

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
I DISLIKE STATE OF CALIFORNIA

In the Matter of:

EDUCATIONAL RIGHTS HOLDER ON  
BEHALF OF STUDENT,

v.

CONTRA COSTA COUNTY PROBATION  
DEPARTMENT.

OAH CASE NO. 2013080471

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Martinez, California, on October 2 and 3, 2013.

Mary-Lee Kimber Smith and Rebecca Williford, Attorneys at Law, represented Student. Student's educational rights holder was present on all hearing days. Student was not present at the hearing.

Christina Ro-Connolly and Cameron Baker, Attorneys at Law, represented Contra Costa County Probation Department (Probation). Bruce Pelle, Probation Director, was present for the entire hearing

On August 12, 2013, Student filed her request for a due process hearing. OAH granted a continuance on September 16, 2013, and bifurcated the issue of if Probation is a responsible public agency<sup>1</sup> for a separate hearing.<sup>2</sup> The parties submitted written opening briefs.<sup>3</sup> At hearing, oral and documentary evidence was received, and the matter submitted for decision on the bifurcated issue on October 3, 2013.

## ISSUE

The sole issue in this bifurcated hearing was whether Probation is a responsible public agency for the provision of special education services to Student?

## CONTENTIONS OF PARTIES

Student asserts that Probation is a public agency under federal and California special education laws, responsible for providing special education services to students detained in Juvenile Hall because of its control of the institution, role in disciplining wards and preventing students from accessing educational opportunities while in one of the three levels of security hold. Additionally, Student contends that Probation is a responsible public agency because of the requirements imposed on it by title 15 of the California Code of Regulations, subchapter 5 (Title 15).<sup>4</sup> These regulations require Probation to collaborate

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<sup>1</sup> For purposes of this decision, responsible public agency is an agency subject to OAH's jurisdiction for providing minors with a free appropriate public education.

<sup>2</sup> Student had additionally named the Contra Costa County Office of Education (CCCOE) as a party. Student settled her matter against CCCOE and dismissed CCCOE as a party on October 2, 2013.

<sup>3</sup> Student's opening brief has been marked as Exhibit S-34 and Probation's opening brief has been marked as Exhibit C-24.

<sup>4</sup> California Code of Regulations, title 15, sections 1300, et seq.

with CCCOE in providing wards with an education and to ensure that wards who are disciplined for conduct or segregated for safety reasons while in Juvenile Hall receive an education. Finally, Student argues that Probation has a duty to seek and serve students who enter Juvenile Hall to find out if they require special education services.

Probation contends that it is not a responsible public agency required to provide students in Juvenile Hall a free appropriate public education (FAPE) as that duty is imposed on CCCOE by state law that delegates the operation of the Juvenile Hall school, Mt. McKinley, to CCCOE. Additionally, OAH does not have jurisdiction to enforce the requirements imposed in Title 15 as that obligation rests upon the juvenile court or the California Corrections Standards Authority (CCSA). Finally, decisions made by Probation to discipline wards or to take other action that prevents wards from attending Mt. McKinley or having a CCCOE educator provide home-hospital instruction in the housing unit for one of these youths are subject to oversight by the juvenile court, not OAH.

## FACTUAL FINDINGS

### JURISDICTION AND FACTUAL BACKGROUND

1. Student is a 14-year-old girl in the 10th grade, now incarcerated in Juvenile Hall, which is the educational responsibility of CCCOE, which operates Mt. McKinley within Juvenile Hall. Student entered Juvenile Hall on June 14, 2012, and subsequently was placed in a group home on July 2, 2012. Student returned to Juvenile Hall on July 18, 2012, and was placed in another group home on August 15, 2012. Student ran away from the group home and returned to Juvenile Hall on August 29, 2012. Student presently attends the Girls in Motion (GIM) program, located within Juvenile Hall and operated by Probation. During all times Student has been detained in Juvenile Hall, including while in GIM, Student has attended Mt. McKinley. Additionally, Student has been denied access to educational services by Probation while on Probation imposed security program.

2. Student has been eligible for special education services before and during her detention in Juvenile Hall. The Antioch Unified School District found Student eligible on May 16, 2011, under the category of other health impaired (OHI). At the October 30, 2011, individualized education program (IEP) team meeting, Student was placed in a non-public school, and attended this school through her detention at Juvenile Hall, except for during times of involuntarily psychiatric commitments. On May 6, 2012, Student's special education eligibility category was changed to emotional disturbance.

#### MT. MCKINLEY SCHOOL

3. Student contends that Probation's general obligation to provide CCCOE with adequate space at Juvenile Hall to operate a juvenile hall school, its duty to cooperate with CCCOE's operation of the school, and the coordination between Probation and CCCOE personnel make it a responsible public agency for which OAH has jurisdiction regarding the enforcement of federal and California special education laws. Probation and CCCOE developed a memorandum of understanding (MOU) to effectuate this requirement in 2009, which includes provisions for ensuring all children in Juvenile Hall receive an appropriate education, and meeting the special education needs of wards eligible for these services. Probation asserts that while these obligations exist, that by itself does not mean that it is a responsible public agency for purposes of providing special education services because California law imposes the obligation for the education of wards in Juvenile Hall to CCCOE. Additionally, any obligation that Probation has to ensure that wards at the Juvenile Hall receive an appropriate education is under the auspices of the juvenile court. Additionally, general complaints about Probation's compliance with Title 15 requirements is subject to appeal to the CCSA. (C.C.R., tit 15, 1314.)

4. Student attempted to demonstrate Probation's legal obligation as a responsible public agency through the testimony of Alice Parker, Ed.D. Dr. Parker oversaw the California Department of Education's quality assurance process from 1997 through

2005, which oversees complaints made against public agencies regarding special education services.<sup>5</sup> Of particular note is Dr. Parker's present work as an expert and member on a three-person team to evaluate Los Angeles County Office of Education's and Los Angeles County Probation Department's performance in implementing a consent decree in *Casey A. v. Gundry* (C.D. Cal. (Civil Action No. CV 10-00192 GHK (FMOx), regarding the operation of Los Angeles County Juvenile Hall in providing educational services to wards.

5. Dr. Parker stated that during the eight years that she was in charge of CDE's compliance section she does not recall CDE receiving a complaint against a county probation department regarding special education services in a juvenile detention facility. However, her opinion was that if CDE received such a complaint that CDE would have jurisdiction over a county probation department and could issue a corrective action plan

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<sup>5</sup> In addition to due process hearing procedures, each state educational agency shall adopt written procedures for resolving complaints of individuals and organizations regarding special education programs. (34 C.F.R. § 300.151(a) (2006).) As part of complaint investigations, a state educational agency must perform an investigation, if necessary; allow for the opportunity to submit additional information regarding the allegations in the complaint; review all relevant information and make a determination as to whether the public agency is violating the IDEA; and issue a written decision that addresses each allegation in the complaint. (34 C.F.R. § 300.152(a) (2006).) The state educational agency must complete this investigation and issue the written decision within 60 days of the filing of the complaint, unless exceptional circumstances exist which warrant an extension. (Id.) CDE's and OAH's jurisdiction overlap, and if a complaint is also the subject of a due process hearing, or contains issues which are part of that hearing, the state educational agency must set aside any part of the complaint being addressed in the hearing until the hearing is concluded. (34 C.F.R. § 300.152(c)(1) (2006).)

for the county probation department to follow to correct at deficiencies. She further buttressed her opinion through her work and knowledge of the *Casey A. v. Gundry* lawsuit in that the Los Angeles County Probation Department was required as part of the consent decree to provide additional facility space and staff to ensure that wards could receive an education, including special education services.

6. However, nothing in the documents provided by the parties<sup>6</sup> established that duties imposed on Los Angeles County Probation Department in the consent decree give OAH jurisdiction to hear disputes whether a county probation department provided adequate educational space for special education services or properly cooperated with the county office of education that operates the juvenile hall school. The plaintiffs in *Casey A. v. Gundry* filed suit in United States District Court on or about January 8, 2010, and then subsequently filed due process hearing complaints in OAH Case No's 2010020251, 2010080678, 2010090601, which were all resolved pursuant to a Decision by Settlement, pursuant to California Code of Regulations, title 5, section 3087.<sup>7</sup> However, such a Decision by Settlement does not have persuasive value because the matter was not argued and decided by an ALJ, the ALJ merely issues the decision agreed upon by the parties, like a consent decree.<sup>8</sup> Additionally, no legal argument was made in any of these three cases whether OAH had jurisdiction over the Los Angeles County Probation Department.

7. Therefore, while the opinion testimony of Dr. Parker provided excellent reasons why a county probation department is a important partner in ensuring that wards detained in a juvenile hall receive a FAPE, decisions about whether a county probation

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<sup>6</sup> Probation introduced in evidence a copy of the April 1, 2013 consent decree monitoring report that Dr. Parker helped draft.

<sup>7</sup> Public Counsel was one of the four legal advocacy groups as attorney of record in these three cases and one of three attorney of record in this pending matter.

<sup>8</sup> California Code of Regulations, title. 5, section 3085.

department should automatically be considered an equivalent responsible public agency as the county office of education is a legislative, not an adjudicatory function. Therefore, Student did not establish that Probation is a responsible public agency regarding the operation of Mt. McKinley.

#### CHILD FIND<sup>9</sup>

8. The term “child find” refers to a local education agency’s (LEA) affirmative, ongoing obligation to identify, locate, and assess all children residing within its jurisdiction who are suspected of having disabilities and who may need special education as a result of those disabilities. Specifically, if the LEA had reason to suspect that a student had a disability and that student may need special education and services to address the disability, the LEA had an obligation to assess student. The relevant inquiry is whether the LEA should assess the child, not whether the student will ultimately qualify for services.

9. Student asserts that Probation has a duty to identify students who may require special education services because of its duty when a minor enters Juvenile Hall to identify at intake if the child has special needs, including special education, and an ongoing duty while the child is detained. Probation contends that the child find obligation falls upon CCCOE, and that special needs and education monitoring duties are imposed by the juvenile court, and not subject to OAH jurisdiction.

10. Probation has a list of duties imposed on it by California law related to minors declared wards of the court related to their education, including special education services. (See Welf. & Inst. Code, §§ 706.5, 706.6, 712, 713, 726, 727.2.) Additionally, Title 15 requirements impose duties on Probation to identify the special needs, including

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<sup>9</sup> For purposes of the child find analysis, the duty discussed only applies to wards who are not on the security program discussed below in Factual Findings 17, 19 through 27 as CCCOE has full access to students not on security program.

education. (See Cal. Code Regs., title 15, § 1370.) However, the duties imposed on Probation do not impose a duty on Probation to seek and serve minors for possible eligibility for special education services and to conduct the required assessment and hold the eligibility IEP team meeting. These duties are in relationship to Probation's obligations to complete reports to the juvenile court so that the juvenile court judge may make decisions regarding the ward's care, control and custody, not duties imposed by special education law.

11. For students in Juvenile Hall, CCCOE has the child find duty and may use information shared by Probation in assisting it in its duties. As noted above in Factual Findings 4 through 7, the fact that Mt. McKinley is located at the Juvenile Hall, and Probation has legal requirements to cooperate with CCCOE to ensure that wards receive an education. However, this duty to detained wards does not impose a separate legal obligation in itself upon Probation to provide a ward with FAPE, which would include meeting the child find obligations. Any failure by Probation to document a ward's special needs and share that information with CCCOE is handled through the juvenile court through Welfare and Institutions Code, section 727. Accordingly, Student did not establish that Probation has a child find duty as a responsible public agency.

#### MANIFESTATION DETERMINATION

12. While pupils with disabilities are subject to disciplinary measures such as suspension or expulsion by a school district, federal law prohibits expelling a special education pupil whose conduct was a manifestation of his or her disability. If the LEA decides to change the educational placement of a pupil with a disability, either by an expulsion or a suspension in excess of 10 days,<sup>10</sup> because of a violation of law or code of

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<sup>10</sup> The removal can either by consecutive school days or a series of removals that constitute a pattern and the series of removals exceeds 10 school days



conduct, the parents and relevant LEA members of the pupil's IEP team must meet and review all relevant information in the pupil's file. The review team must determine: (a) if the conduct in question was caused by, or had a direct and substantial relationship to, the pupil's disability; and/or (b) if the conduct in question was the direct result of the LEA's failure to implement the IEP.

13. Student contends that Probation acts as a LEA when it removes a Student from Mt. McKinley when it prevents a student from attending school for more than 10 days due to conduct or behavior that occurs outside or inside Mt. McKinley, as Probation, not CCCOE determines whether the student can attend school.<sup>11</sup> Probation contends decisions whether to discipline students or prevent their attendance at Mt. McKinley is within the jurisdiction of the juvenile court based on the authority given to Probation by the juvenile court when it approves the minor's detention at juvenile hall, and is subject to a separate due process hearing.

#### Conduct within Mt. McKinley

14. For misconduct or behavior issues that arise during school, the teacher either contacts a probation officer or a probation officer observes the conduct. In either situation, according to School Principal Rebecca Corrigan, the probation officer, not CCCOE, determines how long the student should be removed and whether the student is placed in any of the three security levels, which in effect prevents the student from attending Mt. McKinley.<sup>12</sup> This process exists because of the MOU between CCCOE and Probation, which places the responsibility of ward discipline and safety on Probation. Mr.

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<sup>11</sup> Probation officers are not in the classroom during instruction, but can easily observe the classroom due to the large windows.

<sup>12</sup> The security program will be discussed in depth below, Factual Findings 17, 19 through 27.

Pelle corroborated Ms. Corrigan as when a school teacher calls in a probation officer the teacher may ask that the Student be removed from the classroom, then Probation determines how long the student will remain out of Mt. McKinley. Probation determines which one of three security levels the ward is placed because of Probation's role in ensuring the safety of the wards and CCCOE and Probation personnel. Dr. Parker opined that Probation's taking responsibility for school discipline is further evidence that it is a responsible public agency and that it should convene a manifestation determination meeting with CCCOE when it keeps a student out of Mt. McKinley for in excess of 10 school days.

15. Student contends that Probation's role in school discipline makes it a responsible public agency because it assumes CCCOE's role in school safety and discipline by determining when to remove a child from Mt. McKinley and then how long the ward will be out of school. While these are decisions that a LEA typically makes, the fact that Probation makes these determinations does not automatically make Probation a responsible public agency. Probation's authority to operate Juvenile Hall and to ensure the safety of all persons in the facility is a unique function, for which regulations exist in Title 15 to ensure that due process is afforded to the affected wards to contest Probation's discipline decision. (C.C.R., tit. 15, § 1391.) Additionally, the juvenile court's delegation of authority to Probation over the ward removes this decision as one that would normally make Probation a responsible public agency. The juvenile court has the responsibility to ensure proper oversight of the security level decisions, including how long the student is prevented from attending Mt. McKinley. The issue of CCCOE's deferral to Probation as to how long a student shall remain out of Mt. McKinley for conduct and behavior within Mt. McKinley is not subject to this proceeding with CCCOE being dismissed from the case. Accordingly, Probation's conduct in removing children from Mt. McKinley and keeping them from attending Mt. McKinley in excess of 10 days does not make Probation a

responsible public agency subject to providing Student's with a manifestation determination hearing.

#### Conduct outside of Mt. McKinley

16. For the reasons stated above why Probation is not a responsible public when it removes a student from Mt. McKinley, Probation is also not a responsible public agency for placing a student on a security level for conduct that occurs outside of Mt. McKinley that causes the student to miss more than 10 days of school.

#### WARDS ON SECURITY PROGRAM

17. Probation's security program is memorialized in Bulletin 502 as a disciplinary policy for major rule violations, a pattern of minor rule violations or for wards who present an immediate threat to another person. Bulletin 502 discussed that if a minor is segregated from the rest of the Juvenile Hall population, the ward is entitled to a due process hearing, which is applicable to wards on special program, security risk or maximum security. Bulletin 502 only discusses whether a ward may access educational services, whether general or special education, for those on special program. The evidence presented by both sides was consistent about Probation's educational access practice while a ward is on special program.

18. Student contends that Probation's security program makes it a responsible public agency since Probation prevents wards on maximum security or security risk from attending Mt. McKinley or CCCOE personnel from entering the housing units to provide educational instruction. For wards on security program, Probation does not permit them to attend Mt. McKinley, but does allow CCCOE to send instructors<sup>13</sup> for students on special

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<sup>13</sup> According to the evidence, the persons providing the educational services are instructional aides and not a general or special education teacher.

program or security risk to provide instruction in the ward's housing unit. However, Probation retains the authority to decide not to permit the CCCOE instructor to see the ward if Probation believes the ward to be a safety threat to the CCCOE instructor or Probation does not have adequate staffing in the housing unit, which prevents CCCOE from providing instruction.<sup>14</sup> Probation asserts that its decision whether to place a student on a security program and the ward's access to educational services does not make it a responsible public agency since its decisions are made for safety, not educational purposes, and are under the auspices of the juvenile court, not OAH, to review. Additionally, Probation contends that the ward has a due process hearing right to contest being placed on security program pursuant to Title 15.

#### Special Program

19. Special program is the lowest level of security segregation. Probation places wards on special program for behavior modification for a ward that constantly commits minor rules violation, behavior that creates a lower level safety threat, and to help integrate wards who have been on security risk or maximum security back to the general population. A Probation Institutional Supervisor decides whether a ward is placed on special program and documents any restrictions on school attendance. From the evidence, Probation has not permitted a ward to attend Mt. McKinley while on security program. Instead, Probation permits a CCCOE staff member to enter the housing unit to provide home-hospital instruction.

20. Dr. Parker discussed that CCCOE providing special education instruction to students in the housing unit to students on special program would be the equivalent of

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<sup>14</sup> The issue of whether CCCOE sends a person to the housing unit, the qualifications of that person or how much time CCCOE determine this person will instruct the student is not subject to this proceeding with the dismissal of CCCOE as a party.

home-hospital instruction for special education students who could not attend school due to a medical condition or other reason. (34 C.F.R. § 300.115(b)(1); see also Ed. Code, §§ 56360, 56361.) She stated that for home-hospital instruction, the LEA needs to provide instruction by a credentialed special education teacher designed to permit the student to meet the IEP goals, which is typically one hour a day. She also opined that CCCOE and Probation are jointly responsible for educating a student on security program not only for reasons stated above in Factual Findings 4 through 7 for educating all students in Juvenile Hall, but especially for those students who Probation removes from Mt. McKinley and then it, not CCCOE, determines when the student may return to Mt. McKinley or level of access to home-hospital instruction while the child is on security program.

21. While Probation's decision to remove the student from Mt. McKinley does not make it a responsible public agency, its decisions that prevent a student from receiving educational services either at Mt. McKinley or home-hospital instruction may make it a responsible public agency. Probation's conduct in preventing students from accessing education services prevents CCCOE from carrying out its federally mandated obligation to provide students with a FAPE as the designated LEA. Because according to Probation, students are in one of three security programs and prevented from accessing educational services for safety concerns that the student is placed in a quandary in how to seek relief because if the student files a complaint against CCCOE, CCCOE will take the defense that Probation prevents it from providing the student with a FAPE. If the ALJ rules in favor of the student, the issue becomes how to order Probation to permit the student to either attend Mt. McKinley or permit CCCOE to enter the housing unit to provide home-hospital instruction because of Probation's control and no jurisdiction over Probation if Probation is not a party to the administrative action.

22. Therefore, the only way to ensure that a student receives his or her federally required special education services when Probation prevents CCCOE from providing

special education services is to make Probation a responsible public agency. The Individuals with Disabilities Education Act (IDEA) requires that a responsible public agency exists for each student eligible to receive special education services. If CCCOE cannot carry out its federally mandated duty to provide special education services, the obligation to educate the student must fall upon another public entity. Because CCCOE's inability to carry its duty is caused by Probation, the federal requirement to educate special education services must fall upon Probation.

23. As to when Probation's responsibility kicks in, Probation becomes a responsible public agency when Probation prevents CCCOE from providing educational services. When Probation prevents CCCOE from carrying out its federally mandated duties to ensure eligible students receive special education services and to identify those students, this federally mandated duty must fall upon another public agency. This obligation commences once Probation does not permit CCCOE to educate the student. To permit otherwise would allow Probation to keep the student in the security program indefinitely with no obligation that the student receives federally required special education services.

24. Accordingly, while a student is in the security program and Probation permits the student to either attend Mt. McKinley or CCCOE to enter the housing unit to provide home-hospital instruction, the responsibility for providing the student with a FAPE rests upon CCCOE, including child find duty. This is because CCCOE has access to the student to provide eligible students with services or for students who might require special education access, to determine if the student might require special education services and assess them for eligibility. However, if Probation prevents CCCOE from providing a student with access to special education services, then Probation become the responsible public agency to ensure that the student receives a FAPE as there is no other government agency that can provide the federally mandated special education services. For students not

eligible for special education services, Probation has a child find duty for students who CCCOE cannot access as CCCOE is not able to see the child to determine if he or she might require special education services.

#### Security Risk

25. Probation places wards for security risk who present a safety risk and/or as step-down from maximum security. Wards on security risk cannot participate in any housing unit activity, including attending Mt. McKinley. By practice, Probation prevented these students from receiving home-hospital instruction by CCCOE personnel, which recently changed after the filing of this and related due process actions to permit home-hospital instruction. However, as with wards on security program, Probation retains ultimate authority to determine when a ward may return to Mt. McKinley or if CCCOE personnel may enter the housing unit to provide home-hospital instruction.

26. Thus, for the same reasons for wards on the security program, Probation becomes a responsible public agency because it is the sole decision maker that determines a ward's access to special education services. Therefore, Probation is the responsible public agency for wards in security risk when Probation prevents the ward from attending school or receiving home-hospital instruction. As with the special program, Probation can determine whether it wishes to allow CCCOE to provide the special education services, or it will provide these services, and how it or CCCOE will perform the child find duty.

#### Maximum Security

27. For wards on the highest level of security program, Probation prevents them from accessing instructional services as the ward is confined to their room with only outside access for an hour a day. While Probation has legitimate security concerns about these wards attending Mt. McKinley or CCCOE personnel accessing the student, Probation could not explain how these students would access any educational services, except for

possibly getting some worksheets to complete. Evidence presented established that Probation's only interest for wards on maximum security is correctional, with no concern about the provision of educational services despite the Title 15 regulations. Thus, Probation is the responsible public agency for all wards placed in maximum security because it isolates the student from all educational services from CCCOE, which includes the child find duty and obligation to provide special education services for students who have an IEP.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### ELEMENTS OF A FAPE

2. Under the IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

### CONFLICT OF LAWS

3. It is basic to statutory construction that statutes are to be harmonized if possible. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) An implied repeal of one statute by another may be found "only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " (*Garcia*



*v. McCutcheon, supra*, 16 Cal.4th at p. 477, quoting *In re White* (1969) 1 Cal.3d 207, 212.)

4. Since the power of an ALJ to order relief in an IDEA matter is grounded in federal law, it prevails over conflicting state law. (U.S. Const., art. 6, § 2.)

#### JUVENILE HALL EDUCATION RESPONSIBILITY AND DUTIES

5. Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to “the public agency involved in any decisions regarding a pupil.” (Ed. Code, § 56501, subd. (a).) A “public agency” is defined as “a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs.” (Ed. Code, §§ 56500 and 56028.5.)

6. Title 34, Code of Federal Regulations, parts 300.33 (2006)<sup>15</sup> states that a “[p]ublic agency includes the SEA [state educational agency], LEAs [local educational agencies], ESAs [educational service agencies], nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.”

7. The IDEA requires states to develop programs for ensuring that the mandates of the IDEA are met, and that children eligible for special education receive a free appropriate public education (FAPE). (20 U.S.C. § 1412 (a).) California law generally places the primary responsibility for providing special education to eligible children on the LEA, usually the school district in which the parents of the child reside. (Ed. Code, §§ 56300, 56340 [describing LEA responsibilities].)

8. Children placed in a juvenile hall are entitled to a FAPE. (Ed. Code, § 56150.)

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<sup>15</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

Juvenile court schools provide educational services to all students “detained” in juvenile halls. (Ed. Code, § 48645.1) Regardless of the residence of the parents or legal guardians of such children, the responsibility for providing a FAPE to any student who is detained in juvenile hall rests with the local county board of education. Education Code, section 48645.2 provides that county board of education shall operate juvenile court schools, or contract out their operation with the respective elementary, high school, or unified school district in which the juvenile court school is located.

9. Title 20 United States Code section 1415(k)(6)(A) provides that the IDEA does not “prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.”

10. An incarcerated minor is a ward of the juvenile court and under its jurisdiction. (Welf. & Inst. Code § 602, subd. (a).) While the child is under the jurisdiction of the juvenile court, all issues regarding his or her custody are heard by the juvenile court, and the juvenile court retains exclusive jurisdiction over its orders. (Welf. & Inst. Code, §§ 245.5, 304; *In re William T.* (1985) 172 Cal.App.3d 790, 797.) Pursuant to California Rules of Court, rule 5.651(b)(2), “at the disposition hearing and at all subsequent hearings ... the juvenile court must address and determine the child’s general and special education needs, identify a plan for meeting those needs, and provide a clear, written statement . specifying the person who holds the educational rights for the child.” The county social worker is required to notify the court, the child’s attorney, and the educational representative or surrogate parent within 24 hours of any decision to change a student’s placement that will result in a change in educational placement. (Cal. Rules of Court, rule 5.651(e)(1)(A).) The child’s attorney or the educational rights holder may request a hearing if they disagree with the proposed change in placement, or the court on its own motion may set a hearing. (Cal. Rules of Court, rule 5.651(e)(2).) At the hearing, the court will

determine whether the proposed placement and plan is based upon the best interests of the child, determine what actions are necessary to ensure the child's educational and disability rights, and make all necessary orders to enforce those rights. (Cal. Rules of Court, rule 5.651(f).)

11. In making placement orders, the juvenile court seeks to ensure that the child is in the least restrictive educational programs and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils. (Welf. & Inst. Code, § 726, subd. (c)(2).) In all instances, educational and school placement decisions are based on the best interests of the child. (*Ibid*) The juvenile court may order a ward of the court to be placed under the care, custody and control of a probation officer, who may place the minor as ordered. (Welf. & Inst. Code, § 727, subd. (a)(3).)

12. Welfare and Institutions Code section 727, subdivision (a), provides that a juvenile court has the authority:

[t]o facilitate coordination and cooperation among governmental agencies, the court may, after giving notice and an opportunity to be heard, join in the juvenile court proceedings any agency that the court determines has failed to meet a legal obligation to provide services to the minor. However, no governmental agency shall be joined as a party in a juvenile court proceeding in which a minor has been ordered committed to the Department of the Youth Authority. In any proceeding in which an agency is joined, the court shall not impose duties upon the agency beyond those mandated by law. Nothing in this section shall prohibit agencies which have received notice of the hearing on joinder from meeting prior to the hearing to coordinate services for the minor.

The court has no authority to order services unless it has been determined through the administrative process of an agency that has been joined as a party, that the minor is eligible for those services.

13. Title 15, California Code of Regulations, section 1370 provides, in part, for youth detained in juvenile hall:

a) School Programs

The County Board of Education shall provide for the administration and operation of juvenile court schools in conjunction with the Chief Probation Officer, or designee. The school and facility administrators shall develop written policy and procedures to ensure communication and coordination between educators and probation staff. The facility administrator shall request an annual review of each required element of the program by the Superintendent of Schools, and a report or review checklist on compliance, deficiencies, and corrective action needed to achieve compliance with this section.

(b) Required Elements

The facility school program shall comply with the State Education Code and County Board of Education policies and provide for an annual evaluation of the educational program offerings. Minors shall be provided a quality educational program that includes instructional strategies designed to

respond to the different learning styles and abilities of students.

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(c) School Discipline

- (1) The educational program shall be integrated into the facility's overall behavioral management plan and security system.
- (2) School staff shall be advised of administrative decisions made by probation staff that may affect the educational programming of students.
- (3) Expulsion/suspension from school shall follow the appropriate due process safeguards as set forth in the State Education Code including the rights of students with special needs.
- (4) The facility administrator, in conjunction with education staff will develop policies and procedures that address the rights of any student who has continuing difficulty completing a school day.

(d) Provisions for Individuals with Special Needs

- (1) Educational instruction shall be provided to minors restricted to high security or other special units.
- (2) State and federal laws shall be observed for individuals with special education needs.
- (3) Non-English speaking minors, and those with limited English-speaking skills, shall be afforded an educational program.

14. Title 15, California Code of Regulations, section 1390 provides for youth detained in juvenile hall:

The facility administrator shall develop written policies and

procedures for the discipline of minors that shall promote acceptable behavior. Discipline shall be imposed at the least restrictive level which promotes the desired behavior. Discipline shall not include corporal punishment, group punishment, physical or psychological degradation or deprivation of the following:

- (a) bed and bedding;
- (b) daily shower, access to drinking fountain, toilet and personal hygiene items, and clean clothing;
- (c) full nutrition;
- (d) contact with parent or attorney;
- (e) exercise;
- (f) medical services and counseling;
- (g) religious services;
- (h) clean and sanitary living conditions;
- (i) the right to send and receive mail; and,
- (j) education.

The facility administrator shall establish rules of conduct and disciplinary penalties to guide the conduct of minors. Such rules and penalties shall include both major violations and minor violations, be stated simply and affirmatively, and be made available to all minors. Provision shall be made to provide the information to minors who are impaired, illiterate or do not speak English.

## CHILD FIND OBLIGATIONS

15. A LEA is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as "child find." "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) A LEA's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A LEA's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

16. The child-find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade. (34 C.F.R. § 300.125(a)(2)(ii).) A request for an initial evaluation to determine whether a student is a child with a disability in need of special education and services can be made by either the parent or a public agency. (34 C.F.R. § 300.301(b).)

## MANIFESTATION DETERMINATION

17. A special education student's placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to him. (Cal. Code Regs., tit. 5, § 3042(a).) The removal of a special education student from his placement for more than 10 consecutive school days constitutes a change of placement, or

a series of removals that constitute a pattern and the series of removals exceeds 10 school days. (34 C.F.R. § 300.536(a).)

18. When a LEA changes the placement of a special education student for specific conduct in violation of a student code of conduct, the student is entitled to certain procedural protections. The LEA is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

19. A LEA must notify parents of an IEP team meeting early enough to ensure that they will have an opportunity to attend, and must schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a)(1), (2); Ed. Code, § 56341.5, subds. (a)-(c).) A manifestation determination must be made by the LEA, the parent, and relevant members of the IEP team as determined by the parent and the LEA. (20 U.S.C. § 1415(k)(1)(E)(i).) The manifestation determination analyzes the child's behavior as demonstrated across settings and across times. All relevant information in the student's file, including the IEP, any observations of teachers, and any relevant information from the parents must be reviewed to determine if the conduct was caused by, or had a direct and substantial relationship to the student's disability, or was the direct result of the LEA's failure to implement the student's IEP. (34 C.F.R. § 300.530(e); Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed.Reg. 46540, 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).)

20. If the IEP team determines the conduct is not a manifestation of the student's disability, then normal school disciplinary procedures may be used to address the incident in the same way as they would be applied to non-disabled students. (20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).)



21. A parent who disagrees with any decision regarding the manifestation determination may request a hearing. (20 U.S.C. § 1415(k)(3)(A).) In appropriate circumstances, the ALJ hearing the dispute may order a change in placement of the student, and may return the student to the placement from which he was removed. (20 U.S.C. §1415(k)(3)(B)(ii).) .

#### HOME-HOSPITAL INSTRUCTION

22. Home-hospital instructional services are part of the continuum of special education placements and programs that must be available to pupils who receive special education. (34 C.F.R. § 300.115(b)(1); see also Ed. Code, §§ 56360, 56361.) Special education and related services may be provided in the home or hospital if the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) For pupils with disabilities who have a medical condition “such as those related to surgery, accidents, short-term illness or medical treatment for a chronic illness,” the IEP team must review, and, if appropriate, revise the IEP “whenever there is a significant change in the pupil’s current medical condition.” (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).))

23. When a Student is placed on home-hospital instruction, the IEP team shall meet to reconsider the IEP prior to the projected calendar date for the pupil’s return to school. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).) The teacher providing the home instruction shall contact the pupil’s previous school and teacher to determine the course work to be covered; the books and materials to be used; and who is responsible for issuing grades and promoting the pupil when appropriate. (Cal. Code Regs., tit. 5, § 3051.4, subd. (f).)

ISSUE: THE SOLE ISSUE IN THIS BIFURCATED HEARING WAS WHETHER PROBATION IS A RESPONSIBLE PUBLIC AGENCY FOR THE PROVISION OF SPECIAL EDUCATION SERVICES TO STUDENT?

#### Operation of Mt. McKinley

24. Pursuant to Factual Findings 4 through 7 and Legal Conclusions 1 through 23, Student did not establish that Probation is a responsible public agency of Mt. McKinley. California law delegates the operation of juvenile hall schools to county offices of education, like CCCOE. While Probation has statutory and regulatory obligation to provide CCCOE with adequate space to provide educational services, including special education, and to cooperate with CCCOE in educating wards, these obligations do not make Probation a co-equal public agency with CCCOE for the operation of Mt. McKinley. Student could not point to any specific legal authority to support its position, except to argue that merely Probation's obligation to provide space, cooperate in the educational process and role in discipline and student behavior make it a responsible public agency. Additionally, while Dr. Parker indicated what she would recommend when she oversaw CDE's compliance section if CDE had received a complaint regarding a juvenile hall education, she could not point to any specific complaint during or after her tenure that supported her position. Accordingly, Student did not establish that Probation is a responsible public for all purposes of the operation of Mt. McKinley.

#### Child Find Duties<sup>16</sup>

25. Pursuant to Factual Findings 10 and 11 and Legal Conclusions 1 through 23, Student failed to establish that Probation's legal obligation to obtain information about a ward's education before entrance to Juvenile Hall and to report that information to

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<sup>16</sup> As noted previously, this analysis does not apply to students on security program and not permitted to attend school or receive CCCOE educational services.

CCCOE, including a special needs, makes Probation a responsible public agency to seek and assess children who might be eligible for special education services. Additionally, Probation's duty to monitor minors in Juvenile Hall and to report information to the juvenile court regarding their education, including any special needs, does not transform that obligation to a child find duty. Student did not set forth sufficient legal authority that an agency that monitors minors and reports information to a juvenile court, such as a probation department or social services agency, regarding their educational needs, including special education, makes Probation a responsible public agency for child find duties within Juvenile Hall.

#### Manifestation Determination

26. Pursuant to Factual Findings 14 and 15 and Legal Conclusions 1 through 23, the facts of this case did not establish that Probation is a responsible public agency because of its role in facility discipline and safety at Juvenile Hall. While CCCOE teachers at Mt. McKinley may ask a probation officer to remove a child from school for behavioral, safety or disciplinary reasons, Probation is their final arbiter on the child's removal and how long he or she will be kept from Mt. McKinley. However, Probation's role in the facility's operation and ensuring safety for staff and wards and discipline is not such that makes it a responsible agency. Its authority to discipline wards is pursuant to juvenile court authority and a due process hearing mechanism exists for the ward to use to contest the change of placement when Probation places the ward on a security program. Therefore, Student did not establish that Probation is a responsible public agency based on its role of disciplining, safety protection, and monitoring behavior, which leads to students not being able to attend Mt. McKinley.

#### Security Program and Exclusion from Educational Services

27. Pursuant to Factual Findings 17, 19 through 27 and Legal Conclusions 1

through 23, the situation changes for Probation for students in a security program for whom Probation prevents from either attending Mt. McKinley or receiving educational instruction in their housing unit. Student established that for students who are not able to access educational services in a security program do not have an effective public agency to provide educational services as Probation prevents CCCOE from carrying out its obligation pursuant to federal law to provide a FAPE to all special education eligible students in Mt. McKinley. Federal special education laws require that a responsible public agency exist for each eligible student that can provide the eligible student with special education services. If Probation prevents CCCOE from carrying out that role, the role of responsible public agency logically falls on Probation. Accordingly, Probation is a responsible public agency for all wards in juvenile hall for whom it places in any of the three security programs discussed in this decision and by whose action prevents the ward from receiving special education services.

## ORDER

1. OAH has jurisdiction over Probation as a responsible public agency during those times in which a ward is in the security program and Probation prevents the student from receiving education services from CCCOE. Probation's responsibilities include child find duties and the provision of special education services for students with an IEP.
2. The hearing shall proceed as scheduled.

## 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 partially prevailed on Issue 1. Probation partially prevailed as to Issue 1.

## RIGHT TO APPEAL THIS DECISION

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

Dated: October 17, 2013



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PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings