

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT
AND LOS ANGELES COUNTY DEPARTMENT
OF MENTAL HEALTH,

Respondents.

OAH NO. N 2005110113

DECISION

This matter came on regularly for a due process hearing from February 6, 2006, through February 10, 2006, at the offices of the Los Angeles Unified School District, 333 South Beaudry Avenue, 17th Floor. Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter.

Petitioner-Student (Petitioner) was represented by her attorney, Carol Hickman Graham, Attorney at Law, of the Law Offices of Carol Hickman Graham. Petitioner was not present at the hearing. Petitioner's parent (Mother) was present throughout the entire hearing on Petitioner's behalf.

Respondent Los Angeles Unified School District (District) was represented by Mary Kellogg, Attorney at Law, of Lozano Smith. Susan Glickman, Coordinating Specialist for the District, was present on the District's behalf. Respondent Los Angeles County Department of Mental Health (DMH) was represented by Zoe Trachtenberg, Licensed Clinical Social

Worker (L.C.S.W.), Program Manager, DMH AB 3632 Residential Placement Unit; and by Paul L. McIver, L.C.S.W., District Chief, DMH.

Prior to the commencement of the hearing, respondents orally moved that the evidence of future expenses for petitioner's current residential placement be excluded, on the grounds that they are not recoverable under Education Code section 56505.2, subdivision (a). The ALJ did not grant the motion, and evidence of such expenses was received and admitted as the hearing progressed.

At the conclusion of the hearing, the matter was continued for the parties to file closing briefs. On March 6, 2006, petitioner filed her closing brief, which has been designated in the record as Petitioner's Exhibit Z. On March 6, 2006, respondent DMH filed its closing brief, which has been designated in the record as Respondents' Exhibit 22. On March 6, 2006, the District filed its closing brief, which has been designated in the record as Respondents' Exhibit 23.

Upon consideration of oral and documentary evidence, and written argument, the Administrative Law Judge finds as follows:

PROCEDURAL HISTORY

Petitioner filed her due process complaint herein on October 28, 2005. On December 9, 2005, the parties mutually stipulated to a continuance of the matter. During this period of continuance, the due process hearing was set to commence on February 6, 2005. The hearing lasted five days, from February 6-10, 2006. The matter was continued until March 6, 2006, when closing briefs were ordered to be filed.

ISSUES

The issue presented is whether petitioner is entitled to placement at Chaddock, the private placement selected by her and Mother, at public expense. The resolution of this issue requires resolution of the following issues:

1. Did the District deny petitioner a free, appropriate, public education (FAPE) by failing to timely offer her an appropriate placement from May 23, 2005 to October 18, 2005?
 - A. Was the District's proposed placement at Coutin School (Coutin), a non-residential non-public school (NPS), designed to meet petitioner's unique needs and comport with her Individualized Educational Program (IEP), and was it reasonably calculated to provide petitioner with some educational benefit, so as to constitute a FAPE?
 - B. Did the District and DMH process the petitioner's request for an AB 3632 assessment in an untimely fashion, so as to deny petitioner a FAPE?
2. Did the District and/or DMH deny petitioner a FAPE by failing to offer her an appropriate placement from October 18, 2005, to the present?
 - A. Was the District's and DMH's proposed placement at Excelsior Youth Centers, Inc. (Excelsior), a residential NPS, designed to meet petitioner's unique needs and comport with her IEP, and was it reasonably calculated to provide petitioner with some educational benefit, so as to constitute a FAPE?
3. Is petitioner entitled to reimbursement from the District and/or from DMH for all costs and expenses related to her placement at Chaddock, a residential, non-certified NPS, from June 6, 2005, to the present, and to prospective placement at Chaddock?

FACTUAL FINDINGS

GENERAL BACKGROUND

1. Petitioner is fifteen years old. She was born on September 23, 1990. She resides at Chaddock, a private, co-educational, residential school located in Quincy, Illinois, that specializes in the treatment of adolescents with attachment disorders. She is currently in the ninth grade at Chaddock.

2. Chaddock is not certified by the California Department of Education to provide special education and related services under Education Code sections 56366 and 56366.1. It applied for such certification in early February 2006. At Chaddock, petitioner lives in a "cottage" on campus with a small co-educational group of other emotionally disturbed adolescents. She receives therapy and one-on-one attention, including an "attachment counselor." The attachment counselor is viewed as a surrogate parent, and part of the goal of petitioner's therapy is that she bond with the attachment counselor. Another component of petitioner's therapy at Chaddock is "therapeutic touch," in which Chaddock staff holds and feeds petitioner.

3. Mother resides within the boundaries of the District. She adopted petitioner in November 1997 after petitioner was her foster child for approximately a year. Petitioner's biological mother passed away when petitioner was six days old. Prior to coming to live with Mother, petitioner had lived in a succession of approximately five foster homes, and had endured a failed adoption, a failed reunification with her biological father, neglect, and physical and emotional abuse.

4. Throughout her life, petitioner has suffered from numerous mental health disorders stemming in large measure from the abuse, neglect, and disruption that marked her life prior to coming to live with Mother. She has been receiving unspecified counseling services from an early age, and she has been receiving private therapy from Connie Hornyak, LCSW, of Attachment Center West, since approximately June 1998. She has never been hospitalized for any mental health condition. Petitioner has been diagnosed over time by Ms. Hornyak and/or other assessors with a variety of psychiatric problems. Among them are reactive attachment disorder (disinhibited type), post-traumatic stress disorder, bi-polar disorder, attention deficit hyperactivity disorder, obsessive-compulsive disorder, and oppositional defiance disorder, as well as borderline personality disorder. She also has a history of brain trauma. During a mental health assessment in 2000, petitioner reported hearing voices and having paranoid thoughts.

5. Through the years, her behaviors have included lying, stealing, defiance, harming herself (including cutting herself), threatening to harm others (including threatening to kill Mother), anxiety, aggression, assaulting others, destroying her possessions, impulsively threatening suicide, tantrums, rage, and binge eating. She has never seriously hurt anyone, and never made a serious attempt to take her own life. Her moods have been volatile, and she has demonstrated poor organizational skills, poor social skills, impulsiveness, and social immaturity. She has threatened to run away. She has a history of difficulties with inter-personal relationships, both with her peers and with adults, particularly with adults who are close to her. Many of these behaviors worsened as she entered puberty. Additionally, since entering puberty, petitioner has displayed sexually precocious behavior. She is markedly interested in, and distracted by, boys and sex.

6. Petitioner attended public elementary school in the District for her first few years in school. An initial Individualized Educational Program (IEP) meeting was held in May 1997, when she was in first grade; however, she did not qualify for special education at that time.¹ Towards the end of third grade, in approximately June 1999, petitioner moved away from Los Angeles and Mother to live in Grass Valley, California, with a foster family (Foster Family) for therapeutic respite care. This move, and others which followed, was due to Mother's status as a single parent, and was part of the treatment for petitioner's attachment disorder recommended by her therapist, Ms. Hornyak.

7. Petitioner and Foster Family were very close. Petitioner would live with Mother for a time, and when her behavior deteriorated, she would move to Grass Valley to live with Foster Family for a time. Later, she would return to Los Angeles to live with

¹ Many of the dates and years in this Decision regarding petitioner's history prior to the events which generated the filing of the due process complaint are approximate. At hearing, Mother did not always remember precise dates, and documentation of certain dates regarding events in petitioner's past was not offered by any party.

Mother. This cycle was repeated several times prior to the events which gave rise to petitioner's due process request. When petitioner was living with Foster Family, she would return to Los Angeles periodically, such as during school breaks, some week-ends, and holidays, to visit Mother.

8. Petitioner stayed with Foster Family from approximately June 1999, the end of third grade, until approximately January 2000, the middle of fourth grade. At that time, she moved back to Los Angeles, where she resumed living with Mother, and attended Topanga Charter Elementary School in the District.

9. A second IEP was held by the District on June 9, 2000, when petitioner was attending fourth grade at Topanga. The IEP team concluded that petitioner met eligibility guidelines as a student with Emotional Disturbance (ED), due to her inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behaviors and feelings under normal circumstances, and a tendency to develop physical symptoms associated with personal or school problems. The IEP team made an AB 3632 County Mental Health referral.²

10. After the AB 3632 referral, the District placed petitioner at Kayne ERAS Center, an NPS day school, where the initial AB 3632 assessment occurred. She remained at Kayne ERAS for fifth and sixth grades, during the school years 2000-2001 and 2001-2002. Mother removed petitioner from Kayne ERAS on the advice of petitioner's therapist, Ms. Hornyak, because Mother believed that a teacher did not appreciate the seriousness of an incident in which petitioner had brought a knife to school.

11. Petitioner spent the summer of 2002 with Foster Family in Grass Valley. In the fall of 2002, she returned to Los Angeles. At that time she was placed at Coutin, an

² No party offered into evidence this IEP, nor any assessments or subsequent IEPs related to it. The contents of some of these documents have been only partially revealed though various exhibits that were admitted into evidence.

NPS day treatment program in the District, for the beginning of 7th grade. This placement was unsuccessful. Coutin purportedly did not provide the necessary services to petitioner, and the majority of the student population consisted of boys, many of whom were older than petitioner. The boys gave petitioner undue attention, which was distracting to petitioner. Her behavior and academic performance deteriorated. In approximately late 2002 or early 2003, petitioner moved back to Grass Valley to live with Foster Family. She enrolled there in a class for emotionally disturbed students (ED class) at Lyman/Gilmore School, and repeated seventh grade. On May 5, 2003, while she was still attending Lyman/Gilmore, the IEP team in Grass Valley exited her from special education and she was placed in a Section 504 plan with the consent of Foster Family.³ The IEP team stated that petitioner, "while a student at-risk, is no longer meeting the criteria for special education." She was allowed to remain in the ED class to complete the school year.

12. Petitioner resided in Grass Valley with Foster Family through the remainder of seventh grade (the 2003-2004 school year), and for part of eighth grade (the 2004-2005 school year). She commenced attending Union Hill School there for eighth grade. By early 2005, Foster Family was no longer able to care for petitioner. Not only was the mother of Foster Family seriously ill, but also petitioner, an adolescent, had stated that she wanted to have sex with one of the Foster Family's sons. Furthermore, petitioner had announced to her classmates that she was pregnant and that she had had a sonogram, both of which announcements were untrue. She had been suspended from school four times in January, 2005 due to behavioral problems. Petitioner returned to Los Angeles in February 2005 to

³ Students are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more major life activities, or if they have a record of or are regarded as having such an impairment. (34 CFR § 104.3(j) (2004).) Section 504 plans are authorized by the federal Rehabilitation Act of 1973. (29 U.S.C. § 794.

live with Mother again. At the time she left Grass Valley, her grades ranged from "C" to "F" except for a lone "A" in physical fitness.

ASSESSMENT BY THE DISTRICT, IEP OF MAY 23, 2005, AND PETITIONER'S ENROLLMENT AT CHADDOCK

13. When petitioner returned to Los Angeles in February 2005, Mother home-schooled petitioner with the assistance of a tutor, because Mother did not believe that enrolling petitioner in regular education at the local public school in the District (Paul Revere Middle School, hereinafter, "Paul Revere") was appropriate for her daughter. Because petitioner had been exited from special education in Grass Valley and the District had not been providing her special education services, Mother commenced the process to re-obtain such services. By letter dated March 4, 2005, Mother requested assessments and an IEP for petitioner. On March 10, 2005, the District sent an assessment plan to Mother. On March 18, 2005, Mother signed the consent for assessment. The District received the signed consent on March 30, 2005.

14. On May 9, 2005, Deborah Rabinowitz, the District school psychologist, performed assessments and wrote a report based upon those assessments and those performed by others, such as the academic assessment and the health assessment. Another assessment, the Parent Rating Scale, had been completed by Mother on April 28, 2005.

15. The purpose of Ms. Rabinowitz's evaluation was to "identify and describe the significant elements in [petitioner's] unique learning style and the social emotional factors that affect her availability for learning." The report consisted of a review of petitioner's physical and psychoeducational health history, her educational history, her previous assessments, and additional miscellaneous reports. The report specifically referred to a letter dated March 18, 2005, from petitioner's therapist, Ms. Hornyak. Ms. Hornyak wrote that she had been treating petitioner for the past six years, that petitioner has recovered from Reactive Attachment Disorder and Post-Traumatic Stress Disorder, and

that petitioner still suffers from Bipolar Disorder. The therapist stated that petitioner takes the following medications:

Clomipramine, 150-mg. per day, for depression

Triletal, 900 mg. per day, anti-convulsant

Geodon, 160 mg. per day, anti-psychotic medication

Strattera, 60 mg. per day, stimulant medication for ADHD symptoms

Lorapezepam, 1 mg. every four hours as needed for agitation

Zoloft, 50-mg. daily if needed (not more than 10 days per month) for Premenstrual Syndrome.

In her letter, Ms. Hornyak further stated that petitioner's behavior at home is "fairly well-controlled with these medications," but "[w]ithout them she experiences manic behavior with frenzied activity alternating with uncontrollable crying." The therapist mentioned that petitioner's "greatest challenge has always taken place in the school environment," and briefly described some of petitioner's prior school environments and their outcomes for petitioner. Ms. Hornyak expressed her concern that petitioner would "act out sexually," and recommended that petitioner "be placed in a program for higher functioning emotionally disturbed students, preferably one with a balance of girls and boys." Ms. Rabinowitz interpreted this letter to be a recommendation for a non-public day school placement, or possibly a placement in a regular public school with an ED program. The therapist did not mention residential placement in her letter.

16. Ms. Rabinowitz could not observe petitioner in the classroom, since she was being home-schooled at the time. At her meeting with petitioner on May 9, 2005, Ms. Rabinowitz found petitioner was cooperative and friendly; oriented to person, time, and

place; and displayed adequate levels of attention and concentration throughout the assessment. Ms. Rabinowitz noted that petitioner “did tend to give up rather easily on auditory memory tasks.”

17. Ms. Rabinowitz interviewed petitioner and Mother, and administered or reviewed a variety of assessments regarding petitioner’s health, general cognitive ability, psychological processing skills, social/emotional status, and behavioral issues. These assessments included the Woodcock-Johnson III Tests of Achievement, the Cognitive Assessment System, the Comprehensive Test for Phonological Processing, the Test of Visual Perceptual Skills, and the Beery-Buktenicka Test of Visual Motion Integration.

18. With respect to petitioner’s performance on the academic assessment, Ms. Rabinowitz concluded: “When compared to others at her age level, petitioner’s academic knowledge and skills are both within the average range.” Ms. Rabinowitz found that petitioner demonstrated an inability to learn which could not be explained by intellectual, sensory, or health factors. She was unable to build or maintain satisfactory relationships with peers, exhibited inappropriate types of behaviors under normal circumstances, such as anger, and had periods of mania and depression. Petitioner also had a tendency to develop physical problems or fears associated with school problems, such as stomach aches and headaches from anxiety, “brought on by arguments with peers or teachers, fear of tests, or having not done her work.” Petitioner also had a general pervasive mood of unhappiness and depression, since “her bi-polar cycles include significant periods of depression.” Ms. Rabinowitz found that these characteristics occurred over a long period of time, to a marked degree, across various schools and placements, and that they adversely impacted petitioner’s educational performance.

19. Ms. Rabinowitz concluded, “[Petitioner] may exhibit an **Emotional Disturbance** and be in need of special education services.” (Emphasis in original.) Ms. Rabinowitz considered the possibility that petitioner met special education eligibility criteria as a student with a Specific Learning Disability, due to weaknesses in both auditory

and visual processing. However, Ms. Rabinowitz found no discrepancy between petitioner's average ability and achievement. (An apparent discrepancy in mathematical ability and achievement was based upon erroneous data.) She found that other factors quite possibly may have affected petitioner's performance on the assessments. Therefore, she concluded that petitioner did not appear to meet eligibility criteria as a student with Specific Learning Disability.

20. Ms. Rabinowitz's report referred the matter to the IEP to determine appropriate eligibility and program placement in the least restrictive environment, whether petitioner's social-emotional needs were impacting her ability to access the curriculum, and whether designated instruction and services (DIS) counseling should be recommended.

21. Ms. Rabinowitz recommended a Behavior Support Plan to aid or improve petitioner's attention, visual processing, and auditory processing. She suggested the following strategies to aid in attention: rewards; providing outlines, key concepts, and vocabulary prior to lesson presentation; breaking lessons into smaller parts; calling attention to key concepts and material; attempting to actively involve petitioner in learning; giving petitioner short, specific, and direct instructions, and having her repeat them; and seating petitioner near organized, understanding peers.

Ms. Rabinowitz suggested the following strategies to aid in visual processing: oral instruction; repeating exposures to the material; providing math problems on graph paper, and orally reading directions.

Ms. Rabinowitz suggested the following strategies to aid in auditory processing: seating petitioner away from distractions and so that she can clearly hear and see the teacher; emphasizing visual inputs using charts and other tools; displaying the daily schedule; keeping directions concise and simple; making eye contact with petitioner before speaking; making introductory statements prior to imparting important information; and having petitioner repeat instructions.

22. Based upon her knowledge of petitioner at the time she wrote her report, Ms. Rabinowitz considered petitioner to be a candidate for NPS day school placement. She did not recall any conversation with Mother regarding whether petitioner's previous experience at Coutin had been successful or unsuccessful. She did not consider petitioner for a residential placement, in view of the fact that petitioner had not been in special education for approximately two years, and Mother had not requested a residential placement or a referral to DMH for a mental health assessment. Mother was aware that the procedure for obtaining mental health services involved a referral by the District to DMH, and that such a referral required additional time so that DMH could perform its assessment.

23. On May 7, 2005, while the District's assessment was pending, Mother signed an "Application for Assessment and Treatment" for petitioner to attend Chaddock, a private residential school in Illinois. On May 12, 2005, Chaddock accepted petitioner into its Attachment Program. The District was not advised of these developments until the IEP meeting on May 23, 2005.

24. On or about May 10, 2005, the day after Ms. Rabinowitz's assessment report, Ms. Hornyak wrote a letter to Los Angeles County Department of Children and Family Services (DCFS) advising that petitioner required a residential placement, and "strongly recommending" that petitioner be placed at Chaddock. Among other matters, the letter referred to the therapist's concern that, without the recommended residential placement, petitioner was at risk for criminal behavior, for becoming a long-term patient in a psychiatric institution, and for becoming pregnant. The District received this letter at an unspecified time, and Ms. Rabinowitz became aware, sometime between May 9th, the date she completed her report, and the date of the IEP meeting, that petitioner was seeking a residential placement.

25. The District convened an IEP meeting on May 23, 2005, 54 days after it received Mother's signed consent to assessment on March 30, 2005, and four days after

the statutory deadline with respect to this IEP. Mother did not agree in writing to waive any statutory or regulatory deadlines pertaining to this IEP. The IEP team included Mother, Ms. Rabinowitz, Angelina Tau (the special education coordinator for Paul Revere); a special education teacher, and a general education teacher. Petitioner's therapist, Ms. Hornyak, did not participate in the IEP meeting.

26. The IEP identified petitioner's issues, and summarized petitioner's present levels of performance in the areas of cognitive skills, social/emotional, vocational education, math, written language, reading, and health. It included many of the observations recorded by Ms. Rabinowitz in her report of May 9, 2005. The IEP also identified annual goals and objectives in the areas of math, written language, vocational education, behavior, and counseling. Both Mother and Angel Knoverek, petitioner's school counselor at Chaddock, testified that the IEP identified petitioner's issues very well.

27. The IEP mentions that Mother had "sought the help" of a therapeutic respite home in Atascadero, California, one week prior to the IEP meeting, and other evidence also indicates that unsuccessful attempts were made to place petitioner at a foster home prior to this IEP meeting. There was no evidence that petitioner was ever placed at any respite home other than the Foster Family's home in Grass Valley.

28. The IEP team found that petitioner was eligible for special education services as a student with ED, stating: "Although [petitioner] has a diagnosis of ADHD and has displayed processing deficits in auditory and visual processing, her emotional difficulties are having the most impact on her educational performance. It is felt that ED is a more accurate description of the factors negatively impacting petitioner's academic achievement." The team recommended a "Non-public [day] school setting to provide structure and containment [petitioner] needs to access the general education curriculum." The team also recommended DIS counseling of one hour per week.

29. The IEP included instructional accommodations, such as adult feedback for academic performance and behavior, that petitioner be given clear instructions and repeat

the instructions, that a positive reinforcement plan and a self-monitoring system be instituted, and that petitioner be placed in a contained classroom with a consistent academic and social environment. The IEP also noted the petitioner's own statements as to the environmental factors that help her learn, such as music, a cool, quiet, and relaxed environment, bright lights, and the availability of water drinks or snacks. The IEP included a recommendation for participation in state and district-wide assessments, and provided a transition plan. It also included a Behavior Support Plan with goals and recommendations, focusing on the development of communication skills and social skills, anger management techniques, negotiation and conflict resolution skills, self-management systems, and reactive strategies to problem behavior.

30. In recommending the NPS day school setting, the IEP stated:

The intent of a Non-Public School setting is to provide petitioner with the supports necessary to return to a public school setting. When school reports and observations indicate that petitioner is able to earn passing grades without significant behavioral and emotional incidents over a marked period of time, an IEP meeting will convene to discuss transition back to the public school environment.

Within a few days after the IEP meeting, the IEP team made a specific recommendation of placement at Coutin, which had an opening for petitioner, and which was able to implement the IEP.⁴

⁴ A specific offer of placement at an NPS day school is not made at the IEP team meeting, because the IEP team must contact the NPS department, which, based on the completed IEP, locates an appropriate NPS that has an opening for the student. Such a search for an appropriate and available placement cannot be made in advance of the IEP meeting because to do so would compromise the purpose of the meeting, which is to

31. Coutin is accredited by the Western Association of Schools and Colleges and by the state of California. It issues diplomas. It serves primarily emotionally disturbed students who need a more restrictive environment, a smaller classroom, or a more therapeutic milieu than a public school. There is individual counseling as well as group counseling, and therapists and teachers work together to attempt to meet the students' needs. It is a safe facility, with a locked front door, an electronic gate in the back, and supervision when students are outdoors on school grounds.

32. At the IEP meeting on May 23, 2005, Mother disagreed with the proposed placement, asserting that a residential setting was necessary and, in particular, that Chaddock was an appropriate placement. She showed the IEP team members a pamphlet describing Chaddock. Mother stated at the meeting that she would enroll petitioner at Chaddock as of June 7, 2005, and would attempt to obtain funding for Chaddock through a due process complaint. Mother never mentioned at the meeting that petitioner's previous placement at Coutin had been unsuccessful. Nor did Mother refer to any emergency with respect to petitioner, or explain why petitioner required immediate placement at Chaddock. The IEP team advised Mother that only the DMH could recommend a residential placement. At the meeting, the team also recommended an AB 3632 referral to DMH. Mother signed a consent to a referral to DMH for assessment and services.

gather the team, including the parents, discuss the assessments and the student's needs, and attempt to agree on an appropriate placement. Therefore, within a few days of the May 23, 2005, IEP meeting, Ms. Tau contacted the NPS department. After discussing the IEP with one of the members of the NPS department, Ms. Tau was advised that Coutin was an available and appropriate NPS for petitioner. Ms. Tau then contacted Mother and advised her that the District was offering placement at Coutin.

33. On May 24, 2005, the day after the IEP meeting, Mother sent separate, substantially identical letters to DMH and to the District, stating that she was giving a "10 day notice" of her intention to place petitioner at Chaddock, and advising that she would seek reimbursement from the District.⁵ Each letter stated, "This is an emergency situation," but no explanation of the "emergency" was given. Also on May 24, 2005, Mother purchased plane tickets to transport herself and petitioner to Chaddock on June 7, 2005.

34. Neither in the letters of May 24, 2003, nor when Mother was advised by Ms. Tau several days after the IEP meeting of the recommended placement at Coutin, did Mother mention to the District that Coutin had been an unsuccessful previous placement or the reasons why it was unsuccessful.

35. By letter dated May 31, 2005, mailed on June 1, 2005, DMH acknowledged receipt of Mother's letter dated May 24, 2005. In its letter, DMH advised Mother that it would perform an assessment of petitioner when it received the referral from the District and explained that DMH's AB 3632 program is not an emergency program. The letter further stated that Mother would be required to make petitioner available for assessment after the District's referral arrived at DMH. The letter also advised that, if a residential placement were recommended after the DMH assessment, funding for the residential placement at Chaddock would depend upon whether Chaddock met the necessary criteria of the District and DMH for funding.

36. Mother did not recall when she first learned that Chaddock was not certified by the State of California and, therefore, that petitioner's placement there could not be funded by the District or by DMH. She learned this information by no later than late

⁵ Inexplicably, although separate letters were sent to each respondent herein, each such letter copied the other respondent. Thus, the letter addressed to the District was copied to DMH, and the letter addressed to DMH copied the District.)

June 2005, however, when she was so advised by Dr. Hilsberg, the DMH assessor who was assigned to the case.

37. On June 7, 2005, petitioner entered Chaddock, where she continues to reside. She was not hospitalized upon her enrollment at Chaddock, nor at any time thereafter. Her room and board at Chaddock is paid for by Los Angeles County, as part of petitioner's post- adoption services. Petitioner's targeted discharge date from Chaddock is December 2006.

AB 3632 ASSESSMENT AND IEP OF SEPTEMBER 27, 2005

38. After petitioner moved to Chaddock, Mother continued to pursue petitioner's request for special education services. The District forwarded the AB 3632 referral to DMH on June 13, 2005. This was 13 days after the regulatory deadline by which the District is to transmit the AB 3632 referral to DMH, and within 20 days of June 24, 2005, the end of the regular school year Mother did not agree to waive this or any statutory or regulatory deadlines with respect to the AB 3632 referral. DMH timely sent an assessment plan to Mother, and on June 27, 2005, Mother signed the authorization for the AB 3632 assessment plan.⁶ DMH received Mother's signed authorization for the assessment plan on July 6, 2005.

39. Karen Rosenthal Hilsberg, Ph.D., a DMH assessor, conducted the AB 3632 assessment. Dr. Hilsberg was assigned the case during the week of June 27, 2005. Dr. Hilsberg's assessment included a detailed record review, a two hour in-person interview with Mother on July 6, 2005, a one and one-half hour in-person interview with petitioner on August 16, 2005 with Mother present, and telephone conversations with one of

⁶ Mother executed an identical authorization for the AB 3632 assessment plan on July 6, 2005 when she met Dr. Hilsberg, the DMH assessor. This was done at Dr. Hilsberg's request, because Dr. Hilsberg did not yet have the authorization executed by Mother on June 27, 2005 in her file.

petitioner's therapists at Chaddock and with a representative of the District. Dr. Hilsberg attempted to speak with Ms. Hornyak, but they were unable to make contact until after Dr. Hilsberg had completed her report. Dr. Hilsberg performed no psychological testing, because petitioner had been recently tested and Dr. Hilsberg had access to those records.

Dr. Hilsberg had requested to interview Mother and petitioner on the same day. She could not do so because, on the advice of petitioner's therapists, petitioner could not return from Chaddock to be interviewed at the same time as Mother's interview.

Petitioner flew to Los Angeles from Chaddock on August 16, 2005, solely for the interview. She was accompanied by two escorts. Because petitioner's therapists deemed it inadvisable for her to go to her Los Angeles home, petitioner did not leave the Los Angeles airport. The interview occurred in a somewhat private lounge at the airport with petitioner sitting next to Mother. The escorts stood across the hall, within sight but not within earshot of the interview.

Dr. Hilsberg found that petitioner presented a complicated, although not unusual case, because a variety of conditions have affected petitioner's mental health. These conditions include: (a) documented brain trauma, which can affect her functioning, moods, and behavior; (b) abuse; (c) a mood disorder, which affects her feelings; (4) an attentional disorder, which affects her ability to pay attention and concentrate; (5) an attachment disorder, which affects her relationships, including her ability to form them; (6) a personality disorder, which affects how she sees herself and the world and interacts with the world, and which also affects her perception of reality; and (7) petitioner's adoption.

Dr. Hilsberg completed her assessment report on August 24, 2005, and DMH approved it on August 31, 2005. She concluded that petitioner qualified for mental health services under AB 3632 and recommended a residential setting as the least restrictive setting in which petitioner can be successful in special education.

In reaching these recommendations, Dr. Hilsberg reviewed petitioner's previous assessments and therapy, her medication and medical history, her school history, the IEP

of May 23, 2005, and her progress at Chaddock. The report contained a clinical assessment, noting that petitioner had a "stable, loving support system" including Mother and Foster Family, as well as extended family. The report referred to petitioner's regular church attendance, and her singing and songwriting. Petitioner played several of her songs for Dr. Hilsberg on a CD player. Dr. Hilsberg assessed petitioner's mental status, and found that the song lyrics petitioner wrote expressed and illustrated petitioner's mental issues.⁷

The addendum to the report contained the following DSM-IV diagnoses, in order of importance:

Borderline Personality Disorder

Post-Traumatic Stress Disorder

Major Depression, Severe without Psychotic Features

Attention-Deficit Hyperactivity Disorder, Combined Type

Abuse of Child, Sexual and Physical

Reactive-Attachment Disorder, by history

Dr. Hilsberg formulated two goals for DMH services: improving school performance and reducing behavioral and emotional problems. She recommended several objectives relating to these goals. With respect to the goal of improving school performance, Dr. Hilsberg's recommended objectives included the daily completion of homework and school work; improvement in petitioner's ability to concentrate and focus in the classroom;

⁷ Dr. Hilsberg observed that the lyrics of one of the songs were relevant to one of the tragedies of petitioner's life: her mental illness prevents her from appreciating and accepting the love that Mother has for her.

improvement in organizational skills; and improvement in age-appropriate social interactions.

With respect to the goal of reducing behavioral and emotional problems, Dr. Hilsberg's recommended objectives included: the reduction of negative moods; an increase in petitioner's ability to use techniques to decrease depressive symptoms, agitation, and irritability; the elimination of harmful and self-destructive behaviors; an increase in petitioner's knowledge of and awareness of her mental illness; an increase in petitioner's ability to ask for assistance; and an improvement in petitioner's conflict resolution skills.

40. On September 27, 2005, the District convened an expanded IEP team meeting to review the DMH assessment conducted by Dr. Hilsberg. The meeting was held 21 days after September 6, 2006, the commencement of the regular District school year. The meeting was attended by Mother; by representatives from the District, including Blakely Coe, a special education coordinator at Paul Revere, and by representatives from DMH, including Dr. Hilsberg. Petitioner's therapist, Ms. Hornyak, did not attend or participate in the meeting. The majority of the IEP was left unchanged from the IEP of May 25, 2005, since the IEP team agreed that petitioner's needs had not changed significantly since the District's assessment in March 2005 or the IEP team meeting on May 23, 2005. As did the May 23, 2005 IEP, this IEP indicates that petitioner was placed in a therapeutic foster home shortly before the previous IEP meeting. There was no evidence that any such placement occurred.

The IEP incorporated the goals and many of the objectives set forth in Dr. Hilsberg's report. Further, the IEP refined these goals and objectives by setting benchmarks. In this regard, the IEP team determined that petitioner should reach the goals by March 2006.

41. The IEP team determined that petitioner had a history of negative behaviors, school problems, social problems, and past trauma, as set forth in the DMH assessment. The IEP team noted that DMH recommended residential placement so that

petitioner could benefit from special education services. The IEP team concluded that petitioner continued to be eligible for special education services as ED and recommended NPS residential placement with AB 3632 residential services. The IEP team also determined that travel to and from the residential placement would include four trips per year for the purposes of family reunification. The IEP team did not specify a particular residential placement, because the process of locating an appropriate placement normally occurs after the IEP meeting, when referral packets are sent and appropriate schools with openings are located. However, placement at Coutin was still available to petitioner pending the identification of a residential placement by DMH and petitioner's enrollment at such placement.

42. Mother disagreed with the recommendation for the residential placement, because she believed that Chaddock was the only school in the country that deals with attachment disorder. Mother agreed to have DMH attempt to locate an appropriate residential placement, but her preference was for petitioner to remain at Chaddock. Additionally, Mother stated that she would seek reimbursement for petitioner's educational and therapeutic expenses incurred at Chaddock.

43. By letter dated October 18, 2005, DMH offered petitioner placement at Excelsior. Excelsior is certified by the State of California and has contracts with the District and DMH to provide the education and other services recommended in petitioner's IEP of September 27, 2005. Excelsior is a residential facility located in Aurora, Colorado, which specializes in the education and treatment of adolescent girls with a variety of emotional and behavioral problems, such as petitioner, and has experience in treating students with attachment disorders. The students reside in cottages with approximately 12 through 22 beds, depending upon the needs of the students at the cottages. Class sizes range from approximately 5 to 15 students. It provides group therapy, but it also has the ability to offer one-to-one support to a student. Its staff is aware that the students may have a tendency to run away, and there are procedures to prevent such activity. Excelsior's

treatment program includes a level/phase system, by which appropriate behaviors are rewarded. The staff is aware that the students will attempt to manipulate them and the level/phase system. The average length of time that attachment-disordered students stay at Excelsior varies, but there was no evidence that, if the student has a home to which to return, she would stay at Excelsior for an undue length of time.

44. Mother never accepted the District's proposed placement at Excelsior. Mother never contacted Excelsior to learn more about its program and to determine whether it was suitable for her daughter. Neither Ms. Hornyak nor Mother would have accepted any offer of placement made in October, 2005, other than Chaddock.

45. Ms. Hornyak contacted Excelsior approximately a week prior to the hearing, and spoke to Terresa Hoffman, Excelsior's Admissions Director regarding two students. One was a "hypothetical student" (in reality, Ms. Hornyak intended the "hypothetical student" to be petitioner) whom Ms. Hornyak described as having had violent acting out behaviors and suicidal tendencies. Ms. Hornyak did not indicate that her inquiry regarding this hypothetical student was related to this matter, and Ms. Hoffman did not realize that the inquiry was related to this matter. Ms. Hornyak testified that Ms. Hoffman told her that it was unlikely that Excelsior would admit such a student, but that Ms. Hoffman would have to see the student's paperwork. At the time of this conversation, Ms. Hornyak was unaware that Excelsior had already offered admission to petitioner. The other student Ms. Hornyak had called to inquire about was not a hypothetical student, but rather another patient of Ms. Hornyak with reactive attachment disorder.

DUE PROCESS COMPLAINT

46. On October 28, 2005, Mother filed a due process complaint with the Office of Administrative Hearings, State of California, on behalf of petitioner against respondents District and DMH. Petitioner seeks reimbursement of out-of-pocket expenses related to her placement at Chaddock since June 7, 2005, including tuition and transportation expenses, as follows:

Treatment and education expenses: \$ 7,000 per month

Travel expenses to the time of hearing: \$ 6,153.00.

The travel expenses includes travel expenses of \$3,483 for petitioner and her escorts to travel to and from Los Angeles for Dr. Hilsberg's assessment on August 16, 2005.

Petitioner also seeks prospective funding for treatment and education expenses while she is at Chaddock (which is anticipated to be until December 2006), including the travel expenses for the parental visits at least every 6-8 weeks that the Chaddock program requires.

Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

CONCLUSIONS OF LAW

APPLICABLE LAW

1. Under the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code § 56000 et seq.) The term "free appropriate public education" means special education and related services that are available to the student at no cost to the parent, that meet state educational standards, and that conform to the student's IEP. (20 U.S.C. §1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California provides that DIS, California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code § 56363, subd. (a).)

2. Once a child is identified under the IDEA as handicapped, the local educational agency must: identify the unique educational needs of that child by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. This process results in the IEP. (Ed. Code §§ 56300-56302; 20 U.S.C. § 1412.)

3. The United States Supreme Court has addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that the instruction and services to be provided by the District as stated in a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198-200.) The school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201; *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519.)

4. The United States Supreme Court recently ruled that the petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 126 S.Ct. 528.)

5. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479; 1483.) Citing *Rowley*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that

procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parent's opportunity to participate in the IEP process. (*Ibid.*) The IDEA contains a similar formulation as to when a procedural violation constitutes a denial of a FAPE. (20 U.S.C. § 1415(f)(3)(E).)

6. The right to a FAPE arises only after a student is assessed and determined to be eligible for special education. (Ed. Code § 56320). A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code § 56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code § 56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code § 56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); an assessment may begin immediately upon receipt of the consent. (Ed. Code § 56321, subd. (c).) Thereafter, a school district must develop an IEP no later than 50 calendar days from the date of the receipt of the parent's written consent to assessment (excluding days of school vacation in excess of five school days) unless the parent agrees in writing to an extension. (Ed. Code § 56043, subd. (d).) (Education Code section 56043, subdivision (d), and Education Code section 56344, discussed *infra*, have recently been amended such that the 50 calendar day period to develop an IEP has been enlarged to 60 calendar days, but these amendments were not in effect at the time of the pertinent events in this matter.)

7. Thus, the analysis as to whether a school district has offered a FAPE is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA during the process of developing the IEP. The second inquiry is whether the IEP developed through the IDEA's procedures is reasonably calculated to

enable the child to receive educational benefits. (*Bd. of Education v. Rowley, supra*, 458 U.S. at 206-207.) Under the IDEA and *Rowley, supra*, a school district offers the student a FAPE by meeting the following substantive requirements: (1) the IEP has been designed to meet the student's unique needs; (2) the instruction and services that the IEP offers have been reasonably calculated to provide the student with some educational benefit; (3) the school district has comported with the IEP; and (4) the program set forth in the IEP is provided in the least restrictive environment (LRE).⁸ Whether a FAPE was provided under the substantive portion of the analysis is to be determined from the perspective of the IEP team at the time of the IEP, and not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141 at 1149.)

8. When, as in this case, issues pertaining to a student's residential placement are involved, additional procedures and deadlines apply. In California, a school district cannot offer residential placement when a student's eligibility for special education is based upon severe emotional disturbance without a review of the student's IEP by the county mental health department. (Gov. Code §§7572.5, 7572.55.) This review is ordinarily obtained by what is commonly referred to as an AB 3632 referral. The referral process begins when the parent consents to an assessment by the county mental health department.

9. Out-of-state residential placements shall be made by the county mental health department only in a privately operated school certified by the California Department of Education. (Gov. Code §7572.55, subd. (b).)

10. When an IEP team member recommends a residential placement for a pupil with an eligibility classification of seriously emotionally disturbed, an expanded IEP team

⁸ The requirement that the school district provide a program in the LRE is not at issue in this case, since the private placement selected by petitioner's mother is more restrictive than Coutin, and at least as restrictive as Excelsior.

meeting shall be convened within 30 days with an authorized representative of the community mental health service. If the community mental health service or the school district determines that additional mental health assessments are needed, the school district and the community mental health service shall proceed in accordance with California Code of Regulations, title 2, sections 60040 and 60045. (Cal.Code Regs, tit. 2, § 60100.)

11. A school district must initiate a referral for a mental health assessment within five working days of its receipt of parental consent to a referral. (Cal. Code Regs., tit. 2, § 60040, subd. (a).) The community mental health agency shall develop a mental health assessment plan and provide it to a parent within 15 days of receipt of the school district's referral. (Cal. Code Regs., tit. 2, § 60045, subd. (b).) The school district must schedule an IEP team meeting pursuant to Education Code section 56344 within 50 days from the mental health agency's receipt of the parent's written consent to the mental health assessment (Cal.Code Regs.,tit. 2, § 60045, subd. (d).) At all times relevant to this matter, Education Code section 56344(a) provided that the 50-day time period for convening an IEP meeting does not include school vacations in excess of five school days. Further, Education Code section 56344(a) provides that if the referral for an assessment has been made 20 days or less prior to the end of the regular school year, the IEP developed as a result of that assessment shall be developed within 30 days after the commencement of the subsequent regular school year. If the expanded IEP team decides to place the student in residential placement, a case manager shall be designated immediately, and the case manager shall coordinate the residential placement plan "as soon as possible." (Cal. Code Regs., tit. 2,§ 60110, subd. (a),(b).)

12. The process of obtaining special education mental health services is not designed for an emergency situation. (Gov. Code § 7576, subd. (f); Cal. Code Regs., tit. 2, § 60040, subd. (e).) If a student requires emergency services, a parent must seek other resources. (Gov. Code § 7576, subd. (g); Cal.Code Regs., tit. 2, § 60040 (e).) Furthermore, a

county public health agency is not responsible for any costs incurred prior to the approval of an IEP, except for the costs of conducting the mental health assessment. (Cal. Code Regs., tit. 2, § 60040, subd. (h).)

13. School authorities may be ordered to reimburse parents for their expenditures on private special education for a child if the school authorities did not offer the child a FAPE and if the unilateral private placement chosen by the parents is proper under the IDEA. (*School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359 at 369.) The IDEA supplements this principle by requiring that the offer of FAPE be timely and limits this right to reimbursement under the following circumstances: if the parents did not notify the IEP team at the IEP meeting that they were rejecting the proposed placement, stating their concerns and their intent to enroll the child in a private school at public expense; or if the parents did not give 10 business days written notice to the public agency of the foregoing information prior to removing the child from public school; or if the parents did not make the child available for evaluation; or upon a judicial finding that the actions of the parents were unreasonable. (20 U.S.C. §1412 (a)(10)(C)(ii) and (iii).) Under certain circumstances, there are exceptions to the notice requirement, such as if compliance with the notice requirement would cause serious emotional harm to the child. (20 U.S.C. §1412 (a)(10)(C)(iv).) These provisions were in effect at all times relevant to this matter, and were not changed by the amendments to the IDEA which took effect on July 1, 2005.

DISTRICT'S OFFER OF PLACEMENT AT COUTIN AS SET FORTH IN MAY 23, 2005 IEP

In the May 23, 2005 IEP, the District offered a non-residential placement at Coutin. Petitioner contends that this offer was not a FAPE, both procedurally and substantively. Petitioner has not met her burden of proof on these issues.

Procedurally, the District's offer was a FAPE. All timelines required by the Education Code were met, except that there was a four-day delay in holding the May 23, 2005, IEP meeting. To demonstrate that such a delay constituted a denial of FAPE, petitioner must

show that the delay seriously infringed upon Mother's participation in the process, or denied petitioner educational benefits, or impeded the petitioner's right to a FAPE. Petitioner does not contend that this minimal delay affected Mother's participation in the process.

Petitioner presents no evidence that this four-day delay deprived her of an educational opportunity. At least two weeks before the IEP meeting, and before Ms. Rabinowitz performed her assessment of petitioner, Mother applied to Chaddock. (Finding 23.) Eleven days before the IEP meeting, Chaddock accepted petitioner. (Finding 23.) Had the IEP meeting occurred on the 50th day (May 19, 2005), instead of on the 54th day (May 23, 2005), petitioner's situation would have been exactly the same. She still would have had her acceptance to Chaddock in hand, and she still would have rejected the proposed placement at Coutin. Petitioner presented no evidence that the four-day delay in holding the IEP meeting delayed petitioner's enrollment at Chaddock.

Substantively, the proposed placement at Coutin was also a FAPE. The District has offered a FAPE if the proposed placement at Coutin was designed to meet petitioner's unique needs, was reasonably calculated to provide petitioner with some educational benefit, and comported with the IEP.⁹ Most importantly, these factors are determined based upon the information known to the District at the time of the IEP meeting. (*Adams v. State of Oregon, supra*, 195 F.3d 1141 at 1149.) Based upon the information known to the District at the time of the IEP meeting, all of these factors have been met.

The IEP team considered Ms. Rabinowitz' report of the psychological and educational assessment and developed the IEP in conformity with her findings and

⁹ The fourth FAPE element, that the placement was in the least restrictive environment, is not applicable, since an NPS placement such as Coutin would be in a less restrictive environment than the residential placement at Chaddock which Mother and petitioner seek.

recommendations. Ms. Rabinowitz was aware, at the time of her assessment, of the following: Ms. Hornyak's letter of March 18, 2005, stating that petitioner's attachment disorder had "resolved"; petitioner had not been in special education for approximately two years; she was cooperative and friendly during the assessment; she was receiving private therapy; and Mother was not seeking a mental health assessment. Ms. Rabinowitz was not able to observe petitioner's classroom performance, because petitioner was being home-schooled. Under these circumstances, it was not unreasonable for Ms. Rabinowitz to consider petitioner as a candidate for an NPS day program upon assessing petitioner.

The goals, objectives, supports, and recommendations in the IEP were reasonably based upon the information that was available to the District at the time of the meeting. The IEP team found that petitioner required a structured and contained therapeutic setting to benefit from her education, and reasonably concluded that an NPS day program environment, such as Coutin, with DIS counseling support, provided these elements. Mother and Ms. Knoverek testified that the IEP accurately described petitioner's abilities and disabilities.

Prior to the time of the IEP meeting, the District members of the IEP team had no knowledge that petitioner required a residential placement. Mother did not specifically request that the District provide a residential placement until the IEP meeting and, at that time, Mother did not describe the specific circumstances which supported such a request. The District immediately and appropriately responded to Mother's desire for a residential placement by obtaining Mother's consent to a DMH referral, since DMH participation is required before the District can recommend a residential placement.

Viewed as of the time of the IEP meeting, the District's offer of placement at Coutin was designed to meet petitioner's unique needs and comported with the IEP. In fact, placement in an NPS day program is the highest level of educational intervention that the District can provide without DMH participation. Furthermore, respondents demonstrated that the placement at Coutin could have provided petitioner with an educational benefit.

Ms. Tau, who had performed petitioner's academic assessment which was included in Ms. Rabinowitz's March 9, 2005 report, testified that she was familiar with NPS facilities and DIS services. She testified that placement at an NPS, such as Coutin, with its small setting, small student/teacher ratio, contained environment, and therapeutic support, would have provided an educational benefit to petitioner.

Perky Waterman, Ph.D., coordinates placement of students in NPS settings for the District and has personal knowledge of Coutin. She testified that petitioner's attendance at Coutin, with its small classrooms, dedicated staff, "whole child" philosophy, and pervasive therapeutic support, would have provided petitioner with some educational benefit, and could have been an appropriate interim placement pending a DMH assessment and an offer of residential placement.

Dr. Hilsberg, who recommended a residential placement after assessing petitioner, testified that, with appropriate therapy, petitioner could have received an educational benefit from placement in an NPS day treatment facility as an interim measure until an AB 3632 assessment could be completed and an offer of residential placement made. Even though Dr. Hilsberg is not specifically familiar with Coutin, she is a highly credible witness. Her academic credentials are excellent, and are more impressive than those of any of petitioner's witnesses. Dr. Hilsberg assessed petitioner and wrote a thorough report about her. Both her testimony and her report reflect her high regard for Mother and her fondness of petitioner, thereby demonstrating a measure of impartiality.

In contrast, except for Mother, petitioner's witnesses on this issue had no knowledge of Coutin or the services it offers. Mother did not testify regarding any knowledge of Coutin since the time that petitioner had previously attended there, in approximately 2002-2003. Ms. Hornyak testified that her knowledge of Coutin was based only upon what Mother had told her.¹⁰ There was no evidence to support petitioner's

¹⁰ Ms. Hornyak's testimony in this matter was not persuasive, for several reasons. For example, in her letter dated March 18, 2006, she asserted that petitioner had

contention that, simply because her previous experience at Coutin was unsuccessful, an offer of placement at Coutin was inappropriate. There was no evidence that petitioner's program at Coutin, as set forth in the May 23, 2006 IEP, was comparable to petitioner's previous program at Coutin. Mother testified that petitioner's previous placement at Coutin was unsuccessful, in part, because of the male population there, but no evidence as to the current male population at Coutin was presented. It is particularly difficult to view Coutin's current male population (whatever it may be) as an inappropriate milieu, considering that petitioner not only attends classes with, but also lives in her cottage with, a population of emotionally disturbed adolescent males at Chaddock.

The legal requirement that the District's offer of placement at Coutin be considered in terms of the District's knowledge at the time it formulated the IEP, and not in hindsight, is particularly significant. Mother presented no evidence that, at the time Ms. Rabinowitz was assessing petitioner and writing her report, anyone at the District knew of any emergency, or of petitioner's escalating behaviors, or of her acceptance at Chaddock, or that a residential placement was necessary, or that any of the District members of the IEP team were aware that Coutin had been an unsuccessful placement.

recovered from her reactive attachment disorder and post-traumatic stress disorder, which was incorrect. Since Ms. Hornyak has treated petitioner for many years, and specializes in attachment disorders, this error is troubling. Second, her testimony regarding her pre-hearing telephone contact with Ms. Hoffman, one of respondents' witnesses, is also troubling. Ms. Hoffman testified that she did not know that the telephone call had anything to do with this matter, when, in fact, the hypothetical patient which Ms. Hornyak described to her was intended to be petitioner. By using her professional position to surreptitiously seek information from Ms. Hoffman which might be detrimental to respondents, Ms. Hornyak displayed an unseemly bias.

At some undetermined time between completing her assessment report and the date of the IEP meeting, Ms. Rabinowitz became aware of Ms. Hornyak's letter of May 10, 2005, to DCFS requesting a residential placement. This letter is the only evidence that the District had knowledge that Mother was seeking a residential placement.¹¹ However, prior to the IEP team meeting, Mother did not request a residential placement from the District, and did not advise the District that she had applied for, and obtained, petitioner's admission to Chaddock.

Mother's failure to advise the District of these matters is particularly significant, because, as Mother testified, she and Ms. Hornyak know petitioner "best." Mother knew that the District was at a disadvantage with respect to its knowledge of petitioner's needs, making it even more important that Mother keep the District apprised of them. Mother cannot simply assign the District the task of proposing an appropriate educational program for her daughter, provide information that leads to certain conclusions, withhold information that might have led to an alternate conclusion, and then criticize the District for not having reached the alternative conclusion more quickly than it ultimately did. Petitioner cites no legal authority that, under these circumstances, the District should have known that she clearly required a residential placement and that an NPS day school placement would not provide a FAPE.

Consequently, considered prospectively, the offer of placement at Coutin was an offer of FAPE.

¹¹ Respondents' Exhibit 6 is a letter dated May 6, 2005, from Zhanna Verkh, M.D., petitioner's psychiatrist, to DCFS, also requesting residential placement. This letter was not among the proposed exhibits respondents submitted prior to the due process hearing. It was submitted by petitioner as a proposed exhibit prior to the due process hearing. There was no evidence that the District had any knowledge of this letter prior to the May 23, 2005, IEP team meeting.

DISTRICT'S AND DMH'S OFFER OF RESIDENTIAL PLACEMENT AT EXCELSIOR

In the September 27, 2005, IEP the District and DMH offered residential placement at Excelsior. Petitioner contends that this offer was not a FAPE, both procedurally and substantively. Petitioner has not met her burden of proof on these issues either.

California Code of Regulations, title 2, section 60100, provides for a 30-day period to hold an expanded IEP meeting when an IEP team recommends a residential placement for a student in the eligibility category of serious emotional disturbance. Holding such a meeting in 30 days would have served no purpose under the circumstances of this case. It was immediately apparent that an additional mental health assessment was necessary, and petitioner was not made available for assessment until August 16, 2005, in any event. Furthermore, section 60100 specifically provides that when, as here, DMH determines that additional mental health assessments are needed, the time provisions of California Code of Regulations, title 2, sections 60040 and 60045 apply. As was stated above, these regulations provide for the initiation by the school district of a referral within five working days of its receipt of parental consent to a referral, the development of an assessment plan and presentation of it to a parent within 15 days of the receipt by the mental health agency of the referral, and the convening of an IEP meeting pursuant to Education Code section 56344, within 50 days from the receipt by the mental health agency of the parent's consent to the assessment, not including periods of school vacation in excess of five school days. The September 27, 2005, IEP meeting complied with these requirements. Additionally, the IEP was held within 30 days after the commencement of the school year, as required by California Education Code section 56344(a).

Besides the failure to hold an expanded IEP within 30 days, there was only one minor deviation from those time provisions. The District delayed 13 days in referring the case to DMH after Mother had consented to the assessment at the May 23, 2005, IEP meeting. The referral should have occurred on May 31, 2005, five working days after May 23, 2005. Instead, it occurred on June 13, 2005.

As was stated above, to constitute a denial of FAPE, these procedural deviations must have seriously infringed upon Mother's participation in the process, or denied petitioner educational benefits, or impeded her right to a FAPE. Petitioner does not contend that these deviations seriously infringed upon Mother's participation in the process, and there is no evidence that they did so. Further, there was no evidence that petitioner was deprived of an educational benefit or opportunity because of the failure to hold the expanded IEP meeting within 30 days, or because of the 13-day delay. Rather, petitioner was enrolled at Chaddock as of June 7, 2005, and she contends that she was obtaining educational benefits.

Moreover, there was no evidence that petitioner would have deferred enrollment at Chaddock had the referral or the IEP meeting occurred earlier. Indeed, the May 31, 2005, letter from DMH to Mother advised Mother of both DMH's desire to conduct an assessment, and warned Mother that Chaddock might not meet the criteria for funding by the District and DMH. Yet, only a week later, Mother unilaterally placed petitioner at Chaddock anyway. Nor was there evidence that petitioner would have transferred from Chaddock to Excelsior at any time, such that petitioner was denied an educational benefit by not having been offered Excelsior at any date on or after June 7, 2005.

Petitioner contends that the timelines should have been applied such that the school vacation days during the summer should have not have been included in the 50 calendar day period for holding an IEP after DMH received Mother's consent to the DMH assessment. Although Dr. Hilsberg testified that DMH does not subtract school vacation days in calculating the timelines, she cited no legal authority for this practice, nor does petitioner. Rather, California Code of Regulations, title 2, section 60045, which provides for the 50-day timeline, specifically refers to Education Code section 56344. Education Code section 56344 subdivision (a), provided, in turn, during the time period applicable to this case, that school vacation periods in excess of five school days do not apply to the 50-day period.

To the extent that petitioner contends that such days should count, however, such that the IEP meeting and placement offer at Excelsior were delayed, then a large amount of the delay must be attributed to Mother. She did not make petitioner available for assessment until the middle of August 2005, rather than in early July, as Dr. Hilsberg testified would have been desirable.

In any event, there was no evidence that petitioner was denied any educational benefit by virtue of the IEP not having occurred by August 25, 2005, the date for an IEP if there had been no allowance for the school vacation. There was no evidence that petitioner would have transferred from Chaddock to Excelsior at any time. Nor, again, was there any evidence that this delay significantly impeded Mother's ability to participate in the decision- making process.

Therefore, neither the District nor DMH denied petitioner a FAPE on procedural grounds.

Substantively, the legal issues with respect to September 27, 2005 IEP and the offer of placement at Excelsior are the same as were discussed above regarding the May 23, 2005 IEP and the District's offer of placement at Coutin. The issues are whether the IEP was designed to meet petitioner's unique needs; whether the school district comported with the IEP; and whether the IEP was reasonably calculated to provide petitioner with some educational benefit.¹² A significant difference between the FAPE analysis as applied to Coutin and the FAPE analysis as applied to Excelsior (besides the obvious fact that they are different institutions) is that the FAPE analysis with respect to Coutin involves a placement that was offered before petitioner was enrolled at Chaddock; the analysis with respect to Excelsior involves a placement that was offered afterwards. This is significant because of

¹² Ordinarily, a placement also must be in the LRE to constitute a FAPE, but since the alternative residential placements which are at issue are among the most restrictive environments available, the element of LRE is not relevant.

petitioner's attachment disorder. Even so, petitioner has not met her burden of proving that the District's offer of placement at Excelsior denied her a FAPE.

First, the IEP was designed to meet petitioner's unique needs. It was based on the May 23, 2005, IEP, which, as was noted above, both Mother and Ms. Knoverek testified accurately described petitioner's abilities and disabilities. The September 27, 2005, IEP was expanded to incorporate the goals and many of the objectives in Dr. Hilsberg's assessment, none of which were criticized or contradicted at the hearing.

Second, Excelsior's program itself would have met petitioner's unique needs, and would have comported with the IEP. Respondents' witnesses, Terresa Hoffman (the admissions director at Excelsior), and Jill Gottlieb, L.C.S.W. (the case manager for students in DMH's residential treatment program), testified from personal knowledge about Excelsior's environment and offerings. Ms. Hoffmann emphasized that Excelsior was capable of designing a program to meet petitioner's unique needs, as set forth in the IEP of September 27, 2005. If petitioner required one-on-one services, or a smaller number of co-residents in her cottage, Excelsior could have provided them. Excelsior also provides the safe environment, the trained professionals, group therapy, and the around-the-clock support that Dr. Hilsberg recommended for the treatment of petitioner.

Third, placement at Excelsior would have provided petitioner with educational benefit. Petitioner contends that to move to Excelsior from Chaddock in October 2005 or thereafter would have caused her such psychological harm that she could not access the curriculum at Excelsior. Petitioner has not met her burden of proof on this issue. Dr. Hilsberg testified that it would be too speculative to conclude that petitioner's psychological condition upon a move to Excelsior would be so disrupted that she could receive no educational benefit from placement at Excelsior. Rather, Dr. Hilsberg noted that it was possible for petitioner to be prepared for a move to Excelsior so as to minimize any disruption to her ability to access her education, and suggested positive ways in which the move could be presented to petitioner. In this regard, Molly Greening, M.S.W. (one of

petitioner's therapists at Chaddock), and Ms. Hoffman testified that their respective institutions would do as much as they could to prepare petitioner for any move from Chaddock to Excelsior.

In fact, the evidence overwhelmingly demonstrated that petitioner has tolerated numerous moves throughout her life with Mother, such as the moves between Mother's residence in Los Angeles and the residence of Foster Family in Grass Valley. These moves have, of necessity, involved not only changes in residences, but also changes in schools. Chaddock is the sixth school that petitioner has attended. Both Mother and Ms. Hornyak testified that these moves were part of the therapy for petitioner's attachment disorder. Petitioner presented no persuasive evidence as to why moving her from Chaddock to Excelsior, from one therapeutic environment to another, in a carefully planned and coordinated manner, with proper explanations and supports for petitioner, would be any more or less distressing to her than the prior numerous deliberate moves that petitioner has made from throughout the time she has lived with Mother.

Indeed, at a certain level, petitioner's program at Chaddock appears to be designed so as to increase the likelihood that she will be subject to major, unexpected, and precipitous changes in her close relationships. For example, an attachment counselor is a key therapeutic feature of Chaddock's program for petitioner. This is a person to whom petitioner is to bond, as though to Mother, and eventually transfer that bond to Mother. She separates from petitioner when she takes vacations, sick leaves, and holidays. Most significantly, however, because this person is only a Chaddock employee, she could suddenly disappear from petitioner's life. She could be terminated, or simply quit her employment. Chaddock obviously expects that petitioner can adjust to that change, regardless of the degree to which petitioner has bonded with the person. Under these circumstances, the testimony of petitioner's witnesses that her psychological state, and thus her ability to access her education, would have been seriously jeopardized if she had

been moved from one therapeutic environment to another in October 2005 or thereafter, is unpersuasive.

Furthermore, petitioner's contention that, once placed at Chaddock, she cannot be moved due to her attachment disorder, contains the broader implication that any offer of placement other than her current placement is a denial of FAPE. If so, then school authorities would almost never, by definition, be able to provide a FAPE to child with attachment disorder when to do so would require such a child to be moved from the private placement unilaterally chosen by her parents, so long as the private placement was appropriate under the IDEA. Petitioner has not cited any authority that the IDEA, or its policies, support the theory that parents of attachment-disordered children have such an unfettered right to a private placement at public expense, simply because their child has the misfortune of having an attachment disorder.

On the other hand, both sides presented evidence that tended to show that a move to Excelsior could be beneficial to petitioner (although petitioner did not concede any such benefit). For example, both Mother and Ms. Hornyak testified that petitioner was sexually precocious, was distracted by boys, and was at risk for becoming pregnant before she completed adolescence. These factors were presented as evidence of petitioner's emotional disturbance, and as reasons why petitioner was unable to access her educational curriculum. Chaddock, however, is a coeducational school, at which petitioner not only attends classes with emotionally disturbed adolescent boys, but resides with them in her cottage. Mother and Ms. Greening testified that this situation was desirable, because it would assist the 15- year old petitioner to have "normal" relationships with boys.

Excelsior is an all-girls school, and it is safe to conclude that petitioner's ability to focus on her studies and her chances of avoiding sexual encounters with boys would be considerably enhanced if she attended Excelsior rather than Chaddock. Yet, implicit in the testimony of Mother and Ms. Greening is the idea that the benefit for an at-risk, sexually precocious 15-year old of being in an environment that is less distracting and also

relatively free from the risk of an unwanted pregnancy was outweighed by the benefit of developing normal relationships with boys.

Such testimony adversely reflects upon the credibility of these witnesses. Advocating petitioner's placement in such a pervasive coeducational environment as is offered by Chaddock, where she both goes to school and resides with boys, contradicts their testimony that petitioner's interest in sex and boys is a serious problem for her.

Furthermore, the implication that Chaddock's environment in this regard is actually better than Excelsior's is unreasonable. Reason suggests that petitioner has a lifetime to attempt to develop "normal" relationships with boys; protecting her from inappropriate sexual activities and providing her an environment which makes it easier for her to focus on her schoolwork without distraction would seem to take priority at this stage of her life.

Another possible advantage of Excelsior over Chaddock which was not acknowledged by petitioner is that Excelsior has experience treating a variety of disorders, rather than concentrating on attachment disorder. This may be beneficial to petitioner, especially because, according to Dr. Hilsberg, petitioner's primary diagnosis is borderline personality disorder. Dr. Hilsberg ranked petitioner's attachment disorder as much lower in significance than her borderline personality disorder.

In an attempt to demonstrate that Excelsior was not an appropriate placement for petitioner, petitioner cited various differences in the therapeutic programs between Excelsior and Chaddock, including the smaller student population in Chaddock's cottages and classes, Chaddock's use of an "attachment counselor," the smaller adult/student ratio, Chaddock's use of the therapeutic touch, Chaddock's version of a "level" program, and the extreme awareness of Chaddock's personnel to the possibility that they are being manipulated by the adolescents in their care. Although this testimony may tend to prove that Chaddock is, in fact, a better placement for petitioner than Excelsior, this evidence is not determinative of the issue of whether respondent's offer of placement at Excelsior

constitutes a FAPE.¹³ As was discussed above, to constitute a FAPE, a proposed placement need only be “reasonably calculated to provide some educational benefit.” (*Rowley, supra*, 458 U.S. at 206-207.) It does not need to be the best program possible, or the best program available, to be considered a FAPE.

In any case, the testimony of petitioner’s witnesses regarding the program at Excelsior is not persuasive. They have not visited Excelsior. Ms. Hornyak has had one conversation with one person at Excelsior (Ms. Hoffman), which did not focus specifically on Excelsior’s programs and offerings, but rather on more general issues, such as whether a hypothetical student would be accepted there. Ms. Hornyak’s testimony demonstrated no particular familiarity with Excelsior’s services or capabilities. Ms. Greening and Ms. Knoverek based their testimony about Excelsior only upon the information contained in Excelsior’s brochure. Both Ms. Greening and Ms. Knoverek acknowledged that their information about Excelsior was incomplete. None of petitioner’s witnesses could explain why the somewhat larger cottage, classroom and overall populations at Excelsior and the larger adult-student ratio at Excelsior, as compared with Chaddock, would prevent petitioner from receiving some educational benefit from attending Excelsior.

In this regard, neither the IEP of May 23, 2005, nor of September 27, 2005, require any particular class size, cottage size, school size, one-on-one support, or an attachment counselor. Ms. Hilsberg’s report does not mention these matters. Ms. Hornyak’s letter dated May 10, 2005, and Dr. Verkh’s letter dated May 6, 2005, both of which recommend residential placement, do not mention any such matters, either. Furthermore, with respect to one-on-one support, petitioner’s witnesses testified that petitioner required such

¹³ Respondents disputed the merits and professional acceptance of the therapeutic touch component of Chaddock’s program, but it is neither appropriate nor necessary to resolve any such issues in this Decision.

support earlier in her stay at Chaddock, but did not require such services constantly at this time.

Consequently, petitioner has not met her burden of proof that the District's offer of placement at Excelsior has denied her a FAPE.

THE STATUTORY AND REGULATORY PROCESS FOR RESIDENTIAL PLACEMENTS

Finally, petitioner challenges the entire procedure in California for residential placements. Petitioner contends that, since she required a residential placement as of the May 23, 2005, IEP meeting, under the IDEA the District should have offered her a residential placement at that time. She contends that California's statutory and regulatory two-step residential placement process by which an AB 3632 referral must be made, an assessment performed, and an expanded IEP meeting held, violates the IDEA, because it does not comply with IDEA deadlines. Rather, she contends that it unduly and illegally lengthens the process by which petitioner could receive an offer of residential placement. Specifically, petitioner contends that, since the District did not offer petitioner a residential placement prior to her enrollment at Chaddock on June 7, 2005, she was denied an educational opportunity. She concludes that the failure to so offer her a residential placement denied her a FAPE.

This contention is unpersuasive. The statutes and regulations followed by the respondents in offering a residential placement to petitioner did not deny her a FAPE. As was discussed *supra*, the District's offer of placement at Coutin, which was made and could have been accepted prior to her enrollment at Chaddock, would have been an appropriate interim placement until a residential placement could be offered.

The only authorities cited by petitioner in support of her position are a SEHO case, *Student v. San Diego Unified School District and San Diego County Mental Health*, California SEHO Case No. SN 1146 (2003), and *Evans v. Evans* (818 F. Supp. 1215 (N.D. Ind. 1993)). Neither of those cases is binding authority. (See, Cal.Code Regs., tit. 2, § 3085.) Moreover, each of these cases is distinguishable on its facts.

Student v. San Diego, supra, involved a private placement by parents who had requested not only an assessment from the school district, but also a concurrent mental health referral. Despite the parent's request, no such concurrent referral was done. The District's IEP meeting was delayed well beyond the 50-day limitation, and, once it was held, the District offered no true IEP. Rather, it merely offered monetary reimbursement to the parents for the private placement. The extended IEP to consider the results of the mental health assessment was held almost three weeks after the 50-day limitation. The hearing officer ultimately found, under these facts, that the timelines set forth in the California Code of Regulations regarding the DMH assessment for residential placements violated the IDEA. However, none of those circumstances occurred in this case. This case does not involve a request for a concurrent mental health referral, an inadequate IEP, and unduly lengthy delays.

Evans v. Evans, supra, was a class action in which the court found that the process in Indiana for residential placements, which involved an additional application and review process upon development of an IEP, caused lengthy, systematic delays, thereby violating the IDEA. The court found that the process for the additional application alone took an average of 160 days. When this was added to the 5-6 week average time between development of the IEP and the application for residential placement, the court found that the total average delay was nearly 200 days. No such lengthy delay occurred in this case, and there was no evidence that California's requirement of DMH participation before an IEP team recommends a residential placement systematically creates such lengthy delays.

Neither of these cases supports a conclusion that, under the facts of this case, the timelines in which DMH may make assessments for residential placements are invalid. Rather, the facts of this case indicate that the District and DMH performed their respective tasks in a reasonably timely manner. Although the District missed two deadlines, each such deadline was only missed by a few days. There was no denial of FAPE.

Since the respondents have offered petitioner a FAPE, petitioner is not entitled to reimbursement of any expenses incurred or to be incurred by reason of her attendance at Chaddock, or to prospective placement there. (*School Committee of the Town of Burlington v. Dept. of Education, supra*, 471 U.S. at 369 and 20 U.S.C. §1412, (a) (10) (C)(ii) and (iii).)

In view of this determination, there is no need to decide whether Chaddock is an appropriate placement under the IDEA (*Burlington, supra*, 471 U.S. at 369) or to decide the impact on reimbursement of Mother's conduct in placing petitioner at Chaddock prior to giving DMH an opportunity to assess petitioner, and related issues. (20 U.S.C. § 1412 (a)(10)(C)(ii)- (iv).

ORDER

The request of petitioner for relief and/or reimbursement of private placement and services, costs, and expenses from respondents Los Angeles Unified School District and Los Angeles County Department of Mental Health is denied. The due process complaint of petitioner shall be dismissed.

PREVAILING PARTY

Education Code section 56507, subd. (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that respondents prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: May 10, 2006

ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings