BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. EAST SIDE UNION HIGH SCHOOL DISTRICT AND SANTA CLARA COUNTY OFFICE OF EDUCATION.	OAH Case No. 2016061098

DECISION

Student filed a request for due process hearing on June 23, 2016, naming the East Side Union High School District and the Santa Clara County Office of Education. Administrative Law Judge Charles Marson heard the matter in San Jose, California, on September 27, 28, and 29, October 18, 19, 20, 25, 26, and 27, and November 4, 2016.

Christian M. Knox, Attorney at Law, represented Student throughout the hearing. Julia Souza, Attorney at Law, also represented Student until she withdrew on October 20, 2016. Student's Mother attended some of the hearing. Student was not present.

Eliza J. McArthur, Attorney at Law, represented East Side throughout the hearing. Dr. Barbara Moore, East Side's Director of Special Services, attended the hearing on its behalf.

Tracy Petznick Johnson, Attorney at Law, represented the County Office throughout the hearing. Norma del Rio, Director of Special Education, and Anna Pulido, Assistant Director of Special Education, each attended most of the hearing on its behalf.

Cheryl A. Stevens, Attorney at Law, appeared for witness Julie Ugalde on October 27, 2016.

On July 28, 2016, the matter was continued. On November 4, 2016, the matter was continued to November 23, 2016, for the filing of written closing arguments. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

ISSUES[1]

1. Did East Side deny Student a free appropriate public education from the beginning of the school year 2014-2015 through April 23, 2015, by:[2]

   a. failing to implement the services required by Student's February 7, 2014 individualized education program;

   b. failing to hold an annual IEP team meeting within one year of the last annual IEP before the 2014-2015 school year;

   c. failing to offer or provide adequate specialized academic instruction services in an appropriate therapeutic setting;

   d. failing to offer or provide an appropriate behavior plan;

   e. failing to offer or provide individual counseling;

   f. failing to offer or provide group counseling;

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[1]The issues have been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

[2]During and after the hearing, Student withdrew numerous issues that had been listed in the Order Following Prehearing Conference. The statement of issues in this Decision sets forth the remaining issues, but retains the system of numbering and lettering in the Order Following Prehearing Conference in order to avoid confusion, thus making some lettering non-consecutive.

h. failing to provide adequate present levels of performance;

i. failing to offer or provide measurable goals in all areas of need;

j. failing to offer or provide appropriate extended school year services;

l. failing to adequately maintain educational records;

m. failing to make an offer of placement and services prior to the beginning of the school year;

n. failing to convene an IEP team meeting within thirty days of the beginning of the school year;

o. failing to provide a timely assessment plan;

p. failing to provide progress reports on goals;

q. failing to make a clear written offer;

r. failing to convene a manifestation determination IEP team meeting; and

t. failing to consider a continuum of placement options?

2. Did the County Office deny Student a FAPE for the 2014-2015 school year, beginning on April 23, 2015, through the 2015 extended school year, by:

a. failing to offer or provide adequate specialized academic instruction services in an appropriate therapeutic setting;

b. failing to offer or provide an appropriate behavior plan;

c. failing to offer or provide individual counseling;

d. failing to offer or provide group counseling;

f. failing to offer or provide appropriate extended school year services;

i. failing to provide progress reports on goals; and

k. changing his placement without parental consent?

3. Did East Side deny Student a FAPE during the 2015-2016 school year, from August 12, 2015, through November 2, 2015, and April 19, 2016, through May 31, 2016, by:

a. failing to implement Student's IEP;

b. failing to offer or provide adequate specialized academic instruction services;

c. failing to offer or provide individual or group counseling;

e. failing to offer or provide a behavior intervention plan;

f. failing to provide adequate present levels of performance;

g. failing to offer or provide measurable goals in all areas of need;

h. failing to offer residential treatment;

j. failing to provide progress reports on goals;

k. failing to make an offer or placement and services prior to the beginning of the school year;

m. failing to consider a continuum of placement options;

n. failing to timely convene an IEP team meeting; and

p. failing to convene an IEP team meeting to develop a plan to transition him from juvenile hall?

4. Did the County Office deny Student a FAPE during the 2015-2016 school year, from November 2, 2015, through April 19, 2016, and from May 31, 2016, through the 2016 extended school year, by:

a. failing to implement Student's IEP;

b. failing to offer or provide adequate specialized academic instruction services;

c. failing to offer or provide individual or group counseling;

e. failing to offer or provide a behavior intervention plan;

f. failing to provide adequate present levels of performance;

g. failing to offer or provide measurable goals in all areas of need;

h. failing to offer residential treatment;

j. failing to provide progress reports on goals;

l. failing to consider a continuum of placement options;

m. failing to timely convene an IEP team meeting;

n. failing to convene an IEP team meeting when Student was not making adequate progress; and

o. failing to convene an IEP team meeting to develop a plan to transition him from the juvenile hall?

5. From the beginning of the school year 2014-2015 to the date of hearing, did East Side and the County Office fail to adequately assess Student in all areas of suspected disability by:

a. failing to conduct a functional behavior analysis; and

b. failing to conduct an adequate psycho educational evaluation, including social/emotional functioning, executive functioning, processing, and academic achievement?

6. Did the County Office fail to offer Student a FAPE for the 2016-2017 school year?

SUMMARY OF DECISION

This Decision holds that East Side denied Student a FAPE throughout the times it was obliged to educate him because of several procedural violations of law, including failing to arrange an IEP team meeting for nearly a school year while Student languished in an inappropriate placement, unduly delaying an assessment, and creating an inadequate triennial IEP that lacked needed and measurable goals and an accurate statement of his eligibility and placement. It also holds that East Side violated the Individuals with Disabilities Education Act by failing to educate Student when he returned home from Juvenile Hall in April 2016.

The Decision finds that the County Office did not deny Student a FAPE in any of the ways alleged in the issues statement.

The Decision does not resolve the principal dispute among the parties, which concerned whether and when either agency was required to offer Student residential placement in order to provide him a FAPE. It does, however, as a matter of discretionary relief, order East Side to place Student in the Provo Canyon School in Utah for two years as an award of compensatory education.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 16-year-old male who lives with Mother within the boundaries of East Side. Since 2012 he has been receiving special education and related services in the category of other health impaired, and except for a two-year period, also in the category of emotionally disturbed. He has been variously diagnosed with, or perceived as having, attention deficit hyperactivity disorder, post-traumatic stress disorder, oppositional defiance disorder, psychosis not otherwise specified, and prodromal schizophrenia, though medical professionals and educators disagree on some of those diagnoses and perceptions.

2. Student was enrolled in East Side's Andrew Hill High School as a freshman in the school year 2014-2015, until early May 2015. From that time through the 2015 extended school year, he was enrolled in the Foothill Adolescent Day Treatment Program (now Foothill Annex), a special day class operated by the County Office on the campus of East Side's Foothill High School. From September 10, 2015, to October 21, 2015, he attended the Pathfinder Academy of the Seneca Family of Agencies in Fremont. From November 2, 2015, to April 19, 2016, and from June 2, 2016, to September 19, 2016, he was confined in Santa Clara County's Juvenile Hall, where he attended the County Office's Osborne School. On September 19, 2016, by order of the juvenile court,

he was placed in the Cinnamon Hills Youth Crisis Center in St. George, Utah, where he remained at the time of hearing.

STUDENT'S HISTORY IN ELEMENTARY AND MIDDLE SCHOOL

3. Student is African-American and has been raised in neighborhoods affected by poverty, violence and gang activity. His father suffers from serious mental illness, usually characterized as schizophrenia or bipolar disorder, and has been addicted to methamphetamine throughout Student's youth. Father was frequently in and out of jails or prisons, and when at home committed numerous acts of domestic violence involving Mother and Student, until the couple divorced in 2014. For these and other reasons, Student's home and community life has always been chaotic.

4. Student is intelligent and articulate but lacks the ability to focus for long on a single subject, and cannot attend well to tasks. He is frequently unable to control his behavior. He is oppositional and belligerent, challenges authority, and clings tenaciously to opinions he voices in the course of arguments he provokes. He threatens peers and adults with physical violence and sometimes follows through on those threats. He is quick to anger, and once angered he is often unable to calm himself for lengthy periods of time, even when being removed from the scenes of his outbursts by police.

5. Student attended elementary school in general education classes in the Berryessa Union School District in San Jose through fifth grade. In sixth grade that district placed him in a county special day class. When Student's family's home burned down, the family moved into the Franklin-McKinley School District in San Jose, where Student attended middle school for seventh and eighth grade in general education classes at Franklin-McKinley's Sylvan dale Middle School.

6. Student's records show that he had behavioral outburst sat school beginning in the first grade. In the second grade he had thoughts of shooting or killing

people. He consistently displayed lack of attention, lack of focus, impulsivity, defiance in class, and a reluctance to complete schoolwork. In sixth grade he was made eligible for special education in the category of other health impaired, with a secondary eligibility classification of emotionally disturbed. His first IEP reported that his behaviors were unacceptable in the classroom. They included: "bullying, inappropriate comments, will touch, poke, trip, threaten, or throw objects at other students if he thinks the teacher is not watching." He did very little work and was "disruptive many times." He hit other students and stabbed one in the back with a mechanical pencil.

7. Student's behavior briefly improved in seventh grade, the 2012–2013 school year, and emotional disturbance was removed as an eligibility category from his IEP. In eighth grade counseling was added to his IEP, but his behavior became substantially worse than in earlier grades. Student's math teacher reported that his behavior was unmanageable. He would not work, and "his behavior disrupted the entire class whenever he was there." By the time of his annual IEP in February 2014 he was having daily behavioral outbursts. His history teacher reported he was "not in control of his mouth and emotions (he has no filter)," used vulgar language and engaged in physical and verbal altercations in class with both students and the teacher. He refused almost all assigned work, and his grades dropped. He was constantly negative in attitude, "putting others down, threatening others, and challenging authority." The February 2014 IEP team thought he had ADHD and oppositional defiance disorder. His annual IEP stated that "[h]is current behaviors make it impossible for learning to occur in the classroom" and advised: "It is highly suggested that [Student] continues counseling at whichever school he goes to next." The annual IEP provided Student counseling to the end of eighth grade but no further.

8. Franklin-McKinley's February 2014 IEP team referred Student for a functional behavioral analysis, which was conducted in spring 2014 and discussed at an

IEP team meeting on May 28, 2014, 12 days before the end of Student's eighth grade year. By then Student had been removed from classes; he was allowed to work only in the library. The behavioral consultant who conducted the assessment recommended that Student be moved to a more restrictive environment, and that he be given a crisis management plan and a behavior intervention plan. The IEP team knew Student would matriculate to an East Side high school in the fall, and concluded on this note:

> We need to make a recommendation for placement. [Special Day Class] is not a good placement because [Student] is academically very smart and the classroom would be too easy for him. It is believed that he would not be successful in an ED program because he would victimize other students. [The behavior specialist] proposes that [Student] needs a tightly controlled day program. One that controls movement, controls actions, behaviors, and interactions.

The IEP team then proposed to investigate such a placement further, in cooperation with East Side:

> We do not know what [East Side] has to offer. The Admin for special education will contact [East Side] to determine what [East Side] can offer him. Can we investigate a more restrictive environment for [Student]? . . . . We will have the Admin for special education . . . take the next steps going forward.

There was no evidence that this plan was ever put into effect.[3]

STUDENT'S FRESHMAN YEAR AT ANDREW HILL

9. In fall 2014 Student began attending East Side's Andrew Hill High School, a comprehensive campus with approximately 2,100 students, where East Side placed him in general education classes. Well within the first 30 days of his attendance, East Side knew or should have known that his placement in general education was a failure. Both Gregory Dunlap, a resource teacher and Student's new case manager, and program specialist Tina Swanson had reviewed Student's February and May 2014 IEP's from Franklin-McKinley before the start of the school year. Mr. Dunlap and his department head realized that Student had earlier been classified as emotionally disturbed, but that classification did not appear in his IEP's in eighth grade. According to Mr. Dunlap, even then, "we were concerned about his placement."

10. Shortly before the start of school, Ms. Swanson received a call from Mother, who had questions about Student's new school. At that point Ms. Swanson reviewed Student's files, including his February and May 2014 IEP's. She noticed the warning in the May 2014 IEP that Student needed a more restrictive placement, and discussed it with the director and school staff. They decided to "look into assessments to determine the level of need," but decided not to consider a more restrictive placement until after Student was assessed. They did not call an IEP team meeting or otherwise involve Mother in these decisions, and no one took any action at the time to start the assessment process.

[3] Franklin-McKinley was also named in Student's complaint, but it was dismissed after settlement.

11. East Side made these unilateral decisions based on sparse records from Student's middle and elementary school years. Student's February 2014 annual IEP referred to an attached behavior support plan, but the only behavior plan in the records East Side received was incomplete and unsigned. Although Franklin-McKinley is within East Side's geographical area, is a "feeder" school to its high schools, and has many dealings with East Side, no one at East Side contacted anyone at Franklin-McKinley about Student or attempted to obtain more complete records about him.

12. If East Side had obtained and read Student's records from elementary and middle school, it would have known that he was unlikely to succeed in a general education placement. According to Student's expert Dr. Paula Solomon,[4] who did analyze those records, they contained ample indication that Student did not belong in general education. He had struggled with his behavior since first grade; had a pattern of isolating and not understanding peer relationships; showed obsessional rigid thinking and a high degree of depression; had a history of work refusal and difficulty following directions; and displayed emotional disregulation, hypervigilance, paranoia, irrational responses to rational requests, anxiety, and disruptiveness. From those records Dr. Solomon concluded that placing him on a comprehensive high school campus "would

[4] Dr. Solomon is a licensed clinical psychologist in private practice who has been working with emotionally disturbed adolescents since 1981. She has been the director of two day treatment centers, a case manager in an acute psychiatric hospital, a family therapist, and a consultant to a treatment center. From 1991 to the present she has been the clinical director of residential and outpatient treatment at TLC Child and Family Services in Sebastopol. She has extensive experience in the assessment and treatment of adolescents with emotional disturbances and mental health difficulties.

predictably be a disaster." Her analysis was credible both because of her long experience and because it was confirmed by those of Student's early records which were introduced in evidence. It was also confirmed by the result of East Side's placement of Student in general education at Andrew Hill.

13. Student began classes at Andrew Hill on August 12, 2014. He was placed in general education without an IEP team meeting and without services of any kind until about a month later, when he began to receive specialized academic instruction for 30 minutes twice a week.[5] Franklin-McKinley's predictions about his behavior immediately proved true. On the third day of school Student received an in-house suspension, and within the first two weeks Student's math and English teachers began complaining to Mr. Dunlap that he was defiant and disruptive in class. He received three more in-house suspensions in the first week of September, and Mr. Dunlap spoke to Mother hoping she could explain how his behavior could be handled. Student was given five more in-house suspensions on September 10, 17, 19, 22, and 30, 2014.

14. In October Student began to cut classes, at first remaining on the campus and later not appearing at school at all. For the rest of the fall he completed virtually no schoolwork, generally refused assignments, cut many classes, and was routinely loud, angry, challenging and disruptive in class when he was there. During Student's freshman year at Andrew Hill he failed all his classes, essentially learned nothing and received no educational benefit.

15. Early in the school year Ms. Swanson had alerted Mr. Dunlap that Student's February 2014 annual IEP provided for counseling to the end of the eighth

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[5] Approximately a month into the school year, the principal of Andrew Hill apologized to Mother for not providing the services in the February 2014 IEP earlier, and Student began to receive the specialized academic instruction his IEP required.

grade year, so Mr. Dunlap called a social worker and a marriage and family counselor on the campus to arrange counseling for Student. East Side did not convene an IEP team meeting to add counseling to Student's IEP or otherwise involve Mother in the decision. Mr. Dunlap later was told that his request for counseling had been processed, and that someone was meeting with Student, or trying to meet with him. Mr. Dunlap did not know whether Student actually got counseling in the fall of 2014 because those matters were "confidential" and, he believed, not available even to Student's case manager. There was no substantial evidence that Student actually did receive counseling at Andrew Hill.

16. Ms. Swanson, Mr. Dunlap, and school psychologist Paulette Waters acknowledged at hearing that they knew by October 2014 that Student needed another placement. However, they apparently believed that they could not change his placement without an assessment. There was also some evidence that they delayed convening an IEP team meeting until after an assessment was conducted. In the meeting notes of the IEP team meeting that eventually occurred on April 23, 2015, Father was quoted as asking why the meeting had not happened until 25 days before the end of the school year. Ms. Waters responded: "[W] have been trying to assess [Student] since October."

17. Even though East Side had decided to assess Student before he began the school year, and decided in early October to delay any change of placement until after an assessment was completed, no one at East Side did anything to bring about an assessment until mid-November 2014. On November 18, 2016, Ms. Waters called Mother, who agreed assessment was needed. On that day Ms. Waters sent an assessment plan proposing to assess Student's academic achievement and social and

emotional status to Mother in Student's backpack.[6] On November 21, 2014, when she had gotten no response, Ms. Waters wrote to Mother enclosing another copy of the plan, and later in the fall telephoned her once or twice and left messages on an answering machine. Mother did not respond.

18. The evidence did not explain why Mother did not immediately return a signed assessment plan. Mother testified she did not receive the plan. Student was later to tell an assessor that he threw away some special education documents during this period because he did not want to be in special education.

19. Student's home during this period was turbulent. Mother cares for six children during the day; Student, three siblings aged 13, 8, and 7, and two children of a cousin aged 8 and 3. She usually attends IEP and other school meetings by telephone and sometimes has to leave the phone temporarily to cope with the children. Mother also is vision-impaired; she cannot read a document without holding it close to her eyes and using a magnifying glass. Mother did not inform East Side of that impairment. Throughout fall 2014, Mother did not return a signed assessment plan or inquire about the missing assessment plan to which she had agreed on the telephone.

20. East Side took no further steps to secure Mother's signature on an assessment plan until late February 2015, when Ms. Waters proposed to the school's associate principal Adriana Rangel that someone deliver the plan to Mother at home. Ms. Rangel accomplished that, and obtained Mother's signature on the plan, on March 9, 2015.

[6]Ms. Waters recalled at hearing that she sent one plan home with Student slightly before November 18, 2014, but she could not produce a copy of such a plan, and her letter of November 21, 2014, makes no reference to such a plan.

21. On January 5, 2015, Mr. Dunlap began trying to organize an IEP team meeting for Student. He sent a notice of a proposed meeting on January 13, 2015, to Mother by mail and in Student's backpack, and called her once or twice without result. Having no response from Mother, he assembled the East Side members of the IEP team on January 13, but Mother did not appear. On that day he sent another notice of meeting, this one for January 26, 2015. He sent it only by regular mail, having had no results either from his calls or using Student's backpack.[7] On January 26, 2015, he did not assemble the IEP team; he merely kept them on call in case Mother showed up. She did not, and on January 26, 2015, he mailed another notice for a meeting on February 6, 2015. Again the team was on call, but Mother did not appear.

22. By February 2015, Student's behavior had so worsened that he was effectively expelled from Andrew Hill. On February 24 a teacher overheard Student discussing smoking marijuana with another student and found he had two lighters in his pocket. Student was taken to the Advisor's office but became confrontational, verbally abusing the staff and threatening them with such remarks as "You better watch your back" and "You're going to get what's coming to you." Police were called and Student was verbally abusive to them as well. He was handcuffed and placed in a police car but still could not calm down; he began to spit in the police car. The police asked for surgical masks to cover his mouth and took him away.

23. Maria Trejo, one of the Advisors Student threatened during the incident, informed staff she did not feel safe in his presence. Associate Principal Rangel and other East Side staff decided unilaterally that Student would not be allowed to return to Andrew Hill. School records characterize this action as a five-day suspension, but it was effectively an expulsion since Mother was informed Student could not return to classes

[7] Mr. Dunlap testified he does not know how to use certified mail.

at Andrew Hill indefinitely. The expulsion lasted until May 11, 2015, a period of well over 10 school days. It was accomplished without an IEP team meeting or a manifestation determination, and without the observance of procedural protections of any kind.

24. Someone on the disciplinary team obtained Mother's signature on a document placing Student on home instruction. This was presented to her as the only option to continue the education of her son, and was done without conducting an IEP team meeting or observing any other procedural protection. From March 17 to May 8, 2015, Student remained on home instruction, periodically receiving instructional packets and assignments and returning some of them. He did not receive the services of a teacher during this period except in grading the assignments he returned. He was not allowed on campus unless accompanied by Mother, and then only for official business such as assessment.

25. After Student was expelled from Andrew Hill, Associate Principal Rangel realized that East Side needed to find Student another placement. She too believed that East Side could not change his placement without an assessment. Acting on Ms. Waters's earlier suggestion, Ms. Rangel sent a liaison officer to Student's home with the assessment plan. On March 9, 2015, Mother signed the assessment plan. The record does not show why this was not done earlier. Student's home was half a mile from the school by foot and one and a half miles by car.

26. On March 12, 2015, Student and Mother appeared in Ms. Waters's office to begin the psycho educational assessment, but Student was oppositional and defiant, refused to be tested, and walked out. He also failed to appear for academic testing. However, Ms. Waters was able to gather substantial information by other methods. She obtained behavior rating scales from Mother and Student's teachers, reviewed his previous records and assessment findings, and interviewed Mother, Student's teachers, and others. From the interviews with Student's case manager and teachers, Ms. Waters

concluded it was clear that Student was unable to receive educational benefit in his current placement.

27. Student's triennial review had been due in February 2015, but East Side did not conduct it then. East Side chose to use Ms. Waters's assessment as Student's triennial assessment, and on March 19, 2015, Ms. Waters completed a report entitled "Triennial Psycho educational Assessment." In the report she stated, as the reason for referral, that Student was most often "unable to attend to instruction or to remain in class due to his disruptiveness." She reported he had received 21 behavioral referrals since the beginning of the school year, by multiple teachers and across academic subjects, "primarily for profanity, vulgarity, defiance, outbursts and refusal to comply with a reasonable request from staff/teacher." She reported further that Student had been arrested and "suspended" on February 24, 2015, and that before that event his attendance was "poor with many tardies and period absences."

28. Ms. Waters concluded in her report that, while Student "is capable of achieving within the expected range for his age and grade level," he was experiencing "significant behavioral and emotional difficulties that have been observed over a prolonged period of time and to a marked degree." Noting that Student was, at the time, eligible for special education as other health impaired, she suggested that the IEP team consider adding eligibility in the category of emotional disturbance. She found he met four of the five criteria for that eligibility category. She recommended that a functional behavioral analysis be conducted. She also recommended "a smaller and more supportive school environment . . . in a therapeutic environment where counseling services are provided."

THE APRIL 23, 2015 IEP TEAM MEETING

29. Mr. Dunlap finally arranged Student's first IEP team meeting at East Side on April 23, 2015, which served as his triennial review. Ms. Rangel chaired the meeting,

which was attended by Ms. Swanson, Ms. Waters, and Mr. Dunlap for East Side; Student, Mother and Father; a social worker; and two Wraparound workers who had been assisting the family on behalf of the County's foster care services since the beginning of 2015.[8]

30. At the triennial meeting, Ms. Waters presented her psycho educational assessment and urged the team to add emotional disturbance as an eligibility category on Student's IEP. The team agreed to that designation, and also to Ms. Waters's suggestion of a change of placement to a smaller, more therapeutic placement. Several placements were discussed, but the one favored by East Side team members was the Foothill Adolescent Day Treatment Program (now Foothill Annex), a special day class primarily for emotionally disturbed students operated by the County Office on the campus of East Side's Foothill High School. Mother agreed to visit the Foothill program, and agreed to the IEP.

31. The triennial IEP document produced as a result of the triennial meeting does not accurately reflect what occurred there. Most of the members of the April 23, 2015 IEP team testified at hearing. All those who addressed the subject left the meeting with the understanding that the team had added emotional disturbance to Student's IEP as an eligibility category, and had changed Student's placement to Foothill, at least if Mother agreed after a visit. The notes of the meeting were ambiguous, but Ms. Swanson was reported to have offered that placement. The notes did not clearly state that the Foothill placement was offered by the team itself, and they also stated that Student was

[8] Wraparound services are flexible social services tailored to individual families that are intended to provide alternatives to group home care. (See Welf.& Inst. Code, §§ 18250 et seq.)

still a student at Andrew Hill. Nor did the notes clearly state that the team had determined that Student was eligible as emotionally disturbed.

32. The services page of the IEP, where placement is normally announced, stated that Student would be placed in a regular classroom at a public day school, with 57 minutes a day of specialized academic instruction and career and college awareness services, for the next 12 months. This version of the placement was confirmed by the statement that Student would spend 98 percent of his time in the regular education environment. Mr. Dunlap explained at hearing that he brought a draft of the IEP to the meeting, but failed to finish it to reflect the meeting's actual determinations. Ms. Swanson correctly admitted at hearing that an outsider examining the triennial IEP could not tell what Student's placement would be for the rest of the school year.

33. The triennial IEP document did not contain a coherent report on Student's progress toward the goals in his February 2014 annual IEP, although those goals had been distributed to his teachers at the beginning of his freshman year. None of the testifying participants in the triennial meeting could recall any discussion of those goals. Mother may have received a separate copy of Student's February 2014 IEP from Franklin-McKinley, with a set of the goals that purports to contain ninth grade progress reports. These reports did not actually report progress. For example, the three reports on Student's advancement toward his 2014 math goal state, in Mr. Dunlap's hand: "10% does not participate in class." Mr. Dunlap testified at hearing that the 10 percent number actually represented how much work he was told Student had completed in his math class, not his progress toward the requirements of the goal. The evidence showed that Mother never received any report on Student's progress on his February 2014 goals.

34. The triennial IEP document proposed only four annual goals. Two of them related to Student's transition into post-high-school life; he was to complete an interest

survey and then find three possible jobs on the Internet, and also find three schools which offered training in his chosen career. These two goals were new and therefore contained no baselines from which to measure progress.

35. There were no goals in the triennial IEP for several of Student's greatest areas of need, such as behavior, attention, work completion or attendance. The only two goals in the triennial IEP that were relevant to Student's immediate future were a math goal and a social-emotional goal. The math goal stated that in a year, Student would add, subtract, and multiply polynomials with at least 80 percent accuracy in two of three tries. This goal was not based on any known present level of performance or on any record of Student's mathematical abilities. The baseline for this goal was "0%." The goal was therefore unmeasurable and ineffectual. Mr. Dunlap, who wrote the goal, testified that he wrote zero percent as a baseline because he "had no data to prove otherwise." In fact, Mr. Dunlap had available some information about Student's math abilities in middle school, and some recent information from graded independent study assignments after Student was expelled from Andrew Hill, but he did not consult these sources.

36. The triennial IEP's social-emotional goal proposed that Student "learn social-awareness and interpersonal skills to establish and maintain positive relationships with 90% effectiveness" as measured by classroom reports. Although there was substantial information available from Student's teachers about his social-emotional difficulties, the goal had no baseline; it was described instead as a "new goal." The absence of a baseline, coupled with the vagueness of the goal's terms, rendered it unmeasurable and ineffectual.

37. The evidence showed that Student never received any goals in an East Side IEP other than those described above. It also showed that East Side never created an IEP accurately describing his placement at Foothill.

38. There was no discussion at the triennial meeting of the possibility of a residential placement. No East Side representative mentioned the possibility. At the time, Mother believed residential placements were only made by the County's Probation Department; she was unaware that a school district could make such a placement until about six months before hearing, when she began working with legal advisors.

STUDENT'S EXPERIENCE AT THE FOOTHILL SPECIAL DAY CLASS

39. After the triennial meeting, Mother visited and approved of the Foothill special day class, and Foothill admitted Student on its usual understanding, known to East Side and Mother, that the appropriateness of his placement would be reviewed at an IEP team meeting within 30 days of his arrival. Student began attending Foothill on May 6, 2015, with 15 days left in the school year. He received specialized instruction in a class that included four to seven students and four staff members (a teacher, a behavior coach, and two instructional assistants). He was provided at least 45 minutes a week of individual and group counseling, and had additional access to counseling as needed. The class used a well-developed point system of behavior incentives and rewards to which Student quickly adopted. His behavior, while sometimes troublesome, was not out of the ordinary for students in the class. Student attended Foothill for 12 days before the end of the school year. His time there was too brief to measure his academic progress.

40. The April 23, 2015 triennial IEP team did not discuss or decide whether Student should be offered an extended school year, although the IEP document asserted that the team considered such an offer and decided against it. The meeting notes stated that Ms. Swanson offered Student enrollment in extended school year, and that probably was the understanding of the parties. The County Office offered Student the extended school year provided to most other Foothill students, and Mother accepted. The program, located for the first time at the boardroom of the County Office, in a large building full of its employees, provided two hours of class in the mornings and

involvement in Workability in the afternoons.[9] Student was eager to enroll so that he could get paid for his work. However, he attended only 6 of the summer program's 19 schooldays.

41. Students in the Foothill summer program had to provide a social security card and a birth certificate in order to get paid for their work. Mother promised County Office staff she would provide these documents but never did, for reasons not clear in the record. At one point she told the staff that she did not trust Student to carry the documents to school. Student was relegated to shredding paper in the County Office's warehouse, and as the summer proceeded and the other students got paid but he did not, he became increasingly agitated at Mother's failure to produce the documents. He blamed Mother, the County and Workability staff for the failing. Both County and Workability staff attempted to help him obtain the documents, even by suggesting that they be sent by the bus driver, and eventually concluded that Mother probably did not have the documents.

42. Student's anger about not getting paid eventually brought him to an act of violence. On July 13, 2015, Student began threatening County Office staff with physical harm, including shooting someone. When his classroom teacher Bobby Welch took him into the vacant classroom (the County Office boardroom) to cool off, Student escalated his threats to include everyone in the building. He began to wreck the

[9]Project Workability is a program established by statute and administered by counties and local educational authorities statewide that provides special education students multiple employment options, information for choosing a job or career path, and a variety of vocational experiences. Typically a student receives training and then works a few hours a day for a local merchant or other business, with supervision by Workability program staff.

boardroom, systematically turning over all the tables, ripping framed pictures off the walls, and breaking the frames. He continued this behavior until the police arrived, handcuffed him, and put him in a squad car. Mario Guerrero, one of the family's Wraparound workers, came to the scene and spent three to four hours in the police car calming Student down. Eventually, the police allowed Mr. Guerrero to drive Student home. On the trip Student continued to threaten County Office staff, and jumped out of the car and ran off.

43. The County Office suspended Student for three days because of the July 13, 2015 incident and organized an IEP team meeting for July 16, 2015. Mother attended by telephone. Maureen Dolan, another East Side program specialist, attended the meeting because Ms. Swanson was on vacation. The meeting did not make a manifestation determination and was not called for that purpose; instead the IEP was described as a 30-day review of Student's status in the Foothill program. The team decided that because of Student's behavioral challenges, his Foothill placement was inappropriate and he needed a more restrictive and tightly controlled educational environment at a non-public school. Several possible non-public schools were discussed with Mother, and Ms. Dolan promised to instruct Ms. Swanson to locate an appropriate placement. Mother agreed to this plan but expressed her concern that the new placement be available at the beginning of the school year, which was on August 12, 2015. Ms. Dolan assured her that it would.

44. At hearing, the parties disputed whether Student was permitted to return to Foothill for the two weeks remaining in the summer program. Mother's understanding was that he was not allowed to return; County and District staff thought he was. Student did not in fact return to the Foothill program for the rest of the extended school year, nor did he return to it when the new school year began on August 12, 2015.

45. At the end of the IEP team meeting on July16, 2015, Mother informed the team that Student had been placed in a psychiatric hospital but did not explain the reason for the commitment. Mr. Welch later heard from a friend that, after the incident in the County boardroom, Student had done much worse damage to the family home and had been taken to a hospital. He believed that was why Student had been hospitalized.

46. After the July16, 2015 IEP team meeting at the County Office, Ms. Swanson returned from vacation and was instructed to find Student a non-public school. Ms. Dolan did not tell her that Student had been hospitalized. Ms. Swanson reviewed the April IEP and subsequent events, and on August 3, 2015, set out to locate an appropriate placement. Alma Tenadora, another East Side program specialist, recommended the day program at Seneca's Pathfinder Academy in Fremont, which primarily serves emotionally disturbed students. Ms. Swanson contacted Seneca on August 11 to see if they had space and learned that they did. Seneca agreed to a tour by Mother. Mother was given no role in this process.

47. Ms. Swanson contacted Mother at the end of August, described the Seneca program, and arranged for Mother to visit the school during its first week of classes, which started on August 31. Mother visited and approved of the placement, Seneca accepted Student, and Ms. Swanson set up an amendment IEP team meeting for September 8, 2015 to confirm the placement. At the meeting East Side offered to amend the triennial IEP to place Student at Seneca, and Mother accepted. Again residential treatment was not discussed. Mother still did not know, at this time, that a school district could effect a residential placement.

48. Student's hospitalization in mid-July2015 was the first of several psychiatric hospitalization she endured at several different facilities from August to November 2015. On August 17, 2015, he appeared in front of Andrew Hill, frightened

some people, and was arrested for possessing marijuana and paraphernalia. Later hospitalizations were not explained by the evidence, but Student was apparently hospitalized between 8 and 13 times from August to November 2015, usually under section 5150 or 5250 of the Welfare and Institutions Code, for his safety and that of others. During these hospitalizations he was given a wide variety of psychotropic and other medications, which he frequently ceased taking when he was released.

49. Although Mother had told the July 16, 2015 IEP team that Student was in a psychiatric hospital, East Side did not follow up on that information and did nothing to inquire about his condition at the start of the school year. At the September 8, 2015 IEP team meeting, Mother did not volunteer information about Student's hospitalizations, and East Side staff did not inquire about them. East Side did not know about any of Student's several hospitalizations during this period (except the first one) until the instant request for due process was filed on June 23, 2016.

STUDENT'S FAILURE AT SENECA

50. Student had not attended any school between August 12, 2015, and September 10, 2015. He began attending Seneca on September 10, but was hospitalized two days later for two weeks. Between September 10 and October 2, 2015, he attended about half of the 15 days Seneca was in session. He was transported to school in a taxi, but attacked the taxi driver, and the taxi company suspended his services for two or three days.

51. At Seneca, Student managed no more than two days at a time without behavioral incidents. On October 2, 2015, he assaulted other students, threatened staff, and struck one staff member by throwing a chair. He had to be physically restrained for 35 minutes and was driven home. On October 6, 2015, he left campus, stole food from a 7-11 store, and was sent home. On October 8, 2015, he refused to participate in re-entry procedures, threatened to hurt staff and students, slapped a staff member, swung at

another, and kicked a third. He then ran out to the parking lot, jumped on three cars, and shattered their windshields. Police arrived and took him to a psychiatric hospital. Because of these and similar incidents, Seneca staff decided Student was not appropriately placed there.

52. On October 19, 2015, Seneca held an IEP team meeting for Student and gave a formal 20-day notice of his discharge from the program. The participants recognized he had made no progress there. East Side staff attended the meeting. There was no discussion of a residential placement.

53. Student attended Seneca for only 2 more days of the 20 allowed him. On October 21, 2015, he began again to curse staff, throw things, and threaten physical harm. His disruption required an hour of physical restraint, including 46 minutes prone. Police again took Student to a psychiatric hospital, and he did not return to Seneca.

54. At hearing, Ms. Dolan explained the policies underlying East Side's failure to discuss residential placement at Student's IEP team meetings. The District will not make a residential placement unless a recent assessment justifies it. In addition, East Side asks itself whether it can educate the student in a public program, an alternative program, or a non-public day school. Only if the District determines it cannot educate the child in any of these programs will it consider a residential placement. East Side witnesses established that East Side is convinced that a student's failure in one county program or non-public day school does not mean that the student will fail in another. As Ms. Dolan put it, a student can "blow out" of one non-public day placement and still be successful in another one. The combined effect of these policies and perceptions is that East Side will apparently exhaust the possibilities of placements in at least several County and non-public schools before it even considers residential placement, and then will insist on a current assessment that would support that placement.

55. Because of these policies and perceptions, when Student was discharged from Seneca, Ms. Tenadora began another unilateral search for another non-public day treatment program for him. She was in the process of this search, and had set up a visit for Mother at Pine Hill, another non-public day school, when Student was arrested on November 2, 2015, and incarcerated in Juvenile Hall. At that point Ms. Tenadora suspended her search for a new placement.

56. On November 2, 2015, Student had been away from home for a few days. He came to the family home upset, lit a fire in a trash can in the front yard, went to an AM-PM Minimart, threw coffee in the clerk's face, and threw the trash can lid through the store's window. He went across the street, set another trash can on fire, and was taken to Juvenile Hall by police on charges of robbery and arson. He would remain there for more than five months.

STUDENT'S EDUCATION IN JUVENILE HALL (NOVEMBER 2015 TO APRIL 2016)

57. When Student was incarcerated in Juvenile Hall, his education became the responsibility of the County Office again, this time because the County Office operates the Osborne School in the Juvenile Hall. Once Student was enrolled in Osborne, East Side dis-enrolled him.

58. Santa Clara County's Juvenile Hall is operated by the County's Juvenile Probation Department, which was responsible for Student's confinement, physical well-being, and compliance with the Hall's behavioral standards. The County Office operates Osborne School within, and subject to, the structure and governance provided by Probation. A probation officer is present at all times in the classes at Osborne and enforces behavioral norms there according to Probation's standards.

59. After initial screening at the Hall, Student was housed in a maximum security unit because of the seriousness of the charges against him. He was enrolled in Osborne on November 4, 2015. Osborne obtained his IEP (still the triennial) and

provided him specialized education and services in the Juvenile Hall unit in which he was housed that were comparable to those he received at Foothill. Student's courses were English, Math, World History and Geography, Earth and Space Science, and PE. Student sometimes attended these classes, but refused to participate in any inventory or testing of his academic skills.

60. During this period Student was depressed, volatile, and argumentative, and usually did not take his medications. He engaged in behavioral outbursts that sometimes led to physical restraints. Twice he flooded his unit by stuffing clothing down the toilet, and once tied strings around his fingers, cutting off circulation until the strings were removed by staff. Because Probation does not require an unwilling student to attend Osborne classes, in his first month at Osborne Student declined to attend some classes, but he attended enough to earn nine credits toward graduation.

61. Over winter break and in January and February 2016, Student was prescribed medications, refused to take them, and had serious behavioral outbursts. He often had to be physically restrained, and was frequently on a "one-to-one" watch during which a probation officer would look in on him every 15 minutes, or when he was particularly disturbed, every 5 minutes.

62. During January and February 2016, Student usually refused to attend school, and chose to remain in his room instead. For much of this period Probation placed him on "C-Level" status, the lowest of the three status levels in the point system used by Probation for behavioral control, which meant he could not leave his unit to attend class. He completed some independent studies in his room. He rarely spoke to other people. He was briefly hospitalized again in February. He was transferred on February 11, 2016, to the B4 Mental Health Unit, where he could receive more intensive supports and benefit from a lower staff to student ratio. The Mental Health Unit is operated by the County's Mental Health Department.

63. County Mental Health provided extensive mental health support to Student while he was in the Hall. On his entry he received therapy every one or two weeks from Dr. Selene Luk, a psychiatrist,[10] who managed his medications and coordinated his care. Dr. Luk was assisted by psychiatric social worker Zainab Akintabde, who saw Student two or three times a week and sometimes more often, for 45 minutes to an hour each session. Twice during his stay in Juvenile Hall, Dr. Luk had Student briefly hospitalized for emergency psychiatric services. Dr. Luk and Ms. Akintabde testified at hearing about Student's mental health difficulties while in the Hall, and agreed he suffered from mental illness but did not always agree on his diagnoses. Dr. Luk believed that Student was probably a paranoid schizophrenic, but was reluctant to put that on his permanent records and so diagnosed him on discharge as having Psychosis Not Otherwise Specified. Ms. Akintabde diagnosed him as having bipolar disorder and PTSD.

64. At some point in Student's first Juvenile Hall stay, County Mental Health provided him a Care Plan, which resembled a behavior intervention plan in that it set forth antecedents and triggers to his behaviors and suggested individualized strategies for improving them. Student remained subject to Probation's basic behavioral control plan. This plan extended into the classroom, where it was applied by the Probation Officer who was present.

[10] Dr. Luk has a Doctor of Osteopathic Medicine (D.O) degree from the Touro University College of Osteopathic Medicine in 2003, was a psychiatric resident at the University of Hawaii, and a program fellow in the Child and Adolescent Psychiatry Fellowship program at the University of California at San Francisco. She has significant experience as a child psychiatrist and has worked in Juvenile Hall since April 2014.

65. From late January to mid-March, 2016, Student's Osborne teacher Mary Sanchez orchestrated an effort to persuade Student to attend class. She sent instructional aides to the doorway of his room, where they could work on independent study assignments with him. Ms. Sanchez sent aides Student favored, with materials she thought were of interest to him. Gradually Student's involvement with the curriculum increased, and by mid-March he was attending class more often.

66. Osborne convened Student's annual IEP team meeting on March 15, 2016, and rewrote his IEP. It offered him 1,335 minutes a week of specialized academic instruction in the B4 Mental Health Unit class, and 300 minutes a day of support from an instructional assistant. He was given goals in the areas of writing, algebraic expressions, compliance, and accepting directions. Those goals did not contain baselines showing present levels of performance because Osborne lacked sufficient information to describe them; Student had refused every test and assessment presented to him since his arrival at the Hall. The behavior goal erroneously repeated the annual goal itself as a baseline.[11] Mother agreed to the March 15, 2016 IEP.

67. After the March 15, 2016 IEP went into effect, Student's academic performance improved. He completed more work and attended class about 70 percent of the time. He earned 22.5 credits for his work in spring 2016. Student was released from Juvenile Hall on April 19, 2016.

EAST SIDE'S FAILURE TO EDUCATE STUDENT IN SPRING 2016

68. Upon Student's release from Juvenile Hall, the Osborne School dis-enrolled him. East Side had done nothing to plan for his release. There was no evidence

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[11] Both the goal and the baseline stated that Student would comply with requests from authority 95 percent of the time.

that anyone notified East Side of his release. East Side had a liaison officer who was supposed to deal with such releases, but there was no evidence that she learned of Student's release or acted on it. No one re-enrolled Student in East Side. East Side witnesses testified that it was standard practice not to re-enroll a student returning from Juvenile Hall automatically; instead a separate affirmative act of re-enrollment by a parent was required before the student could return to school in the district. No one notified Mother of that policy.

69. A day or two after Student's release, Mother called Ms. Tenadora seeking information about getting Student back into school, but got no response. She also sought help in reinstating Student in school from Legal Advocates for Youth and Children in San Jose.

70. One day in late April or early May 2016, Student appeared at Andrew Hill and asked to be allowed to enroll in school. East Side staff contacted Ms. Tenadora, who reviewed Student's file with Ms. Swanson. They decided unilaterally that he would require a non-public placement, and instructed East Side administrators to tell Student he had to be re-enrolled in East Side before he could be served. As a minor, Student could not re-enroll himself.

71. After Student was turned away from Andrew Hill, Ms. Tenadora resumed her search for an appropriate non-public school for Student. Beacon School, a non-public school with a facility in San Jose that concentrates on students with behavioral problems related to emotional disturbance and other disabilities, told her it had room for him. Ms. Tenadora called Mother but did not get a response. She also gave information about Beacon to Student's probation officer and arranged an intake appointment. No one appeared at the appointment. East Side did not convene an IEP team meeting during this period or consult Mother about placement at Beacon or

anywhere else, or about any aspect of his education. East Side did not educate Student during this period.

72. Student did well at home for about two weeks after his release, but after that his behavior worsened. He became disobedient, started refusing medication, and spent increasing time away from home. Soon he disappeared into the community, living in abandoned and empty houses and sometimes staying with friends. He drank alcohol and consumed street drugs. He was returned to Juvenile Hall at some time in May for shoplifting, but was released again within three days. He was briefly hospitalized on May 22, 2016, because he was intoxicated.

STUDENT'S SECOND STAY IN JUVENILE HALL (JUNE 2 TO SEPTEMBER 19, 2016)

73. On June 2, 2016, for reasons not clear in the record, Student was returned to Juvenile Hall, where he would stay until his September transfer to an acute crisis center in Utah. He had been homeless for several weeks and had lost about 20 pounds. According to Dr. Luk, his condition was the worst in which she had seen him.

74. Back in the Hall, Student resumed the educational placement he had in February, March and April 2016, which is described above. Although his behavior continued to be occasionally troublesome, his class attendance and school work production improved, and by the time he left the Hall he was completing 80 to 90 percent of his assignments.

75. On June 23, 2016, the instant request for due process hearing was filed. The complaint contained significant information about Student's psychiatric condition and hospitalizations of which East Side and the County Office had been unaware. The two agencies obtained permission from Mother to conduct a social-emotional assessment and an Educationally Related Mental Health Services assessment of Student.

To conduct those assessments the agencies employed Dr. Ray Easler, an experienced school psychologist.[12]

76. On August 2, 2016, after reviewing Student's records and talking to Mother and some staff at Juvenile Hall and Seneca, Dr. Easler spent more than three hours with Student in Juvenile Hall. Student was aware of a recent decision by the Juvenile Court to seek an out-of-state placement for him, and was eager to have such a placement. For the first time in years, Student cooperated completely with an assessment. He was polite, friendly and personable. He answered all of Dr. Easler's questions, took several standardized tests without complaint, and even declined opportunities to take breaks, preferring to concentrate on the assessment until it was finished. He informed Dr. Easler that he previously had not cared about school and had chosen not to attend or complete assignments, but had now realized he could get nowhere without a high school diploma and had decided to attend to his studies. Dr. Easler believed he was sincere in this change of attitude. A Juvenile Hall psychologist confirmed to Dr. Easler that Student's attitude toward his studies had recently changed.

[12]Dr. Easler received his Ph.D. in psychology from the University of South Carolina in 1996. He was a school psychologist intern in Utah starting in 1978, and then a school psychologist for various school districts, the Riverside County Special Education Local Plan Area and the Riverside County Office of Education. In 2004 he became the Director of Special Education at the Valley Center-Pauma Unified School District, and in 2010 the Director of Special Education for the Franklin-McKinley School District, where he first met Student. Since 2014 he has been the Program Manager and Clinical Coordinator for the Moreno Valley SELPA's mental health Counseling Center. He has conducted hundreds of assessments and written many papers and given many presentations concerning the classification of students as emotionally disturbed.

77. On August 17, 2016, without having Dr. Easler's upcoming report, Osborne conducted an amendment IEP team meeting for Student which was attended by Mother and her attorney, representatives of East Side, and various Osborne staff. The team updated Student's present levels of performance, removed and replaced the repetitive language in his behavioral goal, and added two social-emotional goals. For the first time, the IEP team discussed whether Student needed a residential placement. East Side announced it would not consider such a placement until after Dr. Easler's assessment report had been completed. Mother was offered an amended IEP that continued Student's placement in the class taught by Ms. Sanchez and continued the services of an instructional assistant. Mother did not recall at hearing whether she agreed to it.

78. On or about September 16, 2016, Dr. Easler provided to the parties his written reports on his psycho educational assessment and his ERMHS assessment. His psycho educational assessment report explained that he had conducted the evaluation for a limited reason: to determine whether Student met the criteria for special education eligibility as emotionally disturbed. Accordingly, Dr. Easler's psycho educational evaluation did not address Student's academic capacity, his processing, or his social-emotional status beyond that relevant to his eligibility as emotionally disturbed, and did not address whether he required a residential placement.

79. In his psycho educational evaluation, Dr. Easler concluded that Student met none of the eligibility criteria for emotional disturbance. He concluded that Student had for many years engaged in misbehavior deliberately and knowingly, and had control over that behavior. For these reasons and others, including test results, Dr. Easler concluded that Student did not suffer from schizophrenia, was socially maladjusted instead, and was not eligible for special education as emotionally disturbed.

80. In his ERMHS assessment, which was based largely on the same interview and materials as his psycho educational assessment, Dr. Easler concluded that Student

was not eligible for educationally related mental health services, but made recommendations for counseling and therapy.

81. Julie Ugalde, a knowledgeable Probation Officer, established at hearing that Student's placement at Cinnamon Hills will be reviewed by the Juvenile Court every six months, and that the next review is due in February or March 2017. If Probation returns Student to California at that time, the court will have discretion to place him in the family home or in a foster care facility.

CONSIDERATIONS OF RELIEF

82. Student is entitled to substantial compensatory education in the forms of academic instruction, counseling and therapy because of East Side's procedural violations, which are described in the Legal Conclusions.

83. Student's disabilities and disorders have always eluded precise definition. Some IEP teams have concluded he has ADHD. He has been diagnosed with PTSD as the result of childhood exposure to significant domestic violence. Most analysts think he has oppositional defiance disorder. Dr. Luk, Dr. Solomon, and Ms. Akintabde believe he is either fully schizophrenic or displays the symptoms of prodromal schizophrenia. Dr. Easler testified that he had earlier concluded that Student's diagnoses of schizophrenia and Psychotic Disorder NOS were unjustified, but he was not at the time aware of Student's PTSD diagnosis. On cross-examination he conceded, in light of that diagnosis, that it is possible Student is schizophrenic.

84. For related reasons, determining the proper category or categories of Student's eligibility for special education has been troublesome. All IEP teams and all medical professionals who have opined on the subject have agreed he is eligible under the category of other health impaired, which makes it unnecessary for eligibility purposes to resolve the exact nature of his disabilities. Whether he is also eligible as emotionally disturbed is the subject of some controversy. His sixth grade IEP team

thought he was, but his middle school team removed that secondary qualification from his IEP's. East Side restored emotional disturbance as an eligibility category at its April 2015 triennial meeting, according to the participants, and that category was accepted by both Foothill and Seneca. Dr. Easler believes and testified that Student's misconduct is volitional and reflects social maladjustment, and therefore he is not eligible as emotionally disturbed.

85. As the result of these controversies, the hearing produced extensive and conflicting evidence on what educational environment Student needed at various times to obtain a FAPE, and especially on whether and when he may have required placement in a residential treatment center. Dr. Solomon believes it was likely that he needed residential placement as early as the beginning of ninth grade, and certainly needed it by the time of the April 23, 2016 triennial IEP team meeting. At the other end of the spectrum, Dr. Easler believes Student has never needed residential treatment, and can obtain a FAPE on a comprehensive high school campus (although perhaps in a special day class) as long as he has proper services and supports, which would include counseling and therapy.

86. In between these views are the opinions of Dr. Luk and therapist Akintabde. Dr. Luk believed that, based on her many interactions with Student in Juvenile Hall, he needed residential placement, probably in a locked facility. Ms. Akintabde thought that at times during his confinement in the Hall he would have been better served by in-patient mental health treatment.

87. Because East Side's FAPE violations are based on procedural errors, it is not necessary for this Decision to determine whether there was any point in time at which an IEP team was required to offer Student residential placement in order to provide him a FAPE, and it does not resolve that difficult question. However, it is necessary for the crafting of appropriate relief that East Side be ordered to deliver

compensatory education in an educational environment in which Student is likely to benefit from it.

88. Based on all the evidence, including the opinions of the competing experts, and the ALJ's evaluation of Student's condition derived from the evidence, it appears that Student is unlikely to benefit from compensatory education unless it is delivered to him in the stable and controlled environment of a residential treatment center. While living at home, he has failed to regulate his conduct in and out of school so many times that there can be no reliable assurance he would not fail again upon his release from Cinnamon Hills. The nature and extent of his disabilities are still not known with certainty. The weight of expert testimony supports the conclusion that Student needs to learn in an environment in which his attendance at school can be mandated, his tendencies to leave classes and campuses curbed, his medications adequately managed, and his behavioral outbursts professionally controlled, for his safety and that of others.

89. Dr. Easler's opinion that Student can regulate his behavior whenever he so desires does not inspire the level of confidence needed to ensure the effective delivery of compensatory education. Dr. Easler was hired to assess Student after this litigation began and for the purpose of defending against it. Dr. Easler's central conclusion – that Student is not emotionally disturbed and misbehaves volitionally because he is socially maladjusted – was predictable from his professional background and experience. For many years Dr. Easler has been a primary proponent of the view that IEP teams make too many students – particularly from ethnic minorities – eligible for special education as emotionally disturbed, and that educators and professionals not familiar with the cultures and environments of such Students mistake conduct attributable to those cultures and environments for conduct indicative of psychological disturbance. Dr. Easler has been delivering this message to educators and professionals ever since his

dissertation in 1996 through an extensive variety of writings, lectures, speeches to professional groups, and testimony to hearing officers.

90. Dr. Easler's conclusion that Student can control his behavior enough to benefit from education outside a residential center rests heavily on the impressions of Student he gained in one lengthy interview in Juvenile Hall. There are reasons to be skeptical of the enduring reliability of those impressions. Student cooperated with Dr. Easler in a way he had not previously cooperated with any assessor whose assessment is part of the record. His conduct in his interview with Dr. Easler was strikingly different from his previous behavior. His motivations for this newfound cooperation are not clear.

91. During his interview by Dr. Easler, Student stated essentially that he was a changed young man. All his previous behavioral outbursts were, he said, a function of the facts that he did not like school, did not see its importance to him, and therefore did not want to study, work, or obtain passing grades in his classes. However, now that he had been confined at length in Juvenile Hall, he had come to realize that getting a high school diploma was essential to his future. He wanted to obtain suitable employment, such as becoming a veterinarian, and he had realized he had to acquire enough credits to obtain a high school diploma in order to achieve that goal. He would therefore cooperate with his education in the future. Dr. Easler believed and accepted these protestations, and they became central to his opinion that Student did not need residential treatment.

92. However, Student's interview with Dr. Easler was not the first time Student had forsworn misbehavior and promised to concentrate in school. He made similar assurances to Mother several times in the past, and at least sometimes was likely sincere in doing so. For example, he had for the most part lived up to those assurances in the seventh grade, causing his teachers to praise him for better conduct and his IEP team to remove emotional disturbance from his IEP. But he could not sustain that effort, and

lapsed back into severe misconduct in eighth grade. In addition, the evidence showed that Student is not necessarily a reliable reporter of his own condition or normally insightful about it. There can therefore be no confidence, in crafting relief, in Student's ability to regulate his own behavior or in the accuracy of his own perception of his abilities and condition. Student has long resisted special education in the mistaken belief that he does not need it.

93. Student's new attitude was expressed while he was confined in Juvenile Hall and eager to get out of it. Like other jailhouse conversions, this one may prove lasting but it also may not. Given Student's history, his prospects of making good on those promises outside of a structured and controlled environment are not high. If the relief afforded here is to be effective, it cannot depend on the gamble that Student will regulate himself sufficiently to benefit from it. Dr. Solomon explained persuasively that if Student is free to cut class, leave the premises, remove himself from the classroom by misbehaving (as he has learned to do), and reject his medications, it is unlikely that he will be able to benefit from his education. The only effective way to prevent those developments is to place Student in a controlled environment while he learns what he missed in the ninth and 10th grades.

94. Student proposes that, for the purpose of compensatory education, Student be placed in the Provo Canyon School in Provo, Utah. Substantial evidence supports the finding that Provo Canyon is an appropriate placement in which Student may successfully receive compensatory education. Through the testimony of Max Ahquin, Director of Clinical Services for the Provo Campus of the School, Student established that Provo Canyon provides mental and behavioral health services to males ages 12 to 18 on a separate campus for boys. It utilizes individual, group and family therapy, and provides extensive counseling to its students. It has a high school program with a full academic curriculum, and all of its academic teachers are special education

certified, as are some of the academic support staff. It seeks to equip its students to graduate with a high school diploma.

95. Mr. Ahquin explained that Provo Canyon provides trauma informed care, behavioral therapy and other therapeutic methods depending on the needs of a client. Trauma informed care addresses a sub-population of boys who, like Student, have psychiatric conditions related to serious trauma in their pasts. The intervention model seeks to teach traumatized boys how to connect with peers who have been through similar experiences, how to develop understanding of their experiences, and how to deal with the feelings of guilt and self-hate common to traumatized boys. It emphasizes learning about safety, and provides extensive family therapy in order to improve the environment to which the student will return.

96. The Provo Canyon facility for boys is locked. It also has a self-contained psychiatric unit that furnishes acute psychiatric care when, in the opinion of a doctor, a student needs temporary confinement because he is dangerous to himself or others. Because many traumatized boys turned to alcohol and drugs as a coping mechanism, Provo Canyon also has a program to treat substance abuse problems.

97. Dr. Solomon investigated Provo Canyon School and opined at hearing that, in light of Student's condition and needs, it is an appropriate placement in which he can benefit from compensatory education. There was no evidence critical of Provo Canyon either in general or as a placement for Student. Provo Canyon School is certified by the State of California as a non-public school, and Student has been accepted by the School.

CONCLUSIONS OF LAW

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[13]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);[14] Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible 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(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability

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[13] Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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

that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-951.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the

complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student, as the filing party, had the burden of proof on all issues.

5. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

ISSUES 1(B.)AND (N.): DID EAST SIDE DENY STUDENT A FAPE FROM THE BEGINNING OF THE SCHOOL YEAR 2014-2015 THROUGH APRIL 23, 2015, BY:

(b.) failing to hold an annual IEP meeting within one year of Student's last annual IEP; and

(n.) failing to convene an IEP team meeting within thirty days of the beginning of the school year?

6. Since Student entered East Side from a school district in the same special education local plan area, East Side was required to "continue, without delay, to provide services comparable to those described in the existing approved [IEP] . . ." (Ed. Code, § 56325, subd. (b).) However, it also was required to convene an IEP team meeting periodically and revise Student's IEP as appropriate, to address any lack of expected progress toward his annual goals and in the general education curriculum, his anticipated needs, and any other relevant matters. (34 C.F.R. § 300.324(b)(ii)(A), (D), & (E); Ed. Code, § 56341.1, subd. (d)(1), (3) & (4).)

7. Special education law also requires an IEP team to act if a disabled student's behavior impedes his learning or that of others; it must consider the use of

positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R., § 300.324(a)(2)(i); Educ. Code, § 56341.1, subd. (b)(1).) That cannot be done without an IEP team meeting.

8. Under those provisions, within 30 days of Student's entry into ninth grade, East Side had the obligation to call an IEP team meeting and revise Student's IEP in light of his lack of expected progress and his disruptive and uncontrollable behavioral outbursts. These should not have been a surprise to East Side; they had been predicted by Franklin-McKinley. As soon as East Side saw those predictions come true, it should have called an IEP team meeting. By the beginning of October2014 at the latest, and probably earlier, East Side knew a change of placement was an anticipated need. East Side did not begin the process of organizing an IEP team meeting until January 5, 2015, and did not actually conduct one until April 23, 2015, shortly before the end of the school year.

9. East Side offers no explanation for its failure to begin to convene an IEP team meeting before January 5, 2015. It defends its efforts after that date as adequate, but for the following reasons they were not. The meeting was unusually urgent. By the beginning of October 2014 at the latest, Student's case manager and the school psychologist realized his placement was failing. Every day Student spent without alteration of his program was, to East Side's knowledge, a day spent in an inappropriate and unsuccessful placement.

10. In addition, the methods East Side used in January and February 2015, when it did attempt to convene a meeting, were halfhearted and not vigorous enough in light of the urgent need for the meeting. Mr. Dunlap sent a meeting notice to Mother on January 5, 2015, for a meeting on January 17 without inquiring whether she could attend that day, and without proposing or soliciting alternatives, thus violating the law's requirement that the meeting be scheduled with parents "at a mutually agreed on time

and place." (34 C.F.R. § 300.322(a)(2); Ed. Code, §56341.5, subd. (c).) Although East Side knew by January that Mother was being assisted by Wraparound workers, neither Mr. Dunlap nor anyone else at East Side sought their help in organizing a meeting. Mr. Dunlap sent the notice of the January 17 meeting by regular mail and in Student's backpack, and followed up with a telephone message or two, but he knew or should have known that these methods were likely to fail. Ms. Waters had used the same ineffectual methods in November in proposing an assessment plan.

11. By January 2015, the urgency of the need for a meeting and the long delay in convening one required use of a method actually likely to work, such as personal delivery, which was successfully used for the assessment plan by Associate Principal Rangel in March. Mother's home was half a mile from the campus by foot and a mile and a half by car. Some school staff likely passed by the home every school day. Personal delivery would not have been difficult to arrange; East Side had a liaison officer who had done it before. The IDEA contemplates that kind of effort in arranging an IEP team meeting; a district may not meet without parents unless it can document, among other things, "visits made to the parent's home or place of employment." (34 C.F.R. § 300.322(d)(3); see Ed. Code, § 56341.5, subd. (h)(3).) Because East Side made no effort to convene a meeting until January 5, 2015, and inadequate efforts to do so until its March 26, 2015 hand-delivered notice of an April meeting, it violated the above-cited IDEA sections and related provisions.

12. East Side's failure to call an IEP team meeting from September 11, 2014 to March 28, 2015, impeded Student's right to a FAPE and deprived him of educational benefits because it left him in a failing placement until nearly the end of the school year, learning nothing and amassing disciplinary sanctions. It also significantly impeded Mother's participatory rights. Aside from a September call from Mr. Dunlap seeking advice, and a November call from Ms. Waters about assessments, Mother was excluded

from decisions about Student's program. She had no opportunity to learn that East Side thought Student's placement was failing, and no opportunity to take part in considering a more prompt change of placement. She was not consulted when Mr. Dunlap referred Student to counseling, and was not able to inquire whether Student actually received it. Because of these consequences, East Side's failure to call an IEP team meeting from September 11, 2014 to March 28, 2015, denied Student a FAPE.

ISSUE 1(O.): DID EAST SIDE DENY STUDENT A FAPE FROM THE BEGINNING OF THE SCHOOL YEAR 2014-2015 THROUGH APRIL 23, 2015, BY FAILING TO PROVIDE A TIMELY ASSESSMENT PLAN?

13. If an assessment for the development or revision of an IEP is to be conducted, the district must give parent an assessment plan within 15 days of the referral for assessment. (Ed. Code, § 56321, subd. (a).) Parental consent to the plan is generally required before the assessment can proceed. (*Id.*, subd. (c)(1).)

14. The evidence showed that Student was referred for assessment just before the beginning of the 2014-2015 school year, when Ms. Swanson noticed the warning in Student's May 2014 IEP that Student needed a more restrictive placement and discussed the warning with the director and school staff. Ms. Swanson testified that the group decided at that time to "look into assessments to determine the level of need." That constituted a referral for assessment, and since school started on August 12, 2014, the law required that an assessment plan be presented to Mother no later than August 27, 2014.

15. The evidence showed that East Side delayed changing Student's program and placement until it could conduct an assessment. No law justified that unilateral

decision.[15] No assessment plan was drafted until mid-November 2014, when school psychologist Waters discussed the need for assessment with Mother and promised to send an assessment plan. Ms. Waters dated an assessment plan November 18, 2014, sent it home with Student, mailed it, and left one or two messages on Mother's answering machine. But neither she nor any other East Side employee did anything more to obtain Mother's consent to assessment until, in late February 2015, Ms. Waters suggested to Associate Principal Rangel that she send the liason officer to Mother's home with the plan. It was not until well after Student was expelled on February 24, 2015, that Ms. Rangel took that step. Mother signed and returned it on March 9, 2015, more than six months after it should have been presented to her. East Side could have obtained Mother's signature on the assessment plan months before it actually did.

16. The evidence did not show why Mother did not return the assessment plan sooner. East Side now blames her for the delay, and she does have some partial responsibility for it. But the Ninth Circuit Court of Appeals has repeatedly rejected attempts to blame parents for a school district's failure to comply with the IDEA. (See *Doug C. v. Hawai'i Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1045 ["We have consistently held that an agency cannot eschew its affirmative duties under the IDEA by blaming the parents."]; *Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 ["[P]articipating educational agencies cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents."]); *W.G. v. Target Range Sch. Dist. No. 23, supra,* 960 F.2d at p. 1485 [school district could not blame parents' leaving IEP team meeting for its failure to create an IEP with participation of appropriate parties].). It was

[15] An assessment is required before making a significant change in a placement made under Section 504 of the Rehabilitation Act of 1973, but that provision does not apply to IDEA placements. (See 34 C.F.R. §§ 104.1; 104.35(a).)

East Side, not Mother, which decided to assess in early August 2014 but did not begin the process until November. It was East Side which decided to delay changing Student's failing placement, and perhaps even to delay convening an IEP team meeting, until it could assess Student. And it was East Side which did not use available and effective mechanisms for communicating with Mother until March 2015. Having placed such a premium on assessing first, East Side cannot persuasively argue that its unhurried use of its ordinary but ineffectual methods satisfied the legal requirement. East Side therefore violated the IDEA's requirement for timely presentation of an assessment plan.

17. The damage to Student's education and Mother's participatory rights from this violation is plain. Mother was always amenable to assessment and cooperated with the process once it began. If East Side had provided Mother with an assessment plan on August 27, 2014, rather than March 9, 2015, and timely held the required meeting on its results, Student would not have remained for months in his failing placement, and Mother would have known, as East Side already knew, that a change of placement was necessary. If Ms. Waters' assessment had reached the same conclusions in September 2014 that it actually did in March 2015, the parties would have been able to change Student's failing placement more than seven months earlier. Because of these serious consequences, East Side's failure to timely present an assessment plan to Mother denied Student a FAPE.

ISSUES 1(R.) AND (T.): DID EAST SIDE DENY STUDENT A FAPE FROM THE BEGINNING OF THE SCHOOL YEAR 2014-2015 THROUGH APRIL 23, 2015, BY:

(r.) failing to convene a manifestation determination IEP team meeting; and

(t.) failing to consider a continuum of placement options?

18. When a school district decides to change the placement of a special education student for violating a code of student conduct, the district must convene an IEP team meeting within 10 school days to determine whether the conduct that gave

rise to the violation is a manifestation of the student's disability. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).) If the IEP team finds that the conduct was a manifestation of the student's disability, the district must order a functional behavioral assessment of the student, and implement a behavior intervention plan for the student or review, and if necessary modify, the student's existing plan. (20 U.S.C. § 1415(k)(1)(F)(i), (ii); 34 C.F.R. § 300.530(e), (f)(1).) Absent special circumstances, the district must also return the student to the placement from which he was removed unless it and the student's parents agree otherwise. (20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2). Whether or not the student is removed to an interim alternative educational setting, the district must ensure that the student continues to receive educational services so as to enable him to continue to participate in the general education curriculum, and to progress toward meeting the goals set out in his IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i).)

19. The evidence showed that East Side effectively expelled Student from Andrew Hill because of his misconduct on February 24, 2015. He was removed from his placement from February 25, 2015, to May 9, 2015, a period of far more than 10 school days. East Side changed his placement unilaterally, without making a manifestation determination or convening an IEP team meeting for any purpose, including discussing an interim alternative educational setting. By doing so East Side violated the above provisions of the IDEA.

20. In its closing brief, East Side denies these violations on a single ground: that Mother consented to placing Student on independent study and signed a document that did so. However, the evidence showed that Mother consented to independent study not because she was endorsing or waiving a series of procedural violations, but because she was told independent study was the only way Student would continue to get an education. East Side cites no authority for the proposition that a

parent's consent excuses plain and serious violations of the IDEA, and there is none. It is basic that a parent who agrees to a placement can challenge that placement later in due process and in court. (See, e.g., *J.W. v. Fresno Unified Sch. Dist., supra,* 626 F.3d at p. 447.)

21. East Side's violations of the IDEA provisions governing manifestation determinations and disciplinary expulsions impeded Student's right to a FAPE, deprived him of educational benefits, and substantially impeded Mother's participatory rights. If a manifestation determination meeting had occurred, it would have aired the complex and difficult relationship between Student's disabilities and his conduct. Professionals disagree about Student's diagnoses, but almost all the experts whose opinions were introduced at hearing agree that there is some relationship between Student's disabilities and his conduct. If a manifestation determination had been made in Student's favor, he would have had the right to return to Andrew Hill and benefit from a functional behavior assessment and a revisited and perhaps revised behavior plan, and if it had been against him, at least his interim alternative placement would have been discussed by a full IEP team, including someone who could advocate for him, rather than simply imposed on him by administrators. The placement imposed on him deprived him of educational benefit because he had no contact with teachers except when they graded the work packets he completed and turned in. There was no evidence he worked toward his goals or derived any educational benefit during independent study.

22. In addition, if East Side had complied with the manifestation determination provisions, a record of the determination would have been created that would have facilitated further analysis of his condition by professionals, and possible challenge in due process and in court. Mother would have been a full participant in the required procedures, and everyone on the IEP team would have learned significant information about Student's disabilities and conduct they did not then have. Because the negative

consequences of East Side's violations of the legal requirements for manifestation determinations were serious, those violations denied Student a FAPE from February 25, 2015 through April 23, 2015, when a new placement was offered.

ISSUES 1(D.), (H.)-(J.), (P.) AND (Q.): DID EAST SIDE DENY STUDENT A FAPE FROM THE BEGINNING OF THE SCHOOL YEAR 2014-2015 THROUGH APRIL 23, 2015, BY:

(d.) failing to offer or provide an appropriate behavior plan;

(h.) failing to provide adequate present levels of performance;

(i.) failing to offer or provide measureable goals in all areas of need;

(j.) failing to offer or provide appropriate extended school year services;

(p.) failing to provide progress reports on goals; and

(q.) failing to make a clear written offer?

23. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R.§ 300.320; Ed. Code, § 56345.) An annual IEP must contain, among other things, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The statement of present levels creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

24. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to*

Butler (OSERS 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).)

25. In *Union School Dist. v. Smith* (1994) 15 F.3d 1519, the Ninth Circuit held that a district is required by the IDEA to make a clear written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

> We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E).

(*Union School Dist. v. Smith, supra,* 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist. supra,* 626 F.3d at pp. 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001, No. Civ. S001174) 2001 WL 34098658, pp. 4-5.)

26. *Union* itself involved a District's failure to produce a formal written offer at all. However, numerous decisions invalidate IEPs that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City*

School Bd. (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D. Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ.* (D. Hawai'i, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.) One District Court described the requirement of a clear offer succinctly: *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi, supra,* 122 F.Supp.2d at p. 1108.)

27. The IDEA also requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) The purpose of the requirement is to require the District to make clear its proposed commitment to particular aspects of a student's special education and related services. As explained by the United States Department of Education:

> What is required is that the IEP include information about the amount of services that will be provided to the child, so that the level of the agency's commitment of resources will be clear to parents and other IEP Team members. The amount of time to be committed to each of the various services to be provided must be ... clearly stated in the IEP in a manner that can be understood by all involved in the development and implementation of the IEP.

(U.S. Dept. of Education, Off. of Special Education and Rehabilitation Services, final Regs., Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, Analysis of Comments and Changes, com. to § 300.324(d), 71 Fed.Reg. 46540, 46667 (Aug. 14, 2006)(Comments to 2006 Regulations).)

28. The Ninth Circuit has stated that the length of time that an offered service will be delivered must be "stated [in an IEP] in a manner that is clear to all who are involved." (*J.L. v. Mercer Island School Dist., supra,* 592 F.3d at p. 953 [citation omitted].) The requirement ensures that "'the level of the agency's commitment of resources'" is clear to all members of the IEP team, including parents. (*Bend LaPine School Dist. v. K.H., supra,* 2005 WL 1587241 at p. 9 [citation omitted].) Accordingly, a district that omits from an IEP a statement of the duration of an offered service or accommodation commits a procedural violation of the IDEA. (See, e.g, *Student v. Natomas Unified Sch. Dist.* (OAH, Nov. 20, 2012, No. 2012070797, at p. 36; *Student v. Roseville Joint Union High Sch. Dist., et al.* (OAH, Nov. 14, 2011, No. 2011061341, at p. 26.)

29. The April 23, 2015 triennial IEP document did not constitute a clear written offer within the meaning of *Union School Dist. v. Smith, supra*. It was self-contradictory in many respects described in the Factual Findings. Three of the most important contradictions involved extended school year, the frequency and duration of services, and placement. The meeting notes stated that the program specialist, if not the whole team, offered Student an extended school year, but the services page of the document stated that Student did not require and would not receive an extended school year. That same page sets forth the frequency and duration for specialized academic instruction, career awareness and college awareness that would have been applicable to a general education placement, but had no relationship to Student's actual placement at Foothill. Some language in the meeting notes, and the uniform testimony of IEP team members including Mother, identify Student's' upcoming placement as Foothill, but the services

page states he will be placed in a regular classroom in a public day school. As Ms. Swanson admitted in her testimony, there is no way an outsider looking at the document could determine what Student's placement was going to be.

30. The evidence also showed that the April 23, 2015 triennial IEP document did not address Student's behavioral challenges other than in the offered placement. It acknowledged that Student's behavior impeded his learning and that of others, and referred to an attached behavior plan, but no behavior plan was discussed, written, or attached. There was no behavioral goal, although moderation of Student's behavior was his single most significant need. Ms. Waters had proposed conducting a functional behavioral analysis, but the triennial IEP did not contain such an offer.

31. The triennial IEP contained no meaningful present levels of performance; it simply stated repeatedly that there was no way to measure Student's performance because he would not complete work. In failing to include useful present levels, East Side ignored available measurements from previous assessments, from Student's remedial math teacher, and from recently graded independent study assignments. The absence of meaningful present levels made the writing of measurable goals impossible.

32. All the triennial goals that were proposed were either unmeasurable or not useful to Student's future in the next year. Two of the four were for transition to post-high school life. The others, a math goal and a social-emotional goal, entirely lacked baselines.

33. The triennial IEP failed to offer goals in the areas of Student's most pressing needs. No goals addressed Student's behavior, attention deficits, work completion or attendance. Ms. Waters had proposed behavioral and emotional goals in her assessment, but these proposals were not incorporated into the IEP.

34. Mother never received adequate reports on Student's progress toward his February 2014 goals. No participant in the triennial meeting claimed to remember any

oral progress report, except that Student was doing nothing. The single document that was introduced in evidence purported to report progress but actually reported a percentage of work completion instead.

35. The combined deficiencies in the triennial IEP significantly impeded Students right to a FAPE, deprived him of educational benefits, and seriously impeded Mother's participatory rights. "[T]he purpose of an IEP is to embody the services and educational placement or placements that are planned for the child." (*N.E. v. Seattle Sch. Dist.* (9th Cir., Nov. 17, 2016) __ F.3d __, 2016 WL 6803049, p. 3 [citation omitted]).The triennial IEP failed in that central purpose. The absence of a behavior plan left the staff of Foothill, who knew nothing about Student, without any guidance about how to control his behavior. The absence of adequate progress reports, present levels of performance and measurable goals deprived both Mother and Foothill of any reliable method of measuring his progress. The failure to offer goals in Student's most pressing areas of need meant that Foothill was under no obligation to address, or measure Student's progress in, such important areas as behavior, attention deficits, work completion and attendance. In the absence of an attendance goal, Student attended Foothill only 12 days in the academic year and six days in the extended school year.

36. The incoherence of the triennial IEP in setting forth Student's entitlement to extended school year, the duration of his placement, and his actual placement deprived Mother of the information necessary to make a reasoned decision whether to challenge the IEP in due process. It undermined Student's legal entitlement to the placement, which was not accorded him by any existing IEP. It enabled East Side to pick and choose which parts of the IEP it could claim to be Student's program. In its closing brief, for example, East Side relies on the eligibility portion of the document to claim that emotional disturbance was not added as one of Student's disability categories (though the meeting notes arguably contradict that claim), but relies on the meeting

notes (which the rest of the document contradicts) to argue that he was entitled to extended school year. This is the kind of damaging confusion the Ninth Circuit sought to prevent in requiring a clear written offer in *Union Sch. Dist. v. Smith, supra.*

37. The failure of the triennial IEP document to accurately state Student's placement prevented Mother from knowing how long Student's placement at Foothill would last. Mother did not send Student to Foothill after the beginning of the 2015-2016 school year because she did not believe he was placed or welcome there. Whether this belief was technically correct is impossible to determine because of the confusion of the offered IEP. Mother's belief was reasonable even if mistaken, since Mother had been told at the August 17, 2015 IEP team meeting that Student's Foothill placement was inappropriate and that East Side would have a new placement in effect by the beginning of the school year. And there is substantial doubt that Foothill personnel believed Student was still placed there after the end of the extended school year. There was no evidence that, starting on August 12, 2015, Foothill kept any attendance records on Student or tried to find out why he was not in school. Several Foothill and East Side witnesses were asked at hearing where Student was from August 12 to September 8, 2015, but none of them could answer. Because of these serious negative consequences from the procedural violations in the triennial IEP document, East Side denied Student a FAPE in its April 23, 2015 offer, and continually thereafter for as long as the flawed IEP was in place and Student's education was East Side's responsibility. That period was from April 23 to November 2, 2015.[16]

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[16] In his complaint, Student does not seek to impose liability on East Side for the period between April 23 and August 12, 2015, and those school days are not part of the calculation of compensatory education.

ISSUES 2(A.)-(D.), (F.), (I.)-(K.): DID THE COUNTY OFFICE DENY STUDENT A FAPE FOR THE 2014-2015 SCHOOL YEAR, BEGINNING ON APRIL 23, 2015, THROUGH THE 2015 EXTENDED SCHOOL YEAR, BY:

(a.) failing to offer or provide adequate specialized academic instruction services in an appropriate therapeutic setting;

(b.) failing to offer or provide an appropriate behavior plan;

(c.) failing to offer or provide individual counseling;

(d.) failing to offer or provide group counseling;

(f.) failing to offer or provide appropriate extended school year services;

(i.) failing to provide progress reports on goals; and

(k.) changing placement without parental consent?

38. Several of Student's criticisms of the County Office's dealings with Student while he was in Foothill relate to flaws in the April 23, 2015 triennial IEP, such as its failure to specify Student's placement accurately. However, the County Office had no obligation to Student until several days after that IEP was written, when it accepted Student into the Foothill program. So if East Side denied Student a FAPE by failing to offer him a residential setting on April 23, 2015, that was not a decision in which the County Office was involved. And if Student's placement was changed without parental consent, it was not the County Office that changed it.

39. Student assumes incorrectly that Foothill was under some obligation to offer Student something beyond the terms of the triennial IEP with which he arrived. On the contrary, the County Office's obligation to Student existed solely because East Side placed him, with its agreement, in a program the County Office operated. In that role the County Office's role was akin to that a service provider or a non-public school; East Side remained primarily responsible for the placement and for Student's IEP's. Notwithstanding the lack of clarity about Student's placement in the triennial IEP, the parties understood that the Foothill placement was for 30 days, and might or might not

continue after that. Student identifies no law that would have required the County Office to offer Student another IEP containing proper goals or a behavioral plan within those 30 days, and has not established that the County Office was under any obligation to make Student a new and different offer during that brief period of time.

40. Student did not prove that the specialized academic instruction Student received from Foothill or the therapeutic environment in which he was placed were flawed. Student's argument that the only proper therapeutic environment was residential placement addresses East Side's responsibility, not that of the County Office.

41. Student did not prove that the absence of a behavior plan had any effect on Student at Foothill for which the County Office could be held responsible. Foothill had its own point-and-level system of behavioral management, which worked reasonably well for Student while he attended during the regular school year. It only failed during the extended school year, when Student lost control and wrecked the County Office boardroom, after which he did not return to Foothill.

42. The evidence showed that the County Office did not fail to provide individual and group counseling to Student at Foothill. On the contrary, it provided him both kinds of counseling for a minimum of 45 minutes each week and made further counseling available on request. Student does not identify any flaws in the counseling Student received there.

43. The evidence did not show that the County Office failed to provide Student appropriate extended school year services at Foothill. It did not even show that Student was entitled by law to any extended school year services, because it did not show the likelihood of regression, coupled with limited recoupment capacity, required by law for entitlement to that service. (See Cal. Code Regs., tit. 5, 3043 [1st par.].) Nor did it show any flaw in the program Foothill actually delivered to Student. His failure in the summer program was caused by his Mother's unwillingness or inability to provide the

documents necessary for him to get paid for his work, leading to his explosive conduct on the last day of his attendance, not by anything the County Office did or did not do.

44. The evidence did not show that Foothill failed to provide adequate reports to Mother on Student's progress toward his goals. Student's only academic goal was unmeasurable, and he was exposed to math for only 12 days before the end of the school year. His two career goals did not become relevant until summer school, which he attended for only six days. In light of the inadequacy of the goals in Student's triennial IEP and the brevity of Student's attendance at Foothill, the County Office could not have given Mother meaningful progress reports.

45. The evidence did not show that the County Office committed any of the violations specified in issues 2.(a)-(d), (f), and (i)-(k)or denied him a FAPE during Student's time at Foothill.

ISSUES 3(E.),(F.), (G.),(J.), (M.), AND (N.): DID EAST SIDE DENY STUDENT A FAPE FROM AUGUST 12, 2015, TO NOVEMBER 2, 2015 BY:

(e.) failing to offer or provide a behavior intervention plan;

(f.) failing to offer or provide adequate present levels of performance;

(g.) failing to offer or provide measurable goals in all areas of need;

(j.) failing to provide progress reports;

(m.) failing to consider a continuum of placement options; and

(n.) failing to timely convene an IEP team meeting?

46. When the new school year began on August 12, 2015, the triennial IEP was still in effect, and many of its procedural violations continued to impede Student's right to a FAPE, deprive him of educational benefits, and substantially impede Mother's participatory rights. The IEP still lacked a behavior intervention plan, adequate present levels of performance, measurable goals in all areas of need, and adequate progress reports, and these failings had the same negative consequences between August 12,

2015, and November 2, 2015, that they had earlier. The triennial IEP was not rewritten at the September 8, 2015 IEP team meeting in any of those respects; it was simply amended to effect placement at Seneca. It remained as Student's program throughout his time at Seneca, and from the start of the school year 2015-2016 to November 2, 2016, the defects in it denied him a FAPE.

47. Starting on August 12, 2015, East Side should have convened an IEP team meeting. Student was not attending school anywhere, and the last East Side had heard of him was that he was in a psychiatric hospital. Those facts required calling an IEP team meeting under the legal requirements set forth in Legal Conclusion 6, above. They indicated a lack of expected progress, and Student's hospitalizations were matters relevant to his program. East Side's failure to call a meeting during this period impeded Student's right to a FAPE and deprived him of educational benefits. A meeting could have corrected Mother's erroneous view that he was not welcome at Foothill. It would have given East Side an opportunity to make some provision for Student's education between August 12, 2015 (the start of school in the district) and September 10, 2015, when Student started school at Seneca. The absence of a meeting substantially impeded Mother's participatory rights, since she continued to hold the arguably mistaken view that Student was no longer placed in Foothill, and had no idea which possible placements East Side was and was not exploring, and therefore no chance to affect that process.

48. East Side's failure to call an IEP team meeting earlier in the 2015-2016 school year also deprived the IEP team of information important to the creation of an adequate educational program for Student. East Side did not know that Student was enduring a series of psychiatric hospitalizations and commitments (except for the first one), and did not evaluate the meaning of these events for the offer of placement it made on September 8, 2015. In the absence of a meeting, Student's continuing

psychiatric and behavioral decline and his increasing number of psychotic breaks in July, August, and early September 2015 played no part in informing East Side's offer of Seneca on September 8, 2015.

49. Local educational agencies must ensure that a continuum of program options is available to meet the needs of disabled students. (34 C.F.R. § 300.115(a)[duty of public agencies]; Ed. Code, § 56360 [duty of special education local plan areas].) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; instruction using telecommunication; and instruction in the home or in hospitals or institutions. (34 C.F.R. § 300.115(b); Ed. Code, § 56361.)

50. In seeking a new placement for Student during the school year 2015-2016, East Side only considered non-public schools in the area that had day treatment programs. It gave no thought to any alternatives, such as residential placement, although a considerable case could have been made by August 2015 that Student required such a placement. Dr. Solomon and Dr. Luk both advanced that view at hearing. This failing reflected East Side's policy, explained by Ms. Dolan, to exhaust both public placements and at least several local County and non-public placements before it considered residential placement. It also reflected East Side's policy not to consider residential placement until a recent assessment showed it to be necessary. However, in an appropriate case a district must consider, and sometimes make, a residential placement before all local non-public options have been exhausted. As the Ninth Circuit observed in *Seattle Sch. Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501: "The IDEA does not require [the student] to spend years in an educational environment likely to be

inadequate and to impede her progress simply to permit the School District to try every option short of residential placement."

51. The evidence showed that Mother did not know, at any of Student's IEP team meetings that a school district could make a residential placement, except the last one at Osborne on August 17, 2016. It showed that East Side never raised or discussed the possibility of a residential placement for Student at an IEP team meeting until the subject was raised by Student's attorney at the August 17, 2016 IEP team meeting, after the instant request for due process was filed. The evidence further showed that the possibility of residential placement was a reasonable subject of discussion for Student's IEP team, and well within the range of possible placements that should have been considered, at the IEP team meetings of April 23, 2015, and September 8 and August 19, 2016. In the view of some experts who testified at hearing, residential placement was necessary as early as the beginning of Student's ninth grade year, or by the time he had failed in his general education placement, or at least by the times he had failed both in the County program and at Seneca. However, East Side did not mention or consider the residential option at those meetings because of the policies described above.

52. The statutory requirement that a district "ensure" that a continuum of options, including private placement, is "available" (34 C.F.R. § 300.115(a); Ed. Code, § 56360) has not been fully explained by courts. It plainly does not require discussion of every possible option at every IEP team meeting. It should, however, be read to require the discussion of those options that are reasonable to discuss and consider for a particular student at a particular time. The continuum requirement extends to non-public schools, which a district by definition cannot make available in its own programs. The continuum rule therefore does not have much purpose when applied to non-public schools (since a district cannot directly provide them) unless it means that the non-public option must be known to the body that decides whether to use the option, which

is the IEP team. The apparent purpose of the continuum is to have options available for consideration by the IEP team – including parents – when appropriate for consideration in a particular case. (See *T.R. v. Kingwood Township Bd. of Educ.* (3d Cir. 2000) 205 F.3d 572, 579-580 ["the school district is required to take into account a continuum of possible alternative placement options when formulating an IEP . . ."]; *Straube v. Florida Union Free Sch. Dist.* (S.D.N.Y. 1992) 801 F. Supp. 1164, 1176 ["The purpose of the continuum is to ensure that a variety of choices are available so that an IEP can be constructed . . ."].) That purpose is not served when parents -- essential members of the IEP team -- do not know of the available choices, at least in a case in which one of those choices is reasonable to consider in the context of a particular placement decision.

53. For the same reason that a general education teacher is required to attend an IEP team meeting if the student "may" be participating in the regular education environment (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6)), the continuum statutes are properly interpreted to require that an IEP team be conscious of placement options it may be appropriate to select at a particular meeting. So interpreted, the continuum statutes required East Side to inform Mother at the IEP team meetings of April 23, 2015, and September 8 and August 19, 2016, that residential placement was at least an option that could be considered. It failed to do so, thus violating the continuum requirement.

54. East Side's failure to inform Mother that residential placement was an option substantially impeded her right to participate in the IEP development process because it deprived her of the ability to advocate for such a placement, which would have been a reasonable position at the time. It left her unaware that such a placement was possible. Depriving Mother of the ability to advocate for such a placement denied Student a FAPE.

ISSUES 4(E.), (G.), (F.), (J.), (H.), (L.):DID THE COUNTY OFFICE DENY STUDENT A FAPE DURING THE 2015-2016 SCHOOL YEAR, FROM NOVEMBER 2, 2015, THROUGH APRIL 27, 2016, AND FROM MAY 31, 2016, THROUGH THE 2016 EXTENDED SCHOOL YEAR, BY:

(e.) failing to offer or provide a behavior intervention plan;

(g.) failing to offer or provide measurable goals in all areas of need;

(f.) failing to provide adequate present levels of performance;

(j.) failing to provide progress reports on goals;

(h.) failing to offer residential treatment; and

(l.) failing to consider a continuum of placement options?

ISSUE 6: DID THE COUNTY OFFICE FAIL TO OFFER STUDENT A FAPE FOR THE 2016-2017 SCHOOL YEAR?

55. Student faults Osborne's March 15, 2016 IEP for failing to contain a behavioral intervention plan, offering a behavioral goal that uses the annual goal also as a baseline, and failing to contain a social-emotional goal. However, because of the multi-agency responsibility for the services Student was receiving in this Juvenile Hall placement, neither a behavior plan nor social-emotional or behavior goals from the County Office were necessary in his IEP. The County Office was not responsible for Student's behavioral regulation. That was the function of the Probation Department and the probation officer who sat in on Student's class to regulate his behavior according to Probation's three-level behavioral system of rewards and consequences. The many instances in the record of Student's behavioral difficulties while in the Hall all involve his interactions with Probation.

56. Nor was the County Office responsible for Student's social and emotional support. That was the responsibility of County Mental Health, which supplied a therapist (Dr. Luk), a psychiatric social worker (Ms. Akintabde), individual and group counseling,

and daily behavioral consultation, and wrote for Student a Care Plan similar to a behavior intervention plan. The County Office had neither the authority nor the ability to affect how Probation and County Mental Health discharged their duties with respect to Student.

57. In the alternative, even if the absence of these elements constituted procedural violations, they did not affect Student's education by the County Office. Student does not argue that there was any particular shortcoming in the management of his behavior while in the Hall, or in the support services delivered by Mental Health and utilized frequently by him. Student does not identify, in his closing brief, any adverse consequences to Student's education caused by the absence of a behavior plan, a valid behavioral goal, or a social-emotional goal, during this period, and none emerges from the evidence. The absence of these elements did not deny Student a FAPE.

58. Student points out that the March 15, 2016 IEP did not contain Student's present levels of performance and did not report his progress on goals, but cannot identify any information upon which those levels or reports could have been based. Student had refused to take every academic test proposed to him since his entry into the Hall. There was no significant academic information from Seneca, and before Seneca, Student had not been in school since August. There were no reports from Foothill on his academic levels because he did not attend often enough to establish them, and there were no meaningful reports on his one academic goal in the triennial IEP because it was unmeasurable and meaningless. The County Office did not violate the IDEA by failing to include present levels and progress that could not be identified.

59. Education Code section 48200, California's basic compulsory attendance law, requires a parent to send a child between six and 18 years old to a public school in "the school district in which the residency of either the parent or legal guardian is

located . . ." Reciprocally, this provision requires the district of residence to educate the student. (See *Union Sch. Dist. v. Smith, supra,* 15 F.3dat p. 1524-1525; *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.* (2004) 117 Cal.App.4th 47, 56-57.)

60. The Education Code makes exceptions from that general principle when a student is physically located in a particular kind of institution, such as a licensed children's institution, foster home or family home (§ 48204, subd. (a)(1)(A)), or a state hospital (§ 48204, subd. (a)(6)). It also makes an exception for students in a juvenile hall. Juvenile court schools must provide educational services to all students "detained" in juvenile halls. (§ 48645.1) Juvenile court schools are operated by county boards of education. (Ed. Code, § 48645.2.)

61. Student argues that at its IEP team meetings in Juvenile Hall on March 15 and August 17, 2016, the County Office should have considered residential placement as part of the continuum of placements, and should have offered Student a residential placement. Student claims that the August 17, 2016 IEP did not offer him a FAPE for the 2016-2017 school year because it did not offer him a residential placement. However, Student could not have been given a residential placement while in Juvenile Hall because that would have violated the juvenile court order placing him there. And even if Student needed a residential placement after his release from Juvenile Hall, Student has not established that the County Office was the agency that had to offer it.

62. Student relies solely on *M.S. v. Los Angeles Unified Sch. Dist.* (C.D. Cal., Sept. 12, 2016, No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910 for the proposition that the County Office had an obligation to offer Student a residential placement. *M.S.* does not support that claim. In *M.S.,* an emotionally disturbed student had been a ward of the Juvenile Court and the Department of Children and Family Services for several years. For non-educational reasons, DCFS had placed her in the Vista Del Mar Community Treatment Facility, a residential facility and licensed children's institution within the

District's boundaries, thus making her a resident of the school district. (*Id.* atpp. 2-3; see § 48204, subd. (a)(1)(A).) The school district was providing her special education and services by paying for her attendance at the Vista School, a non-public school located within the Vista facility, but had declined to consider offering her a residential placement in its IEP's. (*M.S., supra,* at pp. 2-3.)The District Court held that the district had an obligation to consider and make such a placement, because the student needed residential placement for both educational and non-educational reasons. (*Id.* atpp. 13-14.) DCFS was considering moving the student to a lower level of residential care, and the Court pointed out that if residential placement for educational reasons had been in the Student's IEP, the student could have prevented a change of placement by invoking the stay put rule. (*Id.* at pp. 4, 11.)

63. *M.S.* is distinguishable from this case because the agency in *M.S.* having the obligation to offer a residential placement was a school district obliged by residency rules to provide the student a FAPE while she was residing in a licensed children's institution within its borders. The district was already recognizing and acting on that obligation by supporting the student's education inside the residential placement. Here the County Office had no obligation to provide Student a FAPE except when he was "detained" in Juvenile Hall by virtue of its statutory obligation to operate a juvenile court school in the Hall. (Ed. Code, §§ 48645.1, 48645.2.) As soon as Student was not detained there, the County Office's obligation to provide him a FAPE ceased. Probation, not the County Office, has been responsible for all aspects of Student's placement in Cinnamon Hills, including his education. (Fam. Code, §§ 7901-7902.) Student's argument, then, is that the County Office had an obligation to offer Student a placement it would never have any obligation to put into effect. That is an extremely unlikely reading of the law which is not required or even addressed by *M.S.*, where the school district's obligation to support an educationally necessary residential placement was continuing. To impose an

obligation on the County Office to offer a placement it would never have an obligation to support makes no sense and is not required by law.[17]

64. Moreover, at the beginning of hearing, the County Office moved to limit its alleged liability to the period of time in which Student was confined in Juvenile Hall, and sought a ruling that its liability necessarily ceased on September 19, 2016, when Student was released from the Hall and taken to Cinnamon Hills. The motion was granted when Student's counsel declined to oppose it; she could not identify a legal theory upon which the County Office could be held liable for providing Student a FAPE after release from the Hall on September 19, 2016. Inherent in that ruling is the recognition that the County Office would have no obligation to make or support a residential placement, or offer Student a FAPE, after September 19, 2016.

65. Student argues that the County Office failed to implement Student's September 8, 2015 IEP amendment. Student does not explain why the County Office would have any continuing obligation to Student once he was no longer placed in Foothill and was placed in Seneca instead. The County Office had no obligation to implement Student's September 8, 2015 IEP amendment placing Student in a non-public school.

66. Student did not establish that the County Office unlawfully failed to consider residential placement as part of the continuum of placements, failed to offer residential placement, failed to implement his IEP, or failed to offer a FAPE for the school year 2016-2017. The County Office did not deny Student a FAPE in any of these ways.

[17]Whether East Side had an obligation to offer Student a residential placement while he was in Juvenile Hall is not addressed here.

ISSUES 3(A.)-(C.),(E.)-(G.),(J.),(M.)-(P.):DID EAST SIDE DENY STUDENT A FAPE DURING THE 2015-2016 SCHOOL YEAR, FROM APRIL 19, 2016, THROUGH MAY 31, 2016, BY:

(a.) failing to implement Student's IEP;

(b.) failing to offer or provide adequate specialized academic instruction services;

(c.) failing to offer or provide individual or group counseling;

(e.) failing to offer or provide a behavior intervention plan;

(f.) failing to provide adequate present levels of performance;

(g.) failing to offer or provide measurable goals in all areas of need;

(j.) failing to provide progress reports on goals;

(m.) failing to consider a continuum of placement options;

(n.) failing to timely convene an IEP team meeting; and

(p.) failing to convene an IEP team meeting to develop a plan to transition him from juvenile hall?

67. Since Mother lived within the geographical boundaries of East Side, East Side was obliged to provide education to Student unless some other provision of law applied. (Ed. Code, § 48200.) Before Student entered Juvenile Hall, East Side recognized that obligation. County boards of education are responsible for educating students only when they are confined in juvenile halls. (Ed. Code §§ 48645.1, 48645.2, 56150.) The County Office therefore had the responsibility to educate Student while he was incarcerated in the Hall, but not afterward.

68. When Student returned home from Juvenile Hall on or about April 19, 2016, his education once again became East Side's responsibility by operation of Education Code section 48200. Student's placement in Juvenile Hall in November 2015, and his entry into a school operated by another local education agency, justified East Side in dis-enrolling him at the time, but nothing in any of the Education Code's provisions for residency and school district responsibility justified East Side in treating

him as still dis-enrolled once he returned to the district. In its closing brief, East Side denies that it had any obligation toward Student after his return from Juvenile Hall, repeating merely that he continued to be dis-enrolled, but it does not identify any law, regulation or decision justifying its action in treating Student as still dis-enrolled after he left Osborne. East Side's claim that it could continue the dis-enrollment until Mother took an affirmative step to re-enroll him has no support in law. The claim is inconsistent with special education law's insistence on notice to parents of procedural rights, since Mother had no notice she needed to re-enroll him. It is inconsistent with all of East Side's duties under the IDEA's "child find" provisions, because it allowed East Side to ignore the presence and needs of a disabled child it knew to be residing within its district. Finally, it is inconsistent with East Side's actions; once Ms. Tenadora realized Student had returned to the district, she began a search for a non-public placement for him.

69. One Court of Appeal has squarely rejected the argument East Side makes here. In *James v. Upper Arlington City Sch. Dist.* (6th Cir. 2000) 228 F.3d 764, parents removed their child from the public school district and provided him six years of private school. Then they asked the district for a new IEP, but the district declined to provide one until the student was re-enrolled. (*Id.* at p. 766.)The Court of Appeal held that parents were entitled to a new IEP when they requested it, and did not need to re-enroll the student: "The obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment." (*Id.* at p. 768.)

70. A recent decision of the Ninth Circuit suggests that it would agree with the Sixth Circuit. In *N.G. v. ABC Unified Sch. Dist.* (9th Cir., Nov. 3, 2016, No. 14-56666) __ Fed.Appx.__, 2016 WL 6536677 [nonpubl. opn.], an emotionally disturbed teenager had been placed in a hospital located in the ABC District. Under California law that meant that the ABC District had educational responsibility for her while she was in the hospital.

(Ed. Code, § 56167, subd. (a).) After her discharge from the hospital, the student claimed that the ABC District still had responsibility for her, and should have placed her in a residential treatment center. (*N.G. v. ABC Unified Sch. Dist., supra,* 2016 WL 6536677, at p. 1.)But the Ninth Circuit held that it did not. As soon as the student left the hospital, the Court held, responsibility for her education reverted under Education Code section 48200 to the district in which her guardian resided. (*Ibid.*) Applied here, that ruling means that responsibility to educate Student automatically reverted to East Side upon his discharge from Juvenile Hall.

71. When Student returned to the district from Juvenile Hall, East Side re-acquired the responsibility for educating him by operation of law, without any requirement of re-enrollment. (Ed. Code, § 48200; *James v. Upper Arlington City Sch. Dist., supra; N.G. v. ABC Unified Sch. Dist., supra*.) East Side therefore violated its responsibility to implement his IEP, offer and provide the special education and services he required including, instruction, counseling, a behavior plan, goals with present levels of performance, progress reports on goals, and the like. It also violated its responsibilities to convene timely IEP team meetings. Its unilateral decision to offer placement in Beacon School was belated and made entirely without adherence to the procedural protections of the IDEA and related laws. East Side therefore violated special education laws in all those respects.

72. East Side's failure to extend the substantive benefits and procedural protections of the IDEA to Student from his release from Juvenile Hall on April 19, 2016, to his return to Juvenile Hall on June 2, 2016 (except for three days in Juvenile Hall in May) impeded his right to a FAPE, deprived him of educational benefits, and significantly impeded Mother's participatory rights. Student was deprived entirely of education during that period, and Mother was deprived entirely of participation in the

decisions East Side made. The violations therefore denied Student a FAPE from April 19, 2016, to June 2, 2016.

ISSUES 5(A.)-(B.): FROM THE BEGINNING OF THE SCHOOL YEAR 2014-2015 TO THE DATE OF HEARING, DID EAST SIDE AND THE COUNTY OFFICE FAIL TO ADEQUATELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY BY:

(a.) failing to conduct a functional behavior analysis; and

(b.) failing to conduct an adequate psycho educational evaluation, including social/emotional functioning, executive functioning, processing, and academic achievement?

73. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability, such as vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (c),(f).) Federal law also requires that the child "is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B).) Like the California statute, the federal statute requires assessment in broadly defined areas of educational need related to a suspected disability, such as health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (34 C.F.R. § 300.304(c)(4).)

74. It is not necessary to decide whether East Side should have conducted a functional behavioral analysis or a better psycho educational analysis of Student, since this Decision finds that East Side denied Student a FAPE throughout the relevant periods for other reasons and orders relief that subsumes any relief that would issue for a failure to assess.

75. In its role as the operator of the Foothill program, the County Office did not violate the IDEA by failing to conduct a functional behavioral analysis during Student's brief attendance there. Such an analysis is generally conducted while school is in session so that the student's interactions with peers and teachers can be observed and the student is in an educational environment in which the report's recommendations are expected to be applied. Student attended Foothill for too brief a time in the regular school year to obtain consent for and conduct such an analysis. Its summer program was a different and equally brief educational setting which revolved largely around Workability activities. Such classroom instruction as occurred took place in the unusual setting of the boardroom of the County Office in a building full of County Office employees. Since the Foothill placement was tentative and to be reviewed after 30 days, a functional behavioral assessment would not have been helpful because it could not have been conducted, reported on, and put into effect in that time. In addition, Student's behavior at Foothill was not substantially different from the behavior of the other students there until August 13, 2015. Student had adapted well to the disciplinary point system until he tore up the boardroom on his last day of attendance. Had Student remained at Foothill there might have been a need to assess his behavior, but he did not.

76. There was no need for the County Office to conduct a psycho educational evaluation of Student at Foothill; East Side had just conducted one. That assessment was flawed because Student had not cooperated with it, but there was no evidence that there was any greater chance he would have cooperated with the same assessment process if conducted by Foothill.

77. In its role as operator of the Osborne School in Juvenile Hall, the County Office did not violate the IDEA by failing to conduct a functional behavioral analysis because its equivalent had already been done by County Mental Health in the creation

of Student's Care Plan. Nor was there a need for the County Office to attempt a psycho educational evaluation; it had every reason to believe (until Dr. Easler's September 2016 reports) that Student would not cooperate with a psycho educational assessment any more than he had cooperated with Ms. Waters's assessment. He had consistently refused academic assessment while in the Hall.

78. In addition, Student's psychological services were in the hands of Dr. Luk and Ms. Akintabde, who were employed by County Mental Health and beyond the control of the Osborne School as long as Student remained in Juvenile Hall. The County Office could not have applied the conclusions of a psycho educational evaluation to Student's therapy because another agency provided it, or to his behavior, which was controlled by Probation. There was no substantial evidence that Student needed to be assessed in other areas, such as processing, that a psycho educational assessment might address. There is therefore no need to evaluate Student's many criticisms of Dr. Easler's psycho educational evaluation, which was strictly limited to the subject of Student's eligibility for special education as emotionally disturbed, an issue not decided here, and arrived so late in these events as to be of little relevance to any educational programming decision evaluated here.

RELIEF

79. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be

"reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

80. Student was denied a FAPE during 159 school days from September 11, 2014 to the end of the regular school year 2014-2015, 60 school days between August 12 and November 2, 2015, and 30 school days between April 19 and June 2, 2016. Those days total 249 days during which East Side denied him a FAPE for the procedural reasons addressed above, and for which Student must be compensated with academic instruction, therapy and counseling.

81. It is not feasible to require East Side to compensate Student by means of a system of days or hours of tutoring, counseling and therapy for 249 missed days of school. Such a system would have to allow for, and be reduced because of the curriculum he now receives and will receive by the time he is released from Cinnamon Hills or another Probation placement. It would have to be coordinated by Mother and Student himself to avoid duplication and fit around Student's other activities, including local schooling, and would likely have to be spread over several years. It is more effective to place Student in a residential facility for the stability it provides as an educational environment, and for the delivery of a unitary curriculum coordinated with therapy, than to deliver academic subject matter, therapy and counseling to him piecemeal through tutors and counselors over a longer period of time.

82. Dr. Solomon testified that in her best estimate three years of instruction and therapy at Provo Canyon would compensate Student for his losses, but she admitted that two years would probably accomplish that purpose. There was no evidence that a shorter commitment would be adequate, so the relief issued here requires that, as a form of compensatory education, Student be placed by East Side at its expense in Provo Canyon for two years so he may benefit from the curriculum and

therapies provided there. That time somewhat exceeds the number of school days during which East Side denied Student a FAPE, but it is necessary to make him whole. It is also appropriate because "the period of deprivation may have had an adverse compounding effect on [the student's] educational progress." (*A.W. v. Middletown Area Sch. Dist.* (M.D.Pa., Jan. 28, 2015, No. 1:13-CV-2379) 2015 WL 390864, at p. 18.) Dr. Solomon appropriately refrained from speculating how much worse Student's situation became due to the deficiencies in East Side's treatment of him, but it was clear she reasonably believed that some adverse compounding effect had occurred. That conclusion is unavoidable given the many months Student languished in his freshman year in a program known to be inappropriate, and given East Side's failure to serve him at all in spring 2016.

83. The order for relief must be flexible because it is not known when Student will be released from Cinnamon Hills or from the direct control of the Juvenile Court, what his psychiatric status may be at that time, or how much academic instruction he will have received by that time. For those reasons the order will not go into effect until it is no longer inconsistent with an outstanding order of the Juvenile Court. The parties are free to seek modification of the Juvenile Court's orders. In addition, the parties must have the ability, by agreement, to alter the terms of the OAH order in light of new or unforeseen circumstances. If, for example, the parties agree that a California facility would be an appropriate placement for receipt of compensatory services, or that a day treatment program is desirable, East Side and Student's educational rights holder could alter that part of the order by written agreement.

ISSUES NOT DECIDED

84. This Decision does not resolve the parties' dispute about whether and when Student needed a residential placement in order to have a FAPE. Residential

placement is addressed here only in the different context of the granting of relief in a stable environment.

85. Because of the findings made in this Decision and the relief granted, it is not necessary to decide several issues, which are: whether East Side 1(a.) failed to implement the services required by Student's February 7, 2014 IEP; 1(c.) failing to offer or provide adequate specialized academic instruction services in an appropriate therapeutic setting [Aug. 12, 2014 through Nov. 2, 2015]; 1(e.) failed to offer or provide individual counseling [Aug. 12, 2014 through Apr. 23, 2015]; 1(f.) failed to offer or provide group counseling [Aug. 12, 2014 through Apr. 23, 2015]; 1(l.) failed to adequately maintain educational records; 1(m.) failed to make an offer of placement and services prior to the beginning of the 2014-2015 school year; 3(a.) failed to implement Student's IEP [Aug. 12, 2014 through Nov. 2, 2015]; 3(b.) failed to offer or provide adequate specialized academic instruction [Aug. 12, 2014 through Nov. 2, 2015]; 3(c.) failed to offer or provide individual or group counseling [Aug. 12, 2014 through Nov. 2, 2015]; 3(k.) failing to make an offer of placement of services prior to the beginning of the school year; 4(a.) failing to implement Student's IEP; and 5 failed to assess Student in all areas of suspected disability.

86. Several of Student's claims were not supported by substantial evidence and were abandoned in Student's closing brief. These are: 4(b.) failing to offer or provide adequate specialized academic instruction services [May 31, 2016 through Sept. 19, 2016]; 4(c.) failing to offer or provide individual or group counseling [May 31, 2016 through Sept. 19, 2016]; 4(m.)failing to timely convene an IEP team meeting; 4(n.) failing to convene an IEP team meeting when Student was not making adequate progress; and 4(o.) failing to convene an IEP team meeting to develop a plan to transition him from the juvenile hall. Those arguments are not addressed here.

87. Student raised several arguments relating to the validity of Student's March 15, 2016 IEP for the first time in his closing brief, but those arguments are not fairly embraced in the issues set forth for hearing, and are therefore not among the issues the opposing parties had adequate opportunity to litigate. These are: that the March 15, 2016 IEP is flawed because it was not a clear offer; that it does not contain descriptions of the nature or hours of the mental health services Student was receiving from County Behavioral Health; that it failed to offer mental health services; that the County Office's keeping of Student's attendance records was inadequate; that he was given the wrong reading program; and that the County Office changed his placement when he refused to come to class and it gave him lessons in the hallway outside his room. Those arguments are not addressed here.

ORDER

1. East Side shall place Student at its expense in the Provo Canyon School for a period of two academic years, or in an equivalent facility if Provo Canyon withdraws its agreement to admit Student. This placement shall not be made until it is not inconsistent with an outstanding order of the Juvenile Court.

2. East Side shall provide Student safe transportation to and from Provo Canyon School. It shall also provide to Mother adequate transportation to and from Provo Canyon as often as Provo Canyon, in its discretion, invites or allows a parental visit, up to a maximum of six visits a year. East Side shall also pay for all reasonable travel expenses related to such visits. East Side shall not require Mother to make travel expenditures and then be reimbursed.

3. The terms of this Order may be altered at any time by a written agreement between Student's educational rights holder and East Side. An IEP is a writing for this purpose.

4. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1(b.), 1(d.), 1(h.), 1(i.), 1(j.)., 1(n.), 1(o.), 1(p.), 1(q.), 1(r.), 1(t.), 3(a.)[Apr. 19, 2016 through May 31, 2016], 3(b.)[Apr. 19, 2016 through May 31, 2016], 3(c.)[Apr. 19, 2016 through May 31, 2016], 3(e.), 3(f.), 3(g.), 3(j.), 3(m.), 3(n.), and 3(p.) [Apr. 19, 2016 through May 31, 2016]. The County Office prevailed on issues 2(a.), 2(b.), 2(c.), 2(d.), 2(f.), 2(i.), 2(k.), 4(e.), 4(f.), 4(g.), 4(h.), 4(j.), 4(l.), and 6. The remaining issues were not decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd.(k).)

Dated: December 21, 2016

/s/
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings