal counsel, to contest service, seek dismissal of

CMHS from the action, or otherwise defend the action.[3] Thus, CMHS did not notify the hearing office in writing of any defective notice. As found above, Mr. Raab's letters were addressed to Student's attorneys, not to OAH. There was no evidence introduced at hearing to controvert Student's proof of service, under penalty of perjury, that CMHS was duly served with Student's complaint by facsimile transmission. Facsimile transmission was a reasonable method of service authorized by law. There was no evidence that the transmission to the Director of CMHS was unsuccessful, and in Mr. Raab's communications with Student's law firm, he acknowledged that he had received and read the complaint. Based on the foregoing, CMHS received a copy of Student's complaint notice and therefore received notice of due process as required by law.

ISSUES

Did CMHS deny Student a FAPE for the 2009-2010 and 2010-2011 school years by:

1. Failing to offer or provide Student with measurable mental health goals that complied with the law; and/or

[3] See Order Granting Motion to Dismiss, in Student v. San Francisco Unified School District (May 7, 2009) Cal.Ofc.Admin.Hrngs. Case No. 2009040635, [District presented evidence that it had not been served with Student's complaint]; and Order Denying Motion to Dismiss and Determining Sufficiency of Due Process Hearing Request, in Capistrano Unified School District v. Student (September 20, 2011) Cal.Ofc.Admin.Hrngs. Case No. 2011090002, [Student's motion to dismiss denied as personal service provisions of the California Code of Civil Procedure were inapplicable to special education complaints].

2. Failing to offer or provide Student with adequate mental health services to meet his unique needs related to his disability?[4]

REQUESTED REMEDIES

Student requests that OAH issue an order for CMHS to provide him with compensatory education services by establishing a monetary compensatory fund, from which Parent may be reimbursed for providing Student with individual and group mental health counseling and other related mental health services until he graduates from high school or reaches the age of 22, whichever comes first.[5]

CONTENTIONS OF THE PARTIES

Student contends that CMHS was responsible for Student's educationally related mental health goals and services for the 2009-2010, and 2010-2011 school years in the District, and that, beginning in August 2009, CMHS failed to offer or provide him with appropriate mental health goals and services. Student argues that even after October 8, 2010, when the California Governor suspended the funding mandate for educationally related mental health services under Chapter 26.5 of the Government Code, CMHS continued delivering mental health services to him, and should be held accountable as a public agency for the quality of those services.

---

[4] Student clarified at the hearing that his claims that CMHS failed to "provide" goals or services involved failure to implement such goals or services called for in his individualized education programs (IEP's).

[5] Student withdrew his proposed resolution in his complaint for CMHS to fund Student's placement at a residential treatment center.

As gleaned primarily from hearsay documents, CMHS contends that it is a mental health agency, not an educational agency, and that the statutory legal obligation to provide educationally related mental health services changed and no longer applies to county agencies, including CMHS. CMHS apparently applies this argument to both the 2009-2010, and 2010-2011 school years. However, as noted above, CMHS did not appear to present any evidence, nor file a motion to dismiss it as a party to this action. As determined in the Legal Conclusions, based on the evidence presented, CMHS is a public agency and a proper party to this action.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was born in June 1995, and was over 16 years old during the time of the hearing. Parent resides within the geographical boundaries of the District, and Student resided with her until August 1, 2011, when Parent and Grandmother unilaterally placed him in a residential treatment center, Diamond Ranch Academy, in Utah.

2. Student is eligible for and has received special education and related services under the primary eligibility category of Emotional Disturbance (ED), with a secondary eligibility category of Other Health Impaired based in part on Attention Deficit Hyperactivity Disorder Combined Type (ADHD).

3. Special education law provides that therapeutic mental health services are a related service that may be necessary for a pupil to benefit from his or her education. At times applicable in this case, Chapter 26.5 of the California Government Code (referred to by the parties as AB 3632 for the legislative Assembly Bill that originated the law), set forth a comprehensive system by which a local education agency (LEA) could

refer a special education pupil suspected of being in need of mental health treatment to a local county mental health agency.[6]

4. Student was first found eligible for special education in May 2001 under the ED category. As a special education pupil, Student was first referred to CMHS, and received Chapter 26.5 educationally related mental health counseling services when he was in first grade, the 2001-2002 school year. Student has a long history of inappropriate classroom behavior, including hyperactivity and aggressive behaviors.

October 2008 IEP

5. In April 2008, a District school psychologist at Hill Middle School referred Student to CMHS for another Chapter 26.5 assessment. At that time, Student was described as " 'checked out emotionally,' unable to concentrate on the material presented, regularly making negative comments to others in class, exhibiting oppositional defiant behaviors, ignoring instruction, and 'drawing attention to himself to avoid work.' " He also had difficulties in his relationship with Parent at home, and she had mental health problems.

6. On October 16, 2008, when Student was in eighth grade, CMHS assessed Student and found him again eligible for educationally related mental health services. According to the assessment report, the CMHS assessor, Hiram Elliott recommended weekly individual counseling for Student "to address depressive symptoms and support mood stability at school," at least one monthly collateral counseling session for Mother,

[6] While the records in this case refer to "AB 3632," that reference is inaccurate. Many additional bills and amendments have updated Chapter 26.5 of the Government Code over the years, including AB 2726. Consequently, in this Decision, the relevant laws are referred to as Chapter 26.5, except as referred to in the evidence.

and a medication assessment. He also recommended a mental health goal that was not included in his report.

7. On October 27, 2008, District held an annual IEP team meeting. While Parent did not attend the October 2008 IEP team meeting, Student and Grandmother were present. District and CMHS offered Student one weekly 50-minute session of individual mental health counseling, one monthly 50-minute session of collateral counseling, along with transportation, and a medication assessment. The IEP also offered Student a behavior support plan (BSP), four annual goals, and educational placement in a special day class (SDC) for 150 minutes a day, with 58 percent of his time in general education classes. The IEP contained three annual functional academic goals (to demonstrate effective classroom listening skills by showing attention and responding when called; to take notes of oral lectures; and to develop an outline for a topic using reference material notes). In addition, there was a mental health goal for Student to maintain mood stability and focus in the classroom (completing academic assignments and interacting appropriately with teachers and peers) by "utilizing awareness of at least three environmental triggers and three coping strategies identified in counseling" (mood goal).[7] Parent later consented to the IEP as offered.

8. During the 2008-2009 school year in eighth grade, Student received 36 disciplinary referrals for disrupted activities, eight referrals for violations of school rules, six referrals for causing or threatening physical injury, and seven referrals for obscene acts, profanity and vulgarity, and also received 24 suspensions.

---

[7] The appropriateness of the October 2008 IEP, at the time that it was offered, is not at issue in this proceeding. See Education Code section 56505, subdivision (l) for the applicable two-year statute of limitations, and the exceptions that do not apply in this case.

SUBSTANTIVE DENIAL OF FAPE BASED ON MENTAL HEALTH GOALS AND SERVICES

9. For the time periods in the present case, beginning in late August 2009, Student matriculated from middle school to high school and was transferred to Novato High School, operated by the District. Student contends that CMHS denied him a FAPE during the 2009-2010, and 2010-2011 school years because CMHS failed to offer or provide him with appropriate, measurable mental health goals, and appropriate mental health services. CMHS contended in hearsay letters to Student's attorneys that it was not legally responsible for Student's mental health services for either school year.

10. An LEA or public agency must provide special education and related services to meet a pupil's unique needs related to his or her disability. For an IEP to offer a substantive FAPE, the proposed program must be specially designed to address the pupil's unique needs and be reasonably calculated to provide some educational benefit. The IEP is to be evaluated as of the time the offer was made, in light of the information available at the time, and is not to be judged in hindsight.

11. A pupil's IEP must contain a statement of measurable annual goals that are designed to meet the child's unique needs related to the disability to enable the child to be involved in and make progress in the general education curriculum. It is generally the responsibility of the school district or LEA to offer annual goals. However, under Chapter 26.5, educationally related mental health services in an IEP must include mental health goals and objectives for those services.

Start of the 2009-2010 School Year

12. For Student's 2009-2010 school year in ninth grade, Chapter 26.5 was in full force and effect. CMHS was a member of Student's IEP team as the county provider of his mental health services. As set forth in Legal Conclusions 5 through 25, CMHS was

legally obligated to develop and offer appropriate mental health goals and services for Student for his educationally related mental health needs.

13. Student's October 2008 IEP was in effect until October 21, 2009, when the District held an annual IEP team meeting and the public agencies made a new annual offer. Thus, for the beginning of the ninth grade school year, Student's October 2008 IEP provided him with the mental health goal and related mental health services described in Factual Finding 5 through 7 above: a goal to maintain mood stability and focus in the classroom, weekly individual counseling, and monthly collateral counseling for Mother.

14. Grandmother testified that she did not believe Student received weekly individual counseling from CMHS during the times involved in this proceeding. Although she lived in Oregon, she talked with Student by telephone regularly and he did not often mention the counseling. In addition, she believed that District and CMHS did not regularly provide Student with the transportation services required by his IEP to attend counseling and Mother had difficulties providing transportation for Student. Grandmother's testimony was based on hearsay and cannot be used as the sole basis to make a finding of fact as to the frequency of CMHS's provision of counseling services.[8] Absent other evidence, CMHS, as a public agency, is presumed to have performed its duties required by Student's IEP.[9] However, as found below, additional evidence showed that after April 2009, Student did not receive weekly counseling from CMHS because he did not want to go to counseling and often did not go.

15. As to transportation, the October 2008 IEP did not state that CMHS would be responsible to transport Student to and from his mental health therapy. Rather, the

[8] See California Code of Regulations, title 5, section 3082, subdivision (b).

[9] See Evidence Code section 664.

transportation section of the services page stated that Student would receive transportation "To and from school, To and from CMH." It is reasonable to conclude that the District was responsible to provide Student transportation, both from his home to school and back, and from school to his therapy appointment at CMHS and back. There is no evidence to support Grandmother's assumption that CMHS was responsible for Student's transportation.[10]

16. In late April 2009, Student stopped seeing Mr. Elliott for individual weekly counseling. On June 4, 2009, at the end of Student's eighth grade school year, the District held a manifestation determination (MD) IEP team meeting because of a disciplinary incident in which Student "roughhoused" another pupil with an apple and talked back to a school counselor. District's MD documents established that Student's conduct was the result of his disability. Student's SDC teacher informed the MD team that Student did nothing in class for extended periods, did not read with the class, put his head down, ignored the teacher's instructions, was argumentative, defiant, and rarely took responsibility for his actions. The MD IEP team recommended that Student's combined special/general education placement should continue for the 2009-2010 school year in ninth grade at Novato High School, "where a new functional behavior assessment and a new behavioral intervention plan may be implemented, if deemed necessary." The District IEP team members present placed the public agencies on notice that Student's behaviors needed to be looked at when he started high school.

[10] Student subpoenaed CMHS's educationally related mental health records, but CMHS did not produce the records for the hearing.

STUDENT'S EXPERT WITNESS

17. Dr. Paula Solomon testified for Student and Parent at hearing. Dr. Solomon is a licensed clinical psychologist based in Petaluma, California. Among her many degrees, she obtained a master's in 1985 and a doctorate in 1991, in clinical psychology, and a certificate in neuropsychological assessment in 2002. Dr. Solomon has over 20 years of experience as the clinical director of True to Life Children's Services (TLC) in Sebastopol, which provide services for residential and outpatient treatment, school, and foster care for emotionally disturbed children and adolescents. In addition, Dr. Solomon has maintained a private practice specializing in assessing children, particularly from Marin and Sonoma counties. Dr. Solomon and TLC have many years of experience in dealing with CMHS with respect to many of her clients.

18. Dr. Solomon was persuasive that Student's October 2008 IEP, even if it was fully implemented, was inadequate to address his mental health needs at the start of ninth grade. First, despite CMHS's individual counseling with Student, however frequently that may have occurred through April 2009, Student had received 57 disciplinary referrals and 26 suspensions during eighth grade. In the spring of 2009, District's records showed that Student engaged in repeated disciplinary incidents multiple times a month. Thus, when Student started high school in late August or early September 2009, CMHS knew that Student had not received weekly counseling since April 2009, and knew or should have known that Student's BSP and his mental health services were not adequate interventions. However, CMHS did not immediately ask District to hold an IEP team meeting or otherwise seek to amend Student's IEP to recommend different or more intensive mental health services or a change in placement.

19. In addition, when the October 2008 IEP was formulated, CMHS did not qualify Student to be placed in a "blended classroom," which was an SDC run by the

county with a CMHS mental health therapist on site. The CMHS assessor, Mr. Elliott, stated in his report that he consulted with a CMHS blended class therapist, Sandra Hirschfield, who reviewed the District's referral information for Student and observed him in the District's class, and they determined that Student's conduct did not warrant placement in a blended classroom with increased mental health supports. While that decision was beyond the applicable statute of limitations, CMHS continued to underestimate how severe Student's behaviors were at the beginning of ninth grade, and how much additional, intensive mental health therapy and supports he needed to make educational progress.

20. Dr. Solomon testified that the October 2008 mood goal, for mood stability and focus using coping strategies, was not a mental health goal because the IEP said the goal was to be monitored by a teacher instead of a mental health professional. However, the appropriateness of the goal, when offered, is not at issue. For the start of ninth grade, the goal was a mental health goal because it required Student to identify environmental triggers and coping strategies "identified in counseling," thus implicating a role for the CMHS therapist. In addition, Mr. Elliott's mental health assessment stated that he recommended a mental health goal but it was not set forth in his report. Moreover, the goal identified Student's then-present levels of performance by referring to his "reduced impulse control" and "oppositional/defiant behavior," rather than academic functioning. Thus, for the beginning of ninth grade, CMHS had a mental health goal in place for Student.

21. As found above, CMHS knew, by the beginning of Student's ninth grade year, that its single mental health mood goal was ineffective and that Student had continued to be unable to regulate his moods in the classroom and on the school grounds to a significant extent. The goal was therefore not appropriate for the 2009-2010 school year and should have been modified when school started. In addition, the

goal did not provide any mechanism for how Student was to initiate coping strategies on the high school campus, either on his own or with prompting, and lacked sufficient detail. Moreover, CMHS knew that Student had not yet returned to the weekly counseling services that would have taught and reminded him of the coping strategies.

22. As noted above, District had a BSP in place as part of the October 2008 IEP. The BSP targeted Student's negative behaviors that were impeding his learning, including "off-task behavior such as inappropriate verbal responses, talking back, rude and cruel statements . . . defiant as demonstrated by ignoring a request, communicating with monosyllabic sounds in place of words, and verbally or physically refusing to participate." The BSP noted that Student used these behaviors to avoid requests made of him and delay or avoid working on difficult or nonpreferred tasks, and to obtain status or attention from his peers. The BSP goal was for Student to become compliant with requests 80 percent of the time and to learn positive replacement behaviors. Dr. Solomon was persuasive that the BSP was ineffective because Student needed more intensive services in a smaller environment. While the BSP is not at issue in this proceeding, its lack of effectiveness must be considered as it compounded the ineffectiveness of CMHS's services by the beginning of ninth grade.

23. In September 2009, in preparation for an IEP team meeting, the District conducted a review of Student's present levels of academic performance. In the spring of 2009, Student had scored at the Basic level in English Language Arts and Far Below Basic in Math on the California Standardized Testing and Reporting (STAR) tests. As of September 2009, Student had low grades in all of his general education classes, including a grade of D+ in Health, an F in English, a D in Machine Wood, an F in Life Science, a B- in Physical Education (PE), and was "in danger of failing" in Algebra 1A. The reviewer, Alysse McDaniel, an SDC teacher, reported that Student was not meeting his IEP goals, and that his teachers reported that, while they believed Student to be capable

of doing better, his behaviors and lack of attention were continual issues. In addition, Ms. McDaniel reported that Student did not like the SDC class, and had not been receiving any services from CMHS because he "did not want to go," and recommended that Student should start the counseling services again. She also recommended that Student's IEP team should look at "possibly having a level of care assessment done to see if he needs more services."

24. Based on the foregoing, for the start of Student's ninth grade in high school, CMHS's mental health goal and individual counseling services of once a week pursuant to the operative IEP, were inadequate to address and meet Student's complex and aggressive mental health needs, and were not implemented. CMHS's failure to implement Student's counseling services deprived him of needed counseling to transition into high school. In the absence of other evidence, the agency's failure to provide that counseling cannot be blamed on a 14 year-old youth with both ED and OHI disabilities. CMHS's failures to recommend more intensive mental health services, and to implement the minimal services it should have provided for Student to access his education at the start of ninth grade denied him a FAPE.

Remainder of the 2009-2010 School Year

25. On October 21, 2009, the District held Student's next annual IEP team meeting. Mr. Elliott, CMHS therapist, was present as a member of the IEP team, along with Ms. McDaniel, Student, Mother, and other District personnel. Mr. Elliott reported to the team the results of his Chapter 26.5 Update Report, dated October 19, 2009, in which he noted that Student participated in mental health counseling from November 12, 2008, through April 23, 2009, although Student's attendance was "irregular," and the sessions often focused on conflict resolution between Student and Mother. Thus, from May to October 21, 2009, Student had not received any individual weekly counseling. Mr. Elliott reported that Student and Mother had not responded to his attempts to "re-

engage" with him after April 2009. The nature or frequency of those attempts was not described. Mr. Elliott's report made no recommendations for any mental health counseling services or related goals, and instead sought direction from the IEP team.

26. The October 2009 IEP offered Student reduced placement in general education for 33 percent of the time, and the remainder in special education in an SDC at Novato High School, with the October 2008 BSP unchanged. The IEP also offered individual and family therapy with CMHS for 50 minutes a week. District again offered to provide transportation to and from the CMHS site for therapy. In the IEP, CMHS did not offer any increased individual therapy for Student, and did not offer any monthly collateral counseling for Mother. The IEP team meeting notes indicated that the team recognized Student's social/emotional needs had to be met before they could look at improving Student's academics. The IEP team tried to provide positive motivation based on Student's desire to play school sports, by showing him that if he passed his classes, he could play sports, get to take more general education classes, and graduate.

27. The IEP offered three annual goals labeled "emotional skills" goals, two of which were virtually identical to the middle school's October 2008 functional academic goals for listening skills and taking notes. The third goal, instead of the 2008 outline goal, was for Student to sit at a desk and begin a task when asked 70 percent of the time. The IEP did not contain any mental health goals. Dr. Solomon was persuasive that the offered goals were not mental health goals. CMHS's previous mood goal was not offered or modified, but eliminated. While CMHS is not legally responsible for the functional educational goals, CMHS was responsible for developing and offering a mental health goal related to its mental health counseling services to monitor progress.

28. For the 2009-2010 school year, District's disciplinary records showed that Student received about 14 referrals for disciplinary action, a significant reduction from his eighth grade year. However, most of the referrals resulted in suspension. On May 24,

2010, an MD IEP team determined that Student's conduct on May 10, 2010, in taking property belonging to other pupils in math class, and his behaviors using a cell phone and vulgar language to a teacher once kicked out of the class, were manifestations of his disability. The MD team reviewed and modified Student's BSP. The modified BSP was added as an amendment to Student's October 2009 IEP, and provided for more detailed methods for Student to employ, including using deep breathing techniques to help calm himself, communicating his needs to take a break to his teachers, and being prompted to use the BSP. In addition, the team consulted with Mr. Elliott from CMHS by telephone. Despite the team's expressed concern that Student should receive a level of care assessment, Mr. Elliott reportedly asserted to the IEP team that Novato High School was an appropriate placement for Student "with continued counseling."

29. At the time the October 21, 2009 IEP was offered, and for the remainder of the school year, CMHS's mental health services for one weekly 50-minute therapy session, without a related mental health goal as required by law, were inadequate to meet Student's mental health needs. CMHS failed to offer increased mental health counseling, or other intensified mental health services and goals to Student and Parent, from which they could benefit and therefore denied Student a FAPE for that school year. There was no change in the applicable mental health laws and regulations for that school year.

2010-2011 School Year

SEPTEMBER 20, 2010 IEP MEETING

30. In the fall of 2010, Student began his tenth grade school year at Novato High School with the October 2009 IEP in place, as modified in May 2010. Thus, as found above, Student began the school year with inadequate mental health services from

CMHS, and no related mental health goal to support progress in those services. CMHS therefore denied Student a FAPE for the start of that school year.[11]

31. District held a triennial IEP team meeting on September 20, 2010. Mother and Student attended the meeting, along with Mr. Elliott from CMHS, and District personnel. In preparation for the IEP meeting, District conducted psychoeducational and academic assessments in September 2010, and Mr. Elliott issued a Chapter 26.5 Update Report, dated September 16, 2010.

32. Student's SDC teacher, Joan Culhane, reported in the academic assessment that Student had taken the STAR tests in the spring of 2010, and obtained scores of Basic in both English Language Arts and Math. Ms. Culhane administered the Woodcock Johnson III Tests of Achievement and reported that Student scored in the average range in all areas of broad reading, math, and written language. Overall, Ms. Culhane reported that, despite his potential for academic success, Student had difficulty academically and pointed to his low grades for the 2009-2010 school year: an F in Algebra 1A, two D-grades in Geography and Machine Wood, and C's in PE and English. Ms. Culhane stated that Student's "defiant/oppositional behaviors in the classroom however, make it difficult for [him] to be focused/successful in the classroom. . . . The IEP team will need to discuss how to support [him]. . . ."

33. In addition, District school psychologist Jason Symkowick conducted a triennial psychoeducational assessment of Student, and issued a report dated

[11] As determined in Legal Conclusions 5 through 25, even if the Governor's October 2010 veto of funding for the Chapter 26.5 mandate was retroactive to the start of the fiscal year in July 2010, the fact that CMHS was not legally obligated to provide Student mental health services did not relieve it, as a public agency, of accountability for services it affirmatively offered and provided.

September 20, 2010, which the IEP team considered. Mr. Symkowick administered standardized assessment tests and observed Student once in class. Because Student is of African American heritage, Mr. Symkowick reportedly did not administer traditional intelligence quotient (IQ) tests, but evaluated Student's cognitive abilities with other tests, including the Children's Memory Scale (CMS).[12] Student's global memory functioning was scored as Below Average, overall Low Average for immediate and delayed memory span for auditory and verbal material, and his general memory on the CMS was in the Borderline range, showing a need for multi-modal instruction.

34. On the Behavior Assessment System for Children, Second Edition (BASC-2), Student, Parent, and his SDC teacher, Ms. Culhane, all completed rating scales. Dr. Solomon established that any T-score of 70 or higher on the BASC-2 is in the Clinically Significant range that demonstrates a diagnosable disorder (described by Mr. Symkowick as "a high level of maladjustment.") A T-score of 60 to 69 demonstrates At Risk problems that require careful monitoring. While Student rated himself as Clinically Significant for his attitude towards school, At Risk for attention problems, but Below Average for hyperactivity, both Parent and the teacher rated Student's hyperactivity and externalizing problems as Clinically Significant, with At Risk scores on the aggression

[12] In Larry P. v. Riles the Ninth Circuit Court of Appeals enjoined California schools from using standardized intelligence tests for the purpose of identifying African-American pupils for special education and services. (Larry P. v. Riles (9th Cir. 1974) 502 F.2d 963.) In 1984, the injunction was expanded. (Larry P. v. Riles (9th Cir. 1984) 793 F.2d 969.) However, in Crawford v. Honig (9th Cir. 1994) 37 F3d 485, the court held that the Larry P. injunction would not prevent the use of IQ testing for purposes other than the identification of African-American students as special education students, particularly where the parent consents to IQ testing.

and conduct problems scales, among other high scores. Parent also rated Student's overall adaptive functioning as in the Borderline Range on the Adaptive Behavior Assessment System, Second Edition (ABAS-II). Mr. Symkowick recommended that Student remain qualified for special education under the ED category, and for related mental health services from CMHS. He reported that Student's continued academic struggles were "rooted in an underlying depressive state," and that Student continued to manifest disruptive and shutting down behaviors that "significantly impacted" his ability to obtain educational benefit.

35. In Mr. Elliott's Chapter 26.5 Update Report to the IEP team, he stated that Student and Mother had only "sporadically" participated in the CMHS mental health counseling services required under Student's IEP. However, he provided no details about how frequently or infrequently his "sporadic" counseling was. Significantly, Mr. Elliott reported that CMHS had recommended blended classroom placement and wraparound services to Student outside of the IEP process. However, Student and Mother did not accept those services.

36. Mr. Elliott's report to the IEP team did not recommend a blended classroom placement with daily mental health supports for Student as an IEP placement, based on the family's decision, but instead recommended that Mr. Elliott would continue to provide mental health counseling to Student and Mother, including on-site at the high school "if necessary." He recommended a mental health goal that, again, was not specified in the report. Although Mr. Elliott's report did not specify the services offered, the report clearly did not recommend any modification of the mental health services and suggested that he would continue to be available for the same amount of

services.[13] Mr. Elliott's recommendations were not designed to meet Student's needs in light of both his unwillingness to regularly engage in therapy, and CMHS's determination that Student needed a higher level of care in a blended classroom with more intensified mental health services.

37. The September 2010 IEP offered Student continued placement at Novato High School in an SDC class with 33 percent of the time in general education, the same placement as in the October 2009 IEP. The new IEP included three academically based "social/emotional skills" goals for Student to demonstrate effective listening, write down assignments, and sit at a desk and begin tasks when asked. The IEP in evidence offered Student no mental health services whatsoever, even though Mr. Elliott's report clearly offered continued services. Student did not establish that CMHS was responsible for the content of the IEP services page or that CMHS did not offer any mental health services. It was more likely an oversight on the part of the District that the mental health services offered by CMHS did not make it into the IEP. A later amendment in May 2011, adding the services back into the IEP, corroborates this finding.

38. As found above, CMHS did initially recommend, outside of the IEP process, that Student should be moved to a county blended classroom placement where he could receive more intensive daily mental health supports. The IEP team meeting notes stated that *the family* did not want Student to be moved to a blended classroom, or to increase Student's placement in smaller SDC classes on campus instead of in the general education classes: "Returning [Student] to more SDC classes was discussed and [Student] did not want to change classes. [Student] is very resistant to change . . . ."

---

[13] Although the October 2009 IEP had omitted any offer of collateral counseling for Mother, CMHS had apparently continued to provide those services, and Mr. Elliott clearly re-offered those services at the September 2010 IEP team meeting.

39. CMHS's September 20, 2010 mental health goal provided that Student would utilize "specific coping skills and awareness of emotional issues to maintain attentional focus" so he could complete classroom assignments as required for 80 percent of the time.[14] Dr. Solomon was persuasive that, in light of Student's significant defiant and oppositional behaviors at school, this goal was insufficient to meet his mental health needs and denied him a FAPE. Particularly in view of Ms. Culhane's warning in her assessment, that the IEP team needed to establish additional supports to help Student be successful, the goal was woefully inadequate. There was no evidence as to how progress on the goal would be measured, how a teacher would know if Student silently used a coping skill, or if Student had to initiate an announcement that he was aware of an emotional episode, or if someone was going to keep track of his vocal outbursts or moments of defiance and conclude that he had not tried to use a coping skill or "awareness" of an emotion, or if the incident had to be tied to not completing an assignment. Accordingly, the goal did not meet Student's mental health needs and denied Student a FAPE.

40. Dr. Solomon was also persuasive that CMHS should have offered more intensified mental health services and related goals in view of Student's continued academic and functional struggles at school. In September 2010, Student was 15 years old, and his cooperation and "buy-in" to his educational placement was entitled to consideration. However, Student's rigidity in the face of his academic failures was also a manifestation of his disability. Mr. Elliott's role as the mental health clinician should have been a leadership role on the IEP team to develop ideas to communicate with and motivate Student. Instead, CMHS recommended to keep Student's individual mental

[14] CMHS's September 20, 2010 mental health goal was found in Student's Exhibit 11 with the November 2010 MD IEP team meeting documents.

health counseling at once a week, and to help plan a way for the IEP team to emotionally support Student if he was terminated from the sports team for low grades. Mr. Elliott offered to hold the counseling sessions on Monday afternoons. This was not an appropriate or effective offer.

41. In light of its recommendation for a blended classroom, CMHS should have offered more frequent mental health counseling or other more intensified services if Student remained in the combined special/general education placement at the high school. Dr. Solomon was persuasive that CMHS should have offered to place Student at a day treatment program or other intensified mental health program in a "lower stimulus off-campus environment" rather than the comprehensive Novato High School campus. Dr. Solomon admitted that she did not have the benefit of a review of any of CMHS's treatment records for Student, other than Mr. Elliott's update reports. Based on the foregoing, CMHS did not offer or provide Student a FAPE in connection with the September 2010 IEP.

42. Grandmother established that, at some point following the September 2010 IEP meeting, Student was cut from the school football team due to lowered academic grades. She was persuasive that Student felt humiliated and embarrassed and became more emotionally reactive at school.

GOVERNOR'S VETO OF CHAPTER 26.5 MENTAL HEALTH FUNDING

43. As determined in Legal Conclusions 12 through 17, on October 8, 2010, former California Governor Arnold Schwarzenegger vetoed a legislative funding appropriation for Chapter 26.5 educationally related mental health services and announced that the mandate to comply with Chapter 26.5 was "suspended." In February 2011, an appellate court upheld the funding veto, holding that even though the Governor could not unilaterally suspend the law, the funding veto relieved local county mental health agencies of the obligation to implement the services.

44. However, at the times of Student's subsequent IEP team meetings and MD team meetings during the 2010-2011 school year, from November 2010, through June 2011, there was no record of any discussion of the Governor's actions or their impact, if any, on Student's mental health services. The evidence established that, subsequent to the gubernatorial veto of funding for educationally related mental health services under Chapter 26.5, CMHS continued to offer and provide Student with related mental health services through the IEP process with the District.

NOVEMBER 17, 2010 IEP TEAM MEETING

45. On November 17, 2010, District held an MD IEP team meeting regarding an incident on November 8, 2010, in which Student reportedly was "jumped" from behind by two pupils, was injured, fought back, and was subsequently suspended from school for five days. Grandmother attended the meeting by telephone, but Student did not attend. The CMHS therapist, Mr. Elliott, was also present. The District team members determined that Student's conduct was not caused by his disability and Grandmother disagreed with them.

46. School records showed that as of the MD team meeting, Student had been suspended 12 times since the start of the school year. Grandmother reported that Student was afraid to return to school because he was fearful of getting into further trouble. The team offered to place him on Home Instruction until December 17, 2010, when the District closed for a winter break. Beginning on January 5, 2011, for his second semester of 10th grade, Student's educational placement was changed to Marin Oaks, a small alternative school, primarily for pupils with conduct disorder problems, located adjacent to Novato High School. The team meeting notes concluded: "A higher level of care could be considered through CMH. An assessment plan will be initiated by the school psychologist."

47. The MD team made a written placement plan for Student to work on making up deficient credits and raising his grade point average (GPA) while at Marin Oaks. The plan provided that another IEP team meeting would be held in May 2011, to discuss Student's transition back to Novato High School in August 2011, for the start of the 2011-2012 school year, following which Student would be able to participate in school sports if he had a 2.0 GPA and met other criteria.

48. There is no record that CMHS, through Mr. Elliott or another representative, declined to participate in the November 2010 MD team meeting, and IEP amendment meeting, or declined to provide further educationally related mental health services due to the gubernatorial veto of funding for educationally related mental health services. There was no evidence of the legal or financial arrangements between the District and CMHS for its continued provision of services to Student after October 8, 2010.

49. Mr. Elliott participated in the MD team's decision to change Student's educational placement. However, legal responsibility for the educational placement fell to the District, not to CMHS. Dr. Solomon established that Marin Oaks had no mental health services imbedded in its general education curriculum for pupils with conduct problems. Thus, pending a referral from the District for a level of care assessment by CMHS, CMHS should have offered more intensified mental health services to support Student's placement at Marin Oaks, and failed to do so. This failure denied Student a FAPE.

MAY 4, 2011 IEP TEAM MEETING AND TRANSFER TO NONPUBLIC SCHOOL

50. School records showed that, beginning on January 7, 2011, after Student began to attend Marin Oaks, his academic grades improved somewhat but he continued to receive disciplinary referrals for inappropriate behaviors (six in January, three in February, and one in March, when the District's disciplinary records in evidence abruptly

ended).[15] On May 2, 2011, District held an MD IEP team meeting to address Student's disciplinary conduct on April 26, 2011. Mother and Student attended the meeting and Grandmother participated by telephone. On April 26, Student was reportedly involved in an altercation with a pupil on the main Novato High School campus. According to the report, the Marin Oaks assistant principal escorted Student from the high school gym back to the Marin Oaks facility when two high school pupils approached. Student and one of the pupils confronted each other and got into a fight, during which Student punched the assistant principal who was trying to stop the fight. Student was suspended for five days. The MD team determined that Student's conduct was caused by, or had a direct and substantial relationship to his disability and he did not intend to harm the assistant principal.

51. The MD IEP team recommended that Student's educational placement be changed "as agreed upon by the parent and the District," to Timothy Murphy School (TMS), a nonpublic school (NPS). Accordingly, by IEP amendment documents executed on May 4, 2011, Parent accepted the offer for Student to attend a special day class at the NPS, with continued educationally related mental health counseling through CMHS, and transportation. District's handwritten meeting notes referenced that "CMH" services were clarified: "CMH services were offered in November [2010]. [Student] was attending sessions with Hiram Elliott. CMH services was [sic] not on the last IEP. CMH services were added to the IEP." In addition, the team noted that the NPS had a transition program for

[15] Student requested his cumulative file from the District on August 16, 2011. Student's attorneys represented that, in reply, they received the District's documents from the District on August 19, 2011. Receipt of records in reply to a request for them is sufficient to authenticate the records. (Evid. Code § 1420.)

pupils to attend Terra Linda High School, and the District would support Student's transition to Terra Linda in August 2011, where he could participate in sports.

52. Dr. Solomon was critical of changing Student's placement to TMS. She was familiar with TMS and established that it is located on the campus of St. Vincent's School in Marin County, and does not have a mental health therapist in the NPS school classrooms. Dr. Solomon was persuasive that Student needed an intensive mental health component to his educational placement. However, the education placement was the responsibility of the District, not CMHS. There is no evidence that CMHS recommended Timothy Murphy School for Student's educational placement. However, it was CMHS's responsibility to recommend sufficient related mental health services for Student to receive educational benefit in the placement. CMHS's failure to recommend any changes to the mental health services denied Student a FAPE.

JUNE 29, 2011 IEP MEETING

53. On June 24, 2011, TMS suspended Student for a day due to unacceptable behaviors. District held an IEP team meeting on June 29, 2011, to determine how Student was doing at TMS, and how he was doing with his mental health counseling through CMHS. Parent, Student, and Grandmother participated in the meeting, along with Mr. Elliott from CMHS, District personnel, and a teacher from TMS. Grandmother visited TMS and found it to be a dirty and smelly environment, in which Student rapidly declined. Student told Grandmother that he felt "thrown away by society." Parent and Grandmother expressed their frustrations and reported to the IEP team that Student should never have been sent to TMS as his academics had improved at Marin Oaks. The IEP meeting notes reported that Student had difficulties adjusting to the teacher and pupils at TMS. Grandmother credibly testified that she took Student out of TMS, after which District moved him to a class run by TMS on the Terra Linda High School campus, where Student received another day of suspension for disciplinary violations. While

District records showed that Student had been receiving passing grades at Marin Oaks, his grades dropped at TMS, and as of the June 29, 2011 IEP team meeting, Student was not passing his summer school English or Math lessons in the TMS class.

54. In addition, Parent and Grandmother reported that that they believed Student had not received about two-thirds of the counseling sessions with CMHS as called for in his IEP. Mr. Elliott reported to the IEP team that he made appointments for the family on Wednesdays, but Parent only showed up twice and Mr. Elliott felt that he had to "chase the family down." Since Student's IEP required the District to provide transportation for his therapy sessions, the record does not show why the District did not transport Student to Mr. Elliott's office once a week. Mr. Elliott recommended that Student needed to be held accountable, and to have "a consistent structure." However, Mr. Elliott's Update Report, dated June 27, 2011, merely recommended continued counseling with no specificity. The June 29, 2011 IEP offered Student one 50-minute session of individual therapy per week, and one 50-minute family therapy session per week through CMHS. The increase in the family or collateral sessions was material but the lack of more intensive individual therapy was not explained. District offered to provide Student with transportation: "To/from school/home/CMH."

55. For educational placement, the District offered continued placement in the TMS class at Terra Linda High School for the remaining summer extended school year and the start of the 2011-2012 school year, for a 30-day period from August 18, through September 20, 2011. This was a special education placement with zero time in general education. There was no evidence that Parent consented to the IEP. On July 1, 2011, Student was again suspended from TMS for another day due to unacceptable behaviors.

AUGUST 2011 UNILATERAL RESIDENTIAL TREATMENT CENTER PLACEMENT

56. Grandmother researched residential treatment center placements for Student and found Diamond Ranch Academy (DRA) in Utah. On August 1, 2011, Parent

and Grandmother unilaterally placed Student there, and he was still residing and going to school there at the time of the hearing.

57. Efram Hanks, the Clinical Director for DRA, testified telephonically. Mr. Hanks established that Student was placed in the Lava Falls program at DRA, which has been in existence for 12 years, and includes a fully accredited high school with athletic opportunities; weekly individual, family, and group therapy; an in-depth behavior modification program using a sophisticated token economy of levels and earned points in effect for all hours of the day and night; teachers who served as an extension of the treatment plan, and daily implemented behavior interventions designed by a DRA therapist. All DRA therapists hold Utah state licenses as marriage and family therapists.

58. Mr. Hanks was persuasive that, overall, Student is on a "positive trajectory," with periods of ups and downs, and resistive and combative behaviors. DRA staff reported to Mr. Hanks that Student has recognized the reactive nature of his behaviors and has demonstrated greater accountability, trust, and respect. As of the hearing, Student had a B average in his academic classes for 11th grade.

59. Mr. Hanks established that the minimum stay at DRA is for a 10-month program, and the maximum stay permitted is 24 months. Student is currently a little less than halfway through the six levels of the program, and Mr. Hanks estimates that Student needs the maximum stay to achieve solid progress and increase his chances for success upon his return to Marin County. Mr. Hanks established that the cost of Student's residential and educational placement at DRA is $6,200 per month. He provided a monthly cost breakdown that attributed $570.09 for "traditional" mental health services, $1,377.39 for room and board, $2,880.52 for mental health and behavioral programming services, and $1,372.06 for educational services. When asked if Mr. Hanks thought Student could continue making progress in a day treatment

program, Mr. Hanks was hesitant because in his view, Student required the structure and supervision of the "24/7" environment at DRA to learn new skills.

60. Grandmother visited Student at DRA, and credibly established that Student has made emotional progress at DRA, in addition to academic and functional progress. He was able to laugh and play a game with her without becoming agitated and angry. Parent had a visit to DRA scheduled for the end of January 2012, but had not visited him there as of the hearing. Although DRA is out-of-state, the evidence established that the mental health and related behavioral interventions and supports Student has received there have been effective to support his receipt of educational benefit.

Suspension and Repeal of Chapter 26.5 Effective July 1, 2011

61. As set forth in Legal Conclusions 21 through 24, effective July 1, 2011, California Governor Jerry Brown signed into law a new Budget Bill for the 2011-2012 fiscal year, and a trailer bill affecting educational funding, which made substantial changes that involved suspending significant portions of Chapter 26.5, as to mental health services, subject to repeal by operation of law on January 1, 2012. The statutory responsibilities have been transferred to the LEA's instead. Thus, as of July 1, 2011, the District became directly responsible to provide prospective mental health services to its pupils who require such services to receive a FAPE. Thereafter, the District IEP team is legally responsible to make those mental health need decisions, utilizing the services of any employee, or private or public mental health provider.

62. Thus, as of July 1, 2011, CMHS no longer had or has any statutory or regulatory responsibility to provide educationally related mental health services to Student. The evidence established that, effective July 1, 2011, CMHS entered into a written contract with the County of Marin to continue to provide outpatient related

mental health services to pupils for school districts within the Marin special education local plan area (SELPA), including District.[16]

REMEDIES AND COMPENSATORY EDUCATION

63. An ALJ has broad discretion to remedy a denial of FAPE and may, among other things, order a school district or responsible public agency to provide compensatory education or additional services to the pupil involved. Any such award must be based on a highly individualized determination, and there is no obligation to provide day-for day, or hour-for-hour compensation.

64. Student requests compensatory education for CMHS's violations and denials of FAPE, in the form of a fund to which Student could apply for reimbursement for educationally related mental health therapeutic counseling until he graduates from high school or reaches the age of 22, whichever occurs first. However, the law provides that a pupil who obtains a regular high school diploma is not necessarily prevented from being awarded compensatory education for past violations of FAPE.

65 As set forth in Legal Conclusions 5 through 25, the fact that CMHS is no longer legally responsible to provide any prospective mental health services to Student after July 1, 2011, unless pursuant to contractual arrangements with the District, does not relieve it from liability for past violations of FAPE while Chapter 26.5 was still intact, and while CMHS affirmatively continued to provide the related services after state funding was vetoed. Moreover, since CMHS did not cease providing Chapter 26.5 services to Student, and did not disclose its release from the statutory mandate to him or Parent, CMHS is estopped to deny that it provided those services as a public agency.

[16] While the county agreement in evidence was unsigned, Dr. Solomon testified persuasively that the agreement had been executed and implemented.

66. In November 2011, Student and Parent settled their dispute in this case with the District and entered into a written settlement agreement, in which District agreed to reimburse Parent up to $41,000 for Student's placement at DRA "or other private placement selected by the Parent" for the 2011-2012 school year, 2012 summer extended year, and the same amount for the 2012-2013 school year. The agreement provided that Parent is responsible for all other costs, which Grandmother estimated to be about $13,000 per school year.[17] The settlement agreement was admitted into evidence for the limited purpose of establishing that Student does not seek double recovery.

67. From late August 2009, through June 2011, CMHS denied Student a FAPE as to lack of adequate and measurable mental health goals, lack of appropriate offers for intensified mental health services, and for failure to implement the weekly counseling sessions with Student for significant periods. By September 2010, at the latest, CMHS should have offered Student more intensified mental health services in a blended classroom, and the failure of CMHS to make that recommendation to the IEP team (instead of privately to Parent), also denied Student a FAPE. However, the ultimate educational placement decisions were the legal responsibility of the District, not CMHS. District removed Student to Marin Oaks as of January 2011, but Marin Oaks did not have a mental health component, and CMHS failed to offer any increased mental health services to support Student, either there or at TMS in May and June 2011. Based on

[17] Grandmother's testimony was competent to establish this finding because Grandmother has been paying for Student's program and is the recipient of District's reimbursement monies in the settlement agreement. Thus, Grandmother has paid for some of Student's mental health related costs incurred at DRA that are not included in the settlement with the District.

these violations over an extended period of time, Student suffered a significant loss of educationally related mental health benefits. Accordingly, even if Student graduates from high school, he is entitled to compensatory education for those mental health services.

68. Dr. Solomon testified that the current minimum and maximum rates permitted by the California Department of Mental Health (DMH) for intensive day treatment programs are: $144.13 per half day of Intensive Day Treatment; $202.43 per full day of Intensive Day Treatment; or $2.61 per staff minute for Outpatient Mental Health Services. Dr. Solomon established that there were 180 school days in a regular school year, plus 20 days for the extended school year, for a total of 200 days. She therefore calculated that Student should have received 200 full days of day treatment for each school year, rounded down the full day rate to $200 per day, making the total amount $40,000 per year for each school year, or a total of $80,000. However, the evidence established that the residential and educational programs at DRA, where District is paying up to $41,000 per year, include significant mental health therapy services and behavioral intervention treatments imbedded into the programs around the clock. It would not be equitable to award Student an amount of compensatory education commensurate with that of the residential placement since that would amount to a double recovery and, as found above, CMHS was not responsible for Student's IEP placements.

69. Therefore, a more equitable formula to calculate a fair award of compensatory education would be to use the rate of $2.61 per staff minute for Outpatient Mental Health Services, based on a 50-minute hour of counseling, for a total of $130.50 per hour of therapy. Given a 200-day school year, CMHS should have given Student an hour of mental health therapy per school day, instead of only one day a week in a five-day week. Prorating the weekly sessions provided for in Student's IEPs

(including those Student himself refused to attend), results in a net amount of four-fifths of each week, or 160 remaining school days in each year, equal to $20,880 for each school year (160 times $130.50), for a total of $41,760.

70. Based on the forgoing, so long as Student has not aged out of the special education system, CMHS shall provide Student with compensatory education in the form of a reimbursement fund in the total amount of $41,760, from which Student may receive reimbursement for the costs of privately obtained educationally related mental health services. The private costs of educationally related mental health services will qualify for reimbursement if they were or are from qualified providers, including but not limited to services for mental health therapeutic counseling, behavioral intervention planning and interventions, and coping strategy training and instruction.

71. For purposes of compensatory and reimbursement purposes, providers are deemed qualified if they meet the criteria of the Marin SELPA for vendorized special education and related services. However, providers are also deemed qualified if they hold state licenses as marriage and family therapists, psychologists, clinical social workers, supervised psychological assistants or interns, or comparable licenses, in any state in which Student receives such services, including the DRA staff who hold Utah state licenses. Therefore, Student may request reimbursement from CMHS for the costs for mental health services that Student's Parent and/or Grandmother have already privately incurred and paid to DRA since August 1, 2011. In addition, Student may request reimbursement periodically for the costs of educationally related mental health services that Parent and/or Grandmother may continue to privately incur and pay regardless of Student's educational placement or residency.

LEGAL CONCLUSIONS

1. Student, as the petitioning party, has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The issues in a due process hearing

are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

FAPE AND RELATED SERVICES

2. A pupil with a disability has the right to a FAPE under the IDEA, consisting of special education and related services. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs related to his or disability are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

3. The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) A public agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).)

CONTINUUM OF SERVICES

4. Education Code section 56360 requires that each SELPA must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services.[18] (34 C.F.R. § 300.115(a) (2006); Ed. Code, § 56360.) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006)[19]; see also Ed. Code, §§ 56360, 56361.) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104.)

PUBLIC AGENCIES

5. Special education due process hearing procedures extend to "the public agency *involved in any decisions regarding a pupil*." (Ed. Code, § 56501, subd. (a); emphasis added.) In California, the determination of which agency is responsible to provide education to a particular pupil is, in most instances, governed by residency requirements as set forth in sections 48200 and 48204 of the Education Code. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57; *Orange County Dept. of Educ. v. A.S.* (C.D. Cal. 2008) 567 F.Supp.2d 1165, 1167.) An LEA is

[18] California law refers to pupils who qualify for special education and related services as individuals "with exceptional needs."

[19] All subsequent references to the Code of Federal Regulations are to the 2006 version.

generally responsible for providing a FAPE to pupils with disabilities who reside within the LEA's jurisdiction. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 48200.)

6. California is divided into 58 political county subdivisions. (Cal. Const. Art. 11, § 1(a).) The County of Marin functions, as all counties do, to provide municipal services to its residents, and to act as a delivery channel for state services, such as public health care, child welfare, and foster care. For purposes of special education, Education Code section 56028.5 provides that:

> "Public Agency" means a school district, county office of education, special education local plan area, a nonprofit public charter school ...[as specified]..., *or any other public agency* under the auspices of the state or any political subdivision of the state *providing* special education or *related services to individuals with exceptional needs*. For purposes of this part, "public agency," means all of the public agencies listed in Section 300.33 of Title 34 of the Code of Federal Regulations. [Emphasis added.]

7. Section 300.33 of title 34 of the Code of Federal Regulations provides in part that "public agency" includes "any other political subdivisions of the State that are responsible for providing education to children with disabilities."

8. In the present case, as set forth in Factual Findings 3 through 55, the evidence established that CMHS, a public agency, provided educationally related mental health services to Student. CMHA attended Student's IEP meetings as a public related service provider. Therefore, CMHS was not Student's LEA. However, the Education Code does not provides that joinder of a public agency is limited to parties who are LEA's. CMHS was a public agency involved in educational decisions regarding Student under

Education Code, section 56501, subdivision (a), and was a public agency that provided Student with educationally related mental health services after referral from the District. (See *Student v. Montebello Unified School District, Los Angeles County Office of Education, and Bellflower Unified School District* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2008090354, pp. 38-39.) Accordingly, CMHS was a public agency properly joined in this action, at least for the 2009-2010 school year. As found below, CMHS continued, as a public agency, to provide Student with educationally related mental health services for the 2010-2011 school year, after changes in the public funding.

Changes in the Laws Applicable to County Mental Health

9. CMHS made no appearance in this case. However, OAH is on notice of its hearsay positions, and will address them in the interests of being thorough. CMHS apparently contends that it is not a public agency for purposes of special education law and is therefore not a proper party to this proceeding because the public funding appropriation for the mandate under Chapter 26.5 for CMH to provide educationally related mental health services was vetoed in October 2010.

10. Prior to July 1, 2011, mental health services related to a pupil's education were statutorily provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code.[20]

[20] Government Code section 7570 provides that the Superintendent of Education and the Secretary of the Health and Human Services Agency are jointly responsible to provide related services, including mental health services; and section 7571 provides that the Secretary may designate a State department to assume the responsibilities, and shall also designate "a single agency in each county to coordinate the service responsibilities described in Section 7572." These sections have not been amended or

(Gov. Code §7570, et seq., often referred to by its Assembly Bill name, Chapter 26.5.) A pupil who was determined to be an individual with exceptional needs and was suspected of needing mental health services to benefit from his or her education, could, after the pupil's parent had consented, be referred to a community mental health service agency, such as CMHS, in accordance with Government Code section 7576. The pupil had to meet the criteria for referral specified in California Code of Regulations, title 2, section 60040; and the school district, in accordance with specific requirements, had to prepare a referral package and provide it to the community mental health service agency. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 14, § 60040, subd. (a); Gov. Code § 7576 et seq.)

11. Chapter 26.5 still provides that all hearing requests that involve multiple services that are the responsibility of more than one state department shall give rise to one hearing with all responsible state or local agencies joined as parties. (Gov. Code § 7586, subd. (c).)

October 2010 Veto of Legislative Funding for Legal Mandate

12. On October 8, 2010, the California Legislature sent to the prior Governor, Arnold Schwarzenegger, its 2010-11 Budget Act (Ch. 712, Stats. 2010), which, in item 8885-295-0001, provided full funding for Chapter 26.5 educationally related services. The funding was in the form of reimbursement to community mental health agencies which had already performed Chapter 26.5 services. On that same day, the Governor signed the Budget Act after exercising his line-item veto authority. One of the items he vetoed was the appropriation for Chapter 26.5 mental health services by county mental

---

repealed. However, portions of Section 7572 have been changed effective July 1, 2011, subject to amendment or to repeal on January 1, 2012.

health agencies. In his veto message he stated: "This mandate is suspended." (Sen. Bill 870 [SB 870], 2010-11 (Reg. Sess.) (Chaptered), at p. 12.)

13. On February 25, 2011, the California Court of Appeal for the Second Appellate District affirmed that the Governor had authority to veto the funding for the statutory mandate. (*Cal. Sch. Bds. Ass'n v. Edmund G. Brown Jr., Gov.* (2011) 192 Cal.App.4th 1507, review denied June 8, 2011) (*CSBA v. Brown)*.) In doing so, the court distinguished the veto action from a gubernatorial action to "suspend" a statutory mandate. While the court held that the suspension of a statutory mandate would have been an unconstitutional substantive change to the law in violation of the single-subject rule, the court upheld the Governor's veto to eliminate the funding appropriation. The court held the latter action was constitutional and resulted in freeing the local agencies from the legal duty to *implement* the statutory mandate. Thus, even though the Governor characterized his action as "suspending" the statutory Chapter 26.5 mandate, the Court of Appeal upheld his action as a veto of the funding appropriation for Chapter 26.5 services, which by operation of law freed CMHS from the legal duty to implement the mandate but did not substantively change the law.

14. As a consequence of the Court's determination that the Governor's exercise of his line-item veto was constitutional, CMHS's obligation to provide mental health services was relieved at least as of October 8, 2010. Thereafter, from October 8, 2010, through June 30, 2011, CMHS's *implementation* of the statutory mandate to provide mental health services was not legally required.

15. Government Code section 17581, subdivision (a) gave effect to the Governor's veto, as determined above, by excusing local agencies from implementing any statute "during any fiscal year" for which reimbursement was not appropriated. However, Government Code section 17581, subdivision (c) provides:

> Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency. [Emphasis added.]

16. The appellate court in *CSBA v. Brown* noted that the Legislature's full reimbursement funding item in the Budget Bill for Chapter 26.5 services was to disburse $76 million dollars in federal IDEA monies already received by the State of California, and that the Governor's October 2010 veto intended to delete the earmark of those funds for Chapter 26.5 services. However, the court found that on October 29, 2010, prior to its decision, CDE "indicated that it would distribute these funds to county mental health agencies in order to pay for continued provision of Chapter 26.5 services. This provided a short-term solution only; the funds were expected to be fully expended by mid-January, 2011." *(CSBA v. Brown, supra.)*. The appellate court stated:

> In addition to their main challenge in this proceeding, petitioners also question the Governor's use of the veto in this instance [to delete the earmark for the IDEA funds]; however, as the funds have ultimately been allocated in accordance with the Legislature's intent as expressed in the provision vetoed by the Governor, the issue is moot.

17. Thus, the court in *CSBA v. Brown* determined that, despite the Governor's veto of the funding appropriation for local Chapter 26.5 services, CDE elected to, and did disburse $76 million dollars in IDEA funds to local county mental health agencies to

continue funding educationally related mental health services through approximately mid-January 2011. The funds were disbursed to facilitate the continuation of related mental health services until local counties were able to formulate a new model for delivery of the educationally related mental health services.

18. Here, the evidence established that CMHS implemented the Chapter 26.5 services for Student after July 1, 2010, after October 8, 2010, and through the 2010-2011 school year, including attending and offering related mental health services to Student at the June 29, 2011 IEP meeting. No evidence of a written contract between District and CMHS for that period was produced. No legal authority has been presented for the proposition that the Governor's funding veto "unrang the bell" as to substantive legal rights and responsibilities already implemented pursuant to Chapter 26.5 prior to October 8, 2010, or implemented after that date.

19. Private entities are not subject to direct liability under the IDEA. (20 U.S.C. § 1412(a)(11); *McElroy v. Tracy Unif. Sch. Dist.* (E.D. Cal. Oct. 28, 2008), Civ. No. 2:07-cv-00086-MCE-EFB) 2008 WL 4754831.) Here, CMHS was not a private entity. There was no evidence that District agreed to take legal responsibility to indemnify CMHS for its liability associated with the services. Thus, the evidence did not establish that CMHS entered into a contract with the District for delivery of related mental health services in a manner similar to that of a private vendor of services during the relevant time periods.

20. Based on the foregoing, CMHS's continued receipt of public monies was consistent with its statutory rights and responsibilities as a public agency. Since it is a public agency, even CMHS's right to contract with the District is governed by statute. (Gov. Code § 23004.) After October 8, 2010, the evidence established that CMHS did not cease providing services or inform Student of any change in the legal relationship between the parties for delivery of Student's necessary mental health services. Under the doctrine of equitable estoppel, it would be unjust and unfair to excuse CMHS from

accountability as a public agency with respect to its denials of FAPE, where there is no evidence that Student and Parent were informed of the funding veto, and CMHS's right to elect to cease providing services. Had Student and Parent known, they could have insisted on receiving mental health services in a manner that would have ensured their procedural and substantive rights to a FAPE under the IDEA. Instead, CMHS remained silent and led them to believe that CMHS was still accountable under the IDEA for the quality of its services. In the above circumstances, CMHS is estopped from denying it was a public agency under the IDEA, up to June 30, 2011. (Evid. Code § 623; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, at 305; *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, at 486-488.)

June 2011 Suspension of Chapter 26.5, Subject to Repeal

21. Official notice is taken that on June 30, 2011, California Governor Jerry Brown signed into law a new Budget Bill (SB 87) for the 2011-2012 fiscal year, and a trailer bill affecting educational funding (AB 114). Together the two bills did not repeal Chapter 26.5 of the Government Code in its entirety, but made substantial changes that involved repealing significant portions of it and related laws, particularly with respect to mental health services. Sections repealed were suspended effective July 1, 2011, and were repealed by operation of law on January 1, 2012, unless otherwise amended. In significant part, the obligations of the State Department of Mental Health, and its county designees, including CMHS, to assess and provide related mental health services to special education pupils, were suspended and repealed, and the statutory responsibilities were transferred to the LEA's. (See Gov. Code § 7573.) Henceforth, as of July 1, 2011, the LEA's, including District in the instant case, have the lead responsibility to provide related mental health care services to its qualifying pupils.

22. The new State budget (SB 87) allocated approximately $221.8 million dollars to LEAs to fund mental health services. Significantly, the new budget made a

one-time appropriation from the State general fund of another $80 million dollars to county mental health agencies to partially backfill county mental health expenditures under Chapter 26.5 for the 2010-2011 fiscal year. (*Ibid.*) In addition, another $98.6 million from the Proposition 63 Mental Health Services Act was diverted by the budget for county mental health agencies to fund nonsupplanting IEP/mental health care services for the 2011-2012 fiscal year. The law provides that an LEA may develop a contract with its county mental health agency setting forth the details of the two agencies' respective responsibilities, to access those funds. (SB 87, item 4440-295-3085.)

23. By virtue of the above, beginning on July 1, 2011, Chapter 26.5 was fundamentally changed and significant statutory provisions for related mental health services were suspended, subject to repeal. CMHS is no longer statutorily obligated to assess and provide mental health services to qualifying special education pupils under Chapter 26.5, including Student. Therefore, CMHS's prospective role and responsibilities to Student for the 2011-2012 school year are no longer governed by Chapter 26.5, and instead fall to the District.

24. However, as found above, the June 30, 2011 budget bill for the 2011-2012 fiscal year allocated public monies to reimburse county mental health agencies, including CMHS, for IEP-related mental health services delivered during the 2010-2011 fiscal year, one of the years at issue in this case. CMHS did not appear and identify any legal authority that would relieve it from liability for past conduct while Chapter 26.5 was operative, or for a period for which CMHS affirmatively undertook to provide educationally related mental health services and was reimbursed with public funds. CMHS has not provided any legal authority that would prohibit OAH from issuing an order providing an equitable remedy based on such past liability. In addition, the passage of legislation effective July 1, 2011, suspending and repealing CMHS's statutory obligations regarding the provision of educationally related mental health services is not

relevant to CMHS's liability for the period from August 2009 through June 2011 in this case.

25. Taking into consideration all of the forgoing factors, CMHS was a public agency operating under the auspices of the State and the County of Marin, and was statutorily responsible for providing Student mental health services related to his education pursuant to his IEPs, at all relevant times up to October 8, 2010. After that date, CMHS did not cease its services based on the gubernatorial veto of State funding, but continued to provide those services, and remained involved in decisions affecting Student's IEP's. CMHS thereafter affirmatively offered and provided IEP-related mental health services during the remainder of the 2010-2011 school year through June 2011, for which it was legally entitled to public funds for reimbursement.[21] Therefore, CMHS was a public agency involved in educational decisions regarding Student under Education Code, section 56501, subdivision (a), was a public agency that provided Student educationally related mental health services under Education Code section 56028.5, as is estopped to assert otherwise. Accordingly, CMHS was a public agency properly joined in this action, and liable for the FAPE violations found as to its related

[21] Thus, this case is distinguishable from OAH decisions finding that OAH did not have jurisdiction over county mental health agencies after October 8, 2010, where those decisions were rendered prior to the June 30, 2011 budget bills: (See Student v. Orange County Health Care Agency (April 5, 2011) Cal.Ofc.Admin.Hrngs. Case No. 2011020211; and Student v. Orange County Health Care Agency (May 20, 2011) Cal.Ofc.Admin.Hrngs. Case No. 2010110268.) In addition, in each of those cases, the local county mental health agency issued written notice to the families terminating services pursuant to the Governor's veto of funding to implement the Chapter 26.5 mandate in October 2010, and elected not to thereafter continue to implement the services.

services. (See *Student v. San Luis Obispo County Health* (May 6, 2011) Cal.Ofc.Admin.Hrngs. Case No. 2011020473, Order Denying Motion to Dismiss.)

SUBSTANTIVE FAPE

26. The IEP must include a statement of measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and a description of how the child's progress toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347.) In addition, when it was determined, in accordance with Section 7572 of the Government Code, that a mental health service was necessary for a pupil with a disability to benefit from special education, the mental health portion of the IEP was required to contain "the goals and objectives of the mental health services with objective criteria and evaluation procedures to determine whether they are being achieved," along with a description of the types of mental health services to be provided, including the initiation, duration and frequency of the mental health services. (Cal. Code Regs., tit. 2, § 60050, subds. (a)(2)-(4).)

27. Chapter 26.5 provided that the county mental health assessor's recommendation for mental health services was required to be reviewed and discussed by the pupil's IEP team, including the parents, following which, the recommendation was required to become the recommendation of the IEP team, including the LEA. (Gov. Code section 7587; Cal. Code Regs., tit. 2, § 60045, subds. (f), and (f)(2).)

Material Failure to Implement IEP Services

28. A failure to implement an IEP will constitute a violation of a pupil's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the

services a school district provides to a disabled pupil fall significantly short of the services required by the IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 822.) A party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and instead, must demonstrate that the school district or other responsible agency failed to implement substantial and significant provisions of the IEP. (*Ibid.*) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*)

ISSUE 1: DID CMHS DENY STUDENT A FAPE FOR THE 2009-2010 AND 2010-2011 SCHOOL YEARS BY FAILING TO OFFER OR PROVIDE STUDENT WITH MEASURABLE MENTAL HEALTH GOALS THAT MET HIS UNIQUE NEEDS AND COMPLIED WITH THE LAW?

29. As set forth in Factual Findings 6 through 29, and Legal Conclusions 1 through 3, and 5 through 28, CMHS was responsible to recommend mental health goals to support the mental health services it offered to Student for both school years. The mental health services of individual and family counseling were supposed to address Student's significant mental health needs that manifested in defiant, aggressive, and disruptive behaviors in the school environment. For the start of the 2009-2010 school year, the single mental health goal CMHS kept in place from the October 2008 IEP, for Student to identify emotional triggers and coping strategies to deal with his unstable moods at school, was not measurable, inadequate to meet his needs at that time, and denied him a FAPE. In addition, the October 21, 2009 IEP did not contain a mental health goal and Mr. Elliott did not mention one in his report, which also denied Student a FAPE.

30. As set forth in Factual Findings 30 through 55, and Legal Conclusions 1 through 3, and 5 through 28, for the 2010-2011 school year, Student started the year

with the October 2009 IEP and no mental health goal whatsoever. Since Student had significant mental health needs during that time, the failure to have a mental health goal denied him a FAPE. The CMHS mental health goal was somewhat revised in the September 20, 2010 IEP, but remained woefully inadequate and not capable of measurement. In November 2010, Student suffered another disciplinary suspension, was placed on Home Instruction, and transferred to Marin Oaks in January 2011, all without any offers to change or modify Student's mental health goal, which continued to deny him a FAPE.

31. On the issue of whether CMHS failed to implement, or provide the mental health goal required in Student's IEP's for both school years, each IEP in which the mental health goal was offered, expressly provided that Student's teachers would implement the goal in the classroom, not CMHS. However, Mr. Elliott and CMHS remained responsible to oversee the success of the goal, to propose appropriate mental health goals, and to monitor and report on Student's progress on the goal. For both school years, Mr. Elliott's update reports failed to report to Student's IEP team anything about how the goal was working, how Mr. Elliott was monitoring and measuring the goal, or checking in with Student's teachers, or anything about Student's progress or lack of progress. Therefore, CMHS failed to consistently implement the mental health goal and denied Student a FAPE.

Placement in the Least Restrictive Environment

32. Federal and state laws require LEA's to provide a program in the least restrictive environment to each special education pupil. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education pupil must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether

a special education pupil could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has required several factors to be evaluated. (Sacramento City Unified School Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398, 1404 (Rachel H.) [adopting factors identified in Daniel R.R. v. State Board of Ed. (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also Clyde K. v. Puyallup School Dist. No. 3 (9th Cir. 1994) 35 F.3d 1396, 1401-1402.) However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (Daniel R.R. v. State Board of Ed., supra, 874 F.2d at p. 1050.)

33. As part of Chapter 26.5, Government Code section 7576, subdivision (a) provided in part that an LEA was not required to place a pupil in a more restrictive educational environment for the pupil to receive the mental health services specified in his IEP if the mental health services could be appropriately provided in a less restrictive setting. Effective July 1, 2011, section 7576 was statutorily suspended and was repealed on January 1, 2012. However, the criterion for an educationally related mental health placement in a residential facility was consistent with the on-going requirements of special education law for placement of a pupil with a qualifying disability in the least restrictive environment in which the pupil is reasonably likely to obtain educational benefit.

ISSUE 2: DID CMHS DENY STUDENT A FAPE FOR THE 2009-2010 AND 2010-2011 SCHOOL YEARS BY FAILING TO OFFER OR PROVIDE STUDENT WITH ADEQUATE MENTAL HEALTH SERVICES TO MEET HIS UNIQUE NEEDS RELATED TO HIS DISABILITY?

34. As set forth in Factual Findings 6 through 55, and Legal Conclusions 1 through 3, and 5 through 31, for both school years at issue in this case, CMHS offered Student the same low level of mental health services, consisting of one weekly individual

50-minute counseling or therapy session, and one monthly 50-minute family or collateral counseling session. This offer continued until the June 29, 2011 IEP, where CMHS offered weekly family collateral counseling sessions but did not increase Student's individual therapy. Although the October 2009 IEP did not contain any collateral counseling services, that mistake in the IEP services page was not CMHS's. In addition, although the September 2010 IEP did not offer any mental health services, Mr. Elliott's report and participation in the IEP team meeting showed that CMHS did offer services, as clarified in the May 2011 IEP amendment. Overall, however, Dr. Solomon was persuasive that CMHS should have offered and provided Student with more intensified mental health therapy and counseling supports on a daily basis for both school years, even when Student and Parent declined to consent to a more restrictive environment in a blended classroom. CMHS therefore denied Student a FAPE.

35. As set forth in Factual Findings 6 through 55, and Legal Conclusions 1 through 3, and 5 through 31, the evidence established that CMHS materially failed to deliver mental health counseling services as required by Student's operative IEPs. CMHS, and Mr. Elliott in particular, should have devised ways to motivate Student to attend counseling and worked with the District to ensure consistent transportation for therapy sessions. While the evidence established that Student himself declined to participate in therapy, it was CMHS's responsibility to ensure delivery of the therapy services, including finding another therapist if Mr. Elliott's therapeutic methods were ineffective. Accordingly, CMHS failed to implement Student's mental health services for material periods over both school years, and denied him a FAPE on that basis.

36. However, based on Legal Conclusions 1 through 3, 5, 32, and 33, Student did not sustain his burden to establish that CMHS should have recommended to place Student in a residential treatment center to access his education. Dr. Solomon was persuasive that Student required more intensive mental health services on a daily basis,

and she established that Student should have been placed in a more restrictive environment in a blended classroom or day treatment program to meet his mental health needs and receive educational benefit. However, the District was the agency responsible for Student's educational placement. By the time of the November 2010 IEP meeting, and District's placement of Student on Home Instruction, a level of care assessment for removal to a residential treatment center was discussed, and the District was the agency responsible to make a referral for assessment to CMHS. CMHS was therefore not legally responsible to make a recommendation for Student's residential educational placement. There was therefore no denial of FAPE on that basis.

REMEDIES

37. When an LEA fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (School Committee of Burlington v. Department of Educ. (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (Puyallup, supra, 31 F3d. at 1497.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (Ibid.) There is no obligation to provide day-for-day compensation for time missed. (Park v. Anaheim Union High School Dist. (9th Cir. 2006) 464 F.3d 1025, 1033.)

38. A pupil who is identified by an IEP as a child with a disability who requires special education and related services to receive a FAPE remains eligible after the age of 18, provided the pupil was enrolled in or eligible for the services prior to his or her 19th birthday, and has not yet completed his or her prescribed course of study, met proficiency standards, or graduated from high school with a regular high school diploma. (Ed. Code § 56026, subd. (c)(4).) This obligation generally continues until the

pupil becomes 22 years of age, with some exceptions. (Ed. Code § 56026, subd. (c)(4)(A) – (D).) A pupil with exceptional needs who graduates from high school with a regular diploma is no longer eligible for special education and related services. (Ed. Code § 56026.1, subd. (a).)

39. A pupil's graduation with a regular high school diploma does not necessarily relieve a school district or other public agency of its obligation to provide compensatory education to remedy a denial of FAPE. (San Dieguito High Sch. Dist. v. Guray-Jacobs (S.D. Cal. 2005) 44 IDELR 189, 105 LRP 56315; Capistrano Unified Sch. Dist. V. Wartengerg (9th Cir. 1995) 59 F.3d 884; U.S. Dept. of Education, Office of Special Education Programs (OSEP), Policy Letters (March 20, 2000, August 22, 2000).) The fact that a pupil entitled to compensatory education moved to another school district does not render the compensatory claim as moot. (Independent Sch. Dist. No. 284 v. A.C. (8th C. 2001) 258 F.3d 769 at 775.)

40. As set forth in Factual Finding 64, and Legal Conclusions 37 through 39, Student requests compensatory education only until he graduates from high school with a regular diploma or ages out of the special education system. Student's apparent waiver of his rights to compensatory education between the ages of 18 and 22 is troublesome, particularly in light of CMHS's multiple violations of FAPE found in this decision over a period of two years of high school. Moreover, the fact that Student is now receiving good grades in a structured residential treatment environment with around-the-clock mental health and behavioral supports, which could lead to a regular high school diploma, does not mean that he would no longer need extended compensatory mental health services and supports when he returns to his family or transitions to adulthood outside of a residential treatment center. Accordingly, Student's proposal is rejected because the amount of compensatory education to which he is entitled should not be limited by his receipt of a diploma. (See Riverside County

Department of Mental Health v. Sullivan, et al, (C.D. Cal. 2009), Order Affirming Administrative Law Judge's Decision, Case No. EDVC 08-0503-SGL [ALJ's rejection of stipulation as to remedy upheld]. Finally, the United States Supreme Court has held that once a FAPE violation is found, compensatory reimbursement is not barred because a parent's private placement did not meet all of the IDEA's requirements and was not a "state-approved" program. (Florence County Sch. Dist. Four v. Carter (1993) 114 S.Ct. 361.)

41. As set forth in Factual Findings 63 through 71, and Legal Conclusions 29 through 40, and based on the violations of FAPE for the 2009-2010 and 2010-2011 school years, as determined above, CMHS shall provide Student with compensatory education in the form of a reimbursement fund for Student to receive and be reimbursed for the costs of mental health supports. Should Student graduate from high school with a regular diploma, CMHS is not relieved of the obligation to provide further compensatory education under this order.

42. CMHS shall provide Student with compensatory education in the form of a reimbursement fund in the total amount of $41,760, from which Student may receive reimbursement for the costs of privately obtained mental health services from qualified providers, as ordered below, until the fund is exhausted, or until he turns 22 years of age as provided by law.

ORDER

1. CMHS shall provide Student with compensatory education in the form of a reimbursement fund in the total amount of $41,760, for Student to receive reimbursement for the private costs of educationally related mental health services and supports, as follows:

(a) CMHS shall provide Student with immediate access to the reimbursement fund, from which Student may request and receive reimbursement for the

costs of privately-obtained mental health services, by submitting a written request for reimbursement, accompanied by written invoice(s) from the provider(s), along with standard proofs of payment (such as cancelled checks or credit card statements).

(b) CMHS shall promptly reimburse Student, to a payee of his designation, within 30 days after receipt of each request for reimbursement that complies with this order. CMHS shall not deny a request for reimbursement so long as the services provided to Student and/or Parent were from qualified providers and reasonably related to mental health services, including but not limited to individual, group, and family mental health services, mental health therapeutic counseling, behavioral intervention planning and interventions, and coping strategy training or instruction, and including the costs for mental health services that Student's Parent and/or Grandmother have already privately incurred and paid to DRA since August 1, 2011, and the costs of educationally related mental health services that Student, Parent and/or Grandmother may continue to privately incur and pay regardless of Student's educational placement or residency.

(c) For compensatory and reimbursement purposes, providers are deemed qualified if they meet the criteria of the Marin SELPA for vendorized special education and related services. However, providers are also deemed qualified if they hold state licenses as marriage and family therapists, psychologists, clinical social workers, supervised psychological assistants or interns, or comparable licenses, in any state in which Student receives such services, including DRA and the DRA staff who hold Utah state licenses.

2. CMHS shall continue to make reimbursements to Student from the compensatory reimbursement fund as ordered above until the fund is exhausted, or until Student turns 22 years of age as provided by law, whichever comes first.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on all issues for hearing.

NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this Decision. The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: February 8, 2012

_____/s/_____

DEIDRE L. JOHNSON

Administrative Law Judge

Office of Administrative Hearing