BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: EDUCATIONAL RIGHTS HOLDER ON BEHALF OF STUDENT, v. CONTRA COSTA COUNTY PROBATION DEPARTMENT.	OAH CASE NO. 2013080462

DECISION

On August 12, 2013, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH), naming the Contra Costa County Probation Department (Probation). On August 26, 2013, the 45-day decision timeline commenced with the parties' written waiver of the resolution session and formal request to advance the decision timeline. OAH granted a continuance on September 16, 2013, and bifurcated the issue of whether Probation is a responsible public agency for a separate hearing, which determined Probation to be a responsible public agency.

Administrative Law Judge (ALJ) Peter Paul Castillo heard this matter in Martinez, California, on November 18, 19, and 20, 2013.

Rebecca S. Williford and Elizabeth Dorsi, Attorneys at Law, represented Student. Student was not present at the hearing.

Christina Ro-Connolly and Cameron Baker, Attorneys at Law, represented Probation. Bruce Pelle, Probation Director, was present for the entire hearing.

The hearing commenced on November 18, 2013, and oral and documentary evidence were received. At the conclusion of the hearing, the matter was continued to

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December 20, 2013, at the parties' request to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

ISSUES[1]

Issue 1: During those times in which Student was in the security program and Probation prevented Student from receiving education services from the Contra Costa County Office of Education (County), from on or about May 7, 2012 through October 5, 2012, and November 6, 2012 through January 7, 2013, did Probation deny Student a free appropriate public education (FAPE) by failing to:

a. Perform its respective child find duty by not assessing Student for eligibility for special education services;
b. Find him eligible for special education services; and
c. Provide him with special education services through an individualized education program (IEP)?

Issue 2: From March 13, 2013 through August 9, 2013, did Probation fail to develop an IEP that met Student's unique needs because Probation failed to:

a. Consider a continuum of placements to meet his unique needs;
b. Offer Student special education services to meet his unique needs, including specialized academic instruction, psychological and mental health services, and counseling and behavior services;

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[1] The issues were framed in the November 12, 2013 Order Following Prehearing Conference. The issues have been rephrased and reorganized 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 School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

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c. Establish measurable goals to meet Student's unique needs in the areas of behavior; and

d. Develop a plan to meet Student's behavioral needs?

Issue 3: From March 13, 2013 through August 9, 2013, did Probation deny Student a FAPE by failing to:

a. Have qualified personnel, including those from County, provide Student with special education services;

b. Convene IEP team meetings when Student did not meet his IEP goals;

c. Provide Student with individualized academic instruction and special education services; and

d. Conduct a functional behavior assessment?

SUMMARY OF DECISION

On October 17, 2013, OAH determined that Probation is a responsible public agency for providing Student with a FAPE when Student was in a security program and Probation prevented him from receiving education services from County.[2]

Student asserts that Probation denied him a FAPE by failing to identify him as a minor who might require special education services and failing to assess him for possible eligibility to receive special education services. Additionally, during those periods before and after he was found eligible for special education services, in which he could not attend Mt. McKinley, the school operated by County in Juvenile Hall, because Probation placed him on security restriction, he contends that he did not receive any educational services, included those required by his March 13, 2013 IEP, which caused him to fail to make meaningful educational progress. Additionally, during those

[2] Student had named County as a party. Student settled his matter against County and dismissed County as a party on October 2, 2013.

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instances when Probation prevented Student from accessing educational opportunities, Student contends that Probation was required to assess him and develop an IEP that would provide him with a FAPE.

Probation contends that for the period before County started its assessment and found Student eligible for special education services that the County did not provide education services to any regular education student while on security restriction. Additionally, Probation argues that it provided Student with necessary mental health services before and after his eligibility, which allowed him to make adequate progress in this area, and it never prevented County from assessing him or providing counseling services. Probation also claims that Student is not entitled to any relief because he made educational progress while in Juvenile Hall.

This Decision finds that Probation did not have a child find duty because it did not prevent the County from accessing Student as he was not on any security restriction until right before County began its assessment. Additionally, while Probation is rightfully concerned about the safety and security of all Juvenile Hall residents and personnel, it has the legal obligation to ensure that its eligible wards receive special education services, even when disciplined or placed in protective custody. After County found Student eligible to receive special education services, Probation did prevent County from sending an aide into the housing unit to serve Student while on security restriction, which denied him a FAPE because Probation failed to make any attempt to see if Student could be safely educated. While Probation prevented County personnel from providing specialized academic instruction, it never prevented the delivery of counseling services, or prevented County from assessing him or developing appropriate IEP's.

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FACTUAL FINDINGS

JURISDICTION AND FACTUAL BACKGROUND

1. Student is an 18-year-old young man in the 12th grade. He was incarcerated in Juvenile Hall, which is the educational responsibility of County, who operates Mt. McKinley within Juvenile Hall. Student entered Juvenile Hall on May 7, 2012, through October 5, 2012, when Probation placed him in a group home. Student returned from the group home and into Juvenile Hall on November 6, 2012. Probation placed Student in another group home on January 8, 2013, and he returned to Juvenile Hall on January 28, 2013. He remained in Juvenile Hall through August 9, 2013, when he was released from Juvenile Hall into his Mother's custody.

2. No prior school district had found Student eligible for special education services before his entry into Juvenile Hall. The Mt. Diablo Unified School District (Mt. Diablo) assessed Student and found him not eligible for special education services, but found him eligible for a Section 504 plan.[3] On January 3, 2013, Mother requested that County assess Student for special education eligibility. County started the assessment process after Student returned to Juvenile Hall on January 28, 2013. County found Student eligible for special education services on March 13, 2013, under the category of emotional disturbance. On August 9, 2013, the juvenile court released Student from Juvenile Hall into the custody of his Mother. Student has received home-hospital instruction from Mt. Diablo since his release through the date of the hearing.

[3] A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to students with physical or mental impairments that substantially limit a major life activity such as learning.

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JURISDICTIONAL HEARING

3. At the prior hearing, the parties disputed whether Probation was a public agency responsible for providing special education services at all times while Student was detained in Juvenile Hall, just during specified periods or not at all. OAH found Probation to be a responsible public agency during those times in which it placed Student in a security level and he missed educational services from County because he could not either attend Mt. McKinley or receive special educational services.[4]

MT. MCKINLEY SCHOOL

4. California law imposes the obligation to educate a Juvenile Hall ward on County. Probation has the legal obligation to provide County with adequate space at Juvenile Hall to operate a school, Mt. McKinley, and has the duty to cooperate with County's operation of the school. Probation and County developed a memorandum of understanding to effectuate this requirement in 2009, which included provisions for ensuring all children in Juvenile Hall receive an education, and meeting the special education needs of wards eligible for these services. In the jurisdictional hearing, Mr. Pelle, Probation Director of Juvenile Hall, admitted that he did not know of the

[4] In its closing brief, Probation asserted that the recent California Supreme Court decision, *Los Angeles Unified Sch. Dist. v. Garcia* (2013) 58 Cal.4th 175, supports its contention that it is not the responsible public agency at any time a minor is incarcerated at Juvenile Hall. However, that decision is not applicable because it involved a unique residency question for eligible students incarcerated in an adult correctional facility, for which no educational agency is specified in statute to provide special education services, which is not the situation in this case.

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existence of the memorandum of understanding until recently, and therefore Probation was not implementing it.

WARDS IN SECURITY PROGRAM

5. Probation's security program is a disciplinary program for major rule violations, a pattern of minor rule violations, or for wards who present an immediate threat to another person. Probation recognizes that if a minor is segregated from the rest of the population, the ward is entitled to a hearing to contest being put on a security level or upgrade in the security level. This is applicable to wards on any of the three levels of security separation. Only wards on Special Program have the opportunity to attend Mt. McKinley. Probation's written policy does not discuss access for County personnel to provide services if the ward on a security level is not permitted by Probation to attend Mt. McKinley.

Special Program

6. Special Program is the lowest level of security segregation. Probation places a ward on Special Program for behavior modification if he or she constantly commits minor rule violations, or engages in behavior that creates a lower level safety threat, and to help integrate wards that have been in Security Risk or Maximum Security programs back to the general population. A probation institutional supervisor decides whether a ward is placed in Special Program and documents any restrictions on school attendance. If a ward with an IEP cannot attend Mt. McKinley, a County aide will enter the housing unit to provide instruction.

Security Risk

7. Probation places wards on Security Risk who present a safety risk or as a step down from Maximum Security. Wards on Security Risk cannot participate in any

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housing unit activity, including attending Mt. McKinley. As with wards on Special Program, Probation retains ultimate authority to determine when a ward may return to Mt. McKinley or if a County aide may enter the housing unit to provide instruction.

Maximum Security

8. Probation prevents wards on the highest level of security program from attending Mt. McKinley, as the wards are confined to their rooms except for outside access for an hour a day. Probation maintains authority to decide whether County personnel can access a student on Maximum Security. Until recently, Probation's policy was that a ward on Maximum Security could not be seen by County aides because of a threat to the tutor, Probation staff, other wards, or that student.

CHILD FIND

9. Probation did not place Student on any security restriction before his first group home placement, nor after his return through his second group home placement on January 8, 2013. Student attended Mt. McKinley upon his entry into Juvenile Hall, and received no special education services until right after the March 13, 2013 IEP team meeting. Student presented no evidence that Probation interfered with County's legal obligation to seek and serve students who might require special education services, like Student. Additionally, even if Probation placed Student on security restriction, County would not have sent an instructional aide to tutor Student because he was a general education student. Therefore, Probation did not have a child find obligation because it never prevented County from seeing Student and making a determination whether it should assess him.

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SPECIAL EDUCATION SERVICES

10. Student contended that, during the times he was on one of three security levels and Probation prevented County from providing special education services, Probation had the legal obligation to implement his IEP and to comply with other special education requirements, such as conducting assessments and determining whether Student might require additional special education goals, services or placement. [5] Probation, asserted that it did not have an obligation to assess Student. Further, while not conceding that it had to provide Student any special education services, Probation asserted that it demonstrated that it appropriately restricted access for safety and security due to Student's erratic and dangerous behaviors.

11. Student's mental health progressively became worse during his incarceration and group home placements. The two group homes had Probation return Student to Juvenile Hall because his conduct became more erratic and violent, assaulting staff and other residents. Probation had a Mental Health psychologist, Dr. Edward Donnelly, regularly visit Student because of his behaviors in Juvenile Hall. Upon his return in January 2013, Student reported hearing voices. On February 5, 2013, Probation placed Student in Maximum Security for threatening and spitting on staff. Probation placed Student in a safety smock after he physically attacked staff and was physically restrained.

12. Student's behavior improved subsequently and a week later he had transitioned down to Special Program, but expressed paranoid and delusional thoughts, such as believing that staff spat in his food before serving him. Student continued to

[5] Student attempted to argue at this hearing that Probation denied him a FAPE anytime it prevented him from attending Mt. McKinley. However, this contention was rejected in the jurisdictional hearing and is not considered in this decision.

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remain on Special Program during February 2013, evidencing symptoms of auditory hallucinations, inappropriate laughing, and facial twitching. On March 11, 2013, Dr. Donnelly visited Student and Student became extremely agitated, accusing Dr. Donnelly of blowing mucus into his eye, after accusing other residents and staff of doing the same into his food. Finally, on the day of Student's initial IEP team meeting, March 13, 2013, Probation placed Student on Security Risk because he spat on another resident who he accused of putting mucus in his food.

13. As of the March 13, 2013 IEP team meeting, he had only attended Mt. McKinley for a couple of days between his January 2013 return and the March 13, 2013 IEP team meeting because his behaviors and conduct led Probation to place him on a security restriction and not to allow him to attend school. Because Student was still a regular education pupil, County did not send an aide into his housing unit to provide instruction.

14. The March 13, 2013 IEP provided Student with 90 minutes a day of specialized academic instruction, pushed into the general education classroom. Student's Parents consented to this IEP.

15. After the IEP team meeting, Student remained on security restriction, moving at first between Special Program and Security Risk. He continued to have hallucinations and accused staff and other residents of spitting into his food and shoes. In April 2013, Student started to defecate in the shower and threw excrement in his room, and was extremely angry and stressed out. In early April 2013, Probation placed Student in Maximum Security as he attempted to escape and had to be restrained. Student remained in Maximum Security, until mid-April when he went down to Security Risk for the rest of the month. During April, Dr. Donnelly primarily spoke to Student from outside Student's door because of the safety risk Student's posed, especially

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Student getting agitated when he believed someone, including Dr. Donnelly, was 'flicking boogers' at him.

16. For most of May 2013, Student fluctuated between Security Risk and Special Program, and his behavior remained rather stable. However, on May 23, 2013, Student totally decompensated as he was smearing feces in his room, and Dr. Donnelly made arrangements for Student to have a psychiatric evaluation at a local hospital. On May 25, 2013, Student was transferred to a psychiatric unit at another hospital as he continued to exhibit the same behavior. Student was released back to Juvenile Hall on June 17, 2013, and while he still experienced delusions, these could be countered by serving Student food in sealed containers which was opened in front of him to alleviate the worry of people spitting into his food. Student also began to take medication.

17. On July 9, 2013, after Student's mental health hospitalization, County increased his counseling to three times a week, 20 minutes a session, and implemented a behavior support plan. After Student was finally released on August 9, 2013, Student again was hospitalized after he stopped taking his medications and started to display behaviors that demonstrated to a threat to himself and others.

Counseling Services

18. The evidence established that Student received counseling services when Student was on any of the three security levels from the March 13, 2013 IEP team meeting through Student's discharge. Suzanne Heim-Bowen, School Psychologist with County, established that except for rare situations, she has provided counseling services in the housing unit, including to Student. Ms. Heim-Bowen eventually conducted Student's counseling in the visiting area so Student would not be distracted by other youths. As to counseling provided by Mental Health on behalf of Probation, Student did not present evidence that Dr. Donnelly could not enter the housing unit to provide counseling services to Student when he was on a security level. Therefore, Student did

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not establish that he did not receive counseling services in his March 13, 2013 IEP when prevented from attending Mt. McKinley because he was on a security level.

Academic Services

19. County's procedure at all times relevant to this action was for one of the instructional aides to telephone the probation counselor on each housing unit to find out which students would not attend Mt. McKinley. At times relevant, the probation counselor informed the instructional aide of the particular security level for the student. The instructional aides made a plan to visit students with IEP's to provide the specialized academic instruction in the housing unit. County typically did not provide direct academic instruction to general education pupils. For students with IEP's the aides prepared a log sheet for each student that stated the date; the reason why the student did not attend Mt. McKinley, including the particular security level; the amount time the aide worked with the student, if any; which aide worked with the student; the housing unit; and, if the aide could not provide the academic instruction, the reason why. Probation only documented the underlying incident that caused Probation to place the student on a security level, not how long the student remained on a security level or whether that status prevented County from providing education services.

20. County instructional aide Leslie Bruin was convincing that she and her colleague, who trained her, followed this procedure for students with IEP's and recorded each day an eligible student did not attend Mt. McKinley and therefore needed to receive tutoring in the housing unit. The first entry in the County work log for Student was March 19, 2013, and the last is May 24, 2013, when Student was hospitalized. Student's work log established that there were 42 days on which County was to provide tutoring to him in the housing unit during the 2012-2013 school year. Of these 42 days, Student refused to see the County aides on 16 days, Probation did not permit Student to see an aide on 17 days, and one day he was not seen as he was in the visiting room.

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Additionally, there were days on which a County aide provided less than one hour of instructional services, but the decision to provide less than one hour was made by the County, not Probation.

21. Ms. Bruin persuasively testified as to the procedure that she and her colleague followed. Student did not establish that Ms. Bruin and her colleague failed to document on the work log all times when Probation informed them that Student would not attend Mt. McKinley, or that the 34 days of missed instruction on County work log was not accurate. Therefore, Student only established that Probation prevented Student from receiving 17 days of specialized academic instruction when it placed him on a security level and did not permit him to attend Mt. McKinley.

22. Of these 17 days of missed academic instruction, Probation attempted to demonstrate that Student presented an extreme safety and security risk. Dr. Donnelly's notes indicated that he often talked to Student through his room door during this period because of the threat Student posed after his return to Juvenile Hall on January 28, 2013, through the May 24, 2013 hospitalization. While Probation's conduct appeared reasonable when Student engaged in such conduct, like smearing feces, or becoming extremely agitated because he erroneously believed staff spit into his food and other residents flicked mucus at him, Probation should have taken more steps to stabilize Student or provide additional staffing so he could be safely educated. Additionally, there is no indication that Probation made the juvenile court aware of this situation to seek a higher level of care residential placement to better meet Student's mental health needs.

23. Student's expert, Peter Leone, Ph.D.,[6] provided numerous examples as to how other public agencies who operate correctional facilities and are also responsible

[6] Dr. Leone is a professor at the University of Maryland in its Department of Special Education, and has taught there since 1981. He was also the director of the National Center on Education, Disability and Juvenile Justice from 1999 through 2006,

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for providing educational services or agencies similar to Probation, like Los Angeles County Probation Department, are able to ensure that wards receive educational services, even those segregated into Maximum Security units. Probation did not rebut Dr. Leone's testimony that educational services could be provided to students on a juvenile hall security level, such as by use of a separate classroom with additional correctional staffing or by better coordination between Probation and County.

24. Finally, after Student returned to Juvenile Hall on June 17, 2013, through his release on August 9, 2013, he attended Mt. McKinley. Probation provided sufficient staffing to monitor Student in his classroom, and at no time did Student present a safety and security risk that Probation prevented him from attending Mt. McKinley, which supports Dr. Leone's contention that Student could be educated with adequate staffing and supports. Additionally, Probation never sought approval from either OAH through an expedited hearing process or a juvenile court order to prevent County access to Student. Accordingly, Probation did not demonstrate that during the 17 days in which it prevented County aides from seeing Student that Student was such a safety and security threat, and that with adequate steps Student could be educated.

Assessments and IEP Offers

25. Student contended that when Probation was responsible for providing Student a FAPE, Probation should have assessed him in all areas of suspected disability

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and published numerous scholarly articles on providing education to incarcerated juveniles, especially those needing special education services. Dr. Leone has also consulted with correctional facilities on providing educational services to incarcerated juveniles, and been an expert in these matters for court proceedings and consent decrees, for the Los Angeles County Office of Education and its juvenile court school at the Challenger Memorial Youth Center, among others.

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and held IEP team meetings to update his IEP, especially after his psychiatric hospitalization on May 24, 2013. Probation asserted that even if it was required to provide educational services because it would not permit County to serve Student, County was still able to assess Student and conduct IEP team meetings.

26. Student did not establish that Probation's actions prevented County from assessing Student or obtaining information regarding his suspected disabilities based on information from Mt. McKinley Principal Rebecca Corrigan and Ms. Heim-Bowen. Probation did not keep County personnel from assessing Student at the end of January 2013 even though he was on security restriction. While Probation and Mental Health had important information regarding Student's emotional problems that affected his ability to make meaningful educational progress, County made little or no effort to obtain such information from Probation or Mental Health.

27. After the assessment, County should have invited Probation to attend the IEP team meetings where Probation could have shared information, or take more steps to obtain information from Probation before the IEP team meeting. County could have done the same by contacting Mental Health therapists, who provided service on contract with Probation, after obtaining a release of information. Also, County decided not to make placement offers other than its general education classroom as it erroneously believed that it could not offer a placement into a residential facility that might better meet Student's mental health needs. Therefore, while Probation and Mental Health had important information concerning Student, Probation did not hide this information and County could have easily obtained it during those times when Student could not attend Mt. McKinley. Accordingly, Probation was not required to assess Student or hold IEP team meetings to update or develop IEP's while Student was in a security level and prevented from receiving educational services.

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LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[7]

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)[8] et seq.; 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 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, §

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[7] Unless otherwise indicated, the legal citations in the Introduction and Juvenile Hall Responsibilities sections are incorporated by reference into the analysis of each issue decided below.

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

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56363, subd. (a) [In California, related services are also called designated instruction and services.].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs and academic and functional goals related to those needs. It contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining goals, making progress in the general education curriculum, and participating in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District 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) (*Mercer Island*) Although the required educational benefit is sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these

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phrases refer to the same *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

JUVENILE HALL EDUCATION RESPONSIBILITY AND DUTIES

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

6. Title 34, Code of Federal Regulations, part 300.3 provides that a "[p]ublic agency includes the SEA [state educational agency], LEAs [local educational agencies], ESAs [educational service agencies], nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities."

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

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8. Children placed in a juvenile hall are entitled to a FAPE. (Ed. Code, § 56150.) Juvenile court schools provide educational services to all students "detained" in juvenile halls. (Ed. Code, § 48645.1) Regardless of the residence of the parents or legal guardians of such children, the responsibility for providing a FAPE to any student who is detained in juvenile hall rests with the local county board of education, which is the LEA. Education Code section 48645.2 provides that the county board of education shall operate juvenile court schools, or contract out their operation to the respective elementary, high school, or unified school district in which the juvenile court school is located.

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

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

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educational rights holder may request a hearing if he or she disagrees with the proposed change in placement, or the court on its own motion may set a hearing. (Cal. Rules of Court, rule 5.651(e)(2).) At the hearing, the court will determine whether the proposed placement and plan is based upon the best interests of the child, determine what actions are necessary to ensure the child's educational and disability rights, and make all necessary orders to enforce those rights. (Cal. Rules of Court, rule 5.651(f).)

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

12. Section 1370 of title 15 of the California Code of Regulations provides, in part, for youth detained in juvenile hall:

(a) School Programs

> The County Board of Education shall provide for the administration and operation of juvenile court schools in conjunction with the Chief Probation Officer, or designee. The school and facility administrators shall develop written policy and procedures to ensure communication and coordination between educators and probation staff. The facility administrator shall request an annual review of each

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required element of the program by the Superintendent of Schools, and a report or review checklist on compliance, deficiencies, and corrective action needed to achieve compliance with this section.

(b) Required Elements

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

[¶] . . . [¶]

(c) School Discipline

(1) The educational program shall be integrated into the facility's overall behavioral management plan and security system.

(2) School staff shall be advised of administrative decisions made by probation staff that may affect the educational programming of students.

(3) Expulsion/suspension from school shall follow the appropriate due process safeguards as set forth in the State Education Code including the rights of students with special needs.

(4) The facility administrator, in conjunction with education staff will develop policies and procedures that address the rights of any student who has continuing difficulty completing a school day.

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(d) Provisions for Individuals with Special Needs

(1) Educational instruction shall be provided to minors restricted to high security or other special units.

(2) State and federal laws shall be observed for individuals with special education needs.

(3) Non-English speaking minors, and those with limited English-speaking skills, shall be afforded an educational program.

13. Section 1390 of title 15 of the California Code of Regulations provides for youth detained in juvenile hall:

> The facility administrator shall develop written policies and procedures for the discipline of minors that shall promote acceptable behavior. Discipline shall be imposed at the least restrictive level which promotes the desired behavior. Discipline shall not include corporal punishment, group punishment, physical or psychological degradation or deprivation of the following:
>
> [¶] . . . [¶]
>
> (j) education.

14. While the applicable statutes and regulations require Probation to cooperate with County concerning the provision of educational services, including special education, to all wards in Juvenile Hall, that duty to cooperate does not make Probation equally responsible with County to educate wards in juvenile hall. This duty to detained wards does not impose a separate legal obligation in itself upon Probation to provide a ward with FAPE, which would include meeting the child find obligations. However, if Probation prevents County from providing a student with access to special

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education services, then Probation becomes the responsible public agency to ensure that the student receives a FAPE as there is no other government agency that can provide the federally mandated special education services.

ISSUES 1A – 1C: CHILD FIND

15. Student asserts that Probation should have assessed him for special education eligibility from his entry into Juvenile Hall because of its knowledge of Student's mental health issues that may have made him eligible for special education services. Probation asserts that the County had the obligation to assess Student upon his entry into Juvenile Hall and that Probation never prevented County from assessing Student.

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

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17. The child-find obligations apply to children who are suspected of having a disability and being in need of special education, even if they are advancing from grade to grade. (34 C.F.R. § 300.125(a)(2)(ii).) A request for an initial evaluation to determine whether a student is a child with a disability in need of special education and services can be made by either the parent or a public agency. (34 C.F.R. § 300.301(b).) Further, the IDEA requires that parents be provided with a copy of the procedural safeguards upon the initial referral for evaluation. (34 C.F.R. § 300.504(a)(1); Ed. Code, § 56301 subd. (d)(2)(A).)

18. Student did not establish that Probation prevented County from assessing him for initial eligibility to receive special education services from May 7, 2012, through January 3, 2013, when Mother made the assessment request. The fact that County declined to assess Student, despite his continued decompensating behavior and did not ask Probation or Mental Health for more current information is not the responsibility of Probation. Finally, Probation did not prevent Student from attending Mt. McKinley for any significant time before County started the formal assessment in late-January 2013. Accordingly, Probation did not have a child find duty to assess Student.

ISSUE 2A: CONTINUUM OF PLACEMENTS

19. Student asserted that, during those times in which Probation was a responsible public agency, it was required to consider other placements because it knew that his unique needs could not be met in Juvenile Hall. Probation contended that even during those times when Probation was a responsible public agency for academic services that County retained responsibility to determine Student's educational placement.

20. An LEA must ensure that "To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This "least

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restrictive environment" (LRE) provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) An LEA must have a continuum of alternative placements available that proceed from "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." (34 C.F.R. § 300.115(b); see also Ed. Code, § 56342, subd. (b).)

21. Student failed to establish that Probation undertook any actions to prevent County from considering a continuum of placements when making a decision where to educate Student. The fact that County did not consider any placement options other than its general education classroom at Mt. McKinley as it mistakenly believed that it could not offer a certified non-public school or residential placement was not the responsibility of Probation, even though Student was incarcerated. County still had the obligation to consider all placement options, including a non-public school. (*Los Angeles County Office of Educ. v. C.M.* (April 22, 2011, No. CV 10–4702 CAS (RCx)) 2011 WL 1584314; *Student v. Sacramento City Unified School District and Sacramento County Office of Education* (2013) Cal.Off.Admin.Hrngs. Case No. 2013010137.) Accordingly, Student did not establish that Probation had a legal obligation under the IDEA to consider other placements during those times in which it prevented Student from receiving educational services from County.

ISSUES 2B, 2C, 2D AND 3B: IEP DEVELOPMENT

22. Student contended that Probation was required by law to assess him and develop IEP's that met his unique needs, especially his academic, mental health and behavioral needs, during those times in which Probation prevented him from receiving educational services from County. Probation asserted that it never prevented County

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from developing appropriate IEP's during those times so any failure to develop IEP's was County's responsibility.

23. Mental health services related to a pupil's education must be provided by the student's responsible LEA. (Gov. Code, §7570, et seq.) A pupil who is determined to be an individual with exceptional needs and is suspected of needing mental health services to benefit from his or her education, is to be assessed by the student's responsible LEA. (See Gov. Code, § 7573.) LEA's have the full responsibility to provide mental health care services that are required to provide a FAPE in a child's IEP, and for a student in juvenile hall the obligation rests upon the county office of education. (*Student v. Los Angeles County Office of Education* (April 30, 2012) Cal.Off.Admin.Hrngs. Case No. 2011090350, pp. 34-35.)

24. Student did not establish that during those times in which Probation prevented County from providing educational services that Probation prevented County from developing IEP's that met his unique needs. County developed an IEP for Student in March 2013 after its initial assessment and an amendment in July 2013 after Student returned to Juvenile Hall after his psychiatric hospitalization. Whether these IEP's met Student's unique needs, was County's responsibility. County never stated that Probation's conduct prevented it from developing an appropriate IEP. Therefore, Probation did not deny Student a FAPE because it was not Probation's responsibility and Probation did nothing to prevent County from obtaining information needed to develop an appropriate IEP.

ISSUE 3D: FUNCTIONAL BEHAVIOR ASSESSMENT

25. Student asserted that during those times when Probation was the responsible public agency for academic services that Probation should have conducted a functional behavior assessment. Probation contended that it never prevented County from assessing Student during the time in question.

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26. The student must be assessed in all areas related to his or her suspected disability. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).) A school district's failure to adequately assess a student is a procedural violation that may result in a substantive denial of FAPE. (*Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11–1253 JVS(MLGx)) 2012 WL 2478389, *8; 20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2).)

27. County did not believe that it had to assess Student until Mother made her January 3, 2013 request. After the March 13, 2013 IEP team meeting, County did not find it necessary to further assess Student for possible changes to his IEP despite Student's repeated absences from Mt. McKinley due to his deteriorating mental state. Student did not establish that Probation undertook any activity that prevented County from assessing Student. Accordingly, Student did not establish that Probation denied Student a FAPE by not assessing him after County found him eligible for special education services on March 13, 2013, especially since it was at all times County's duty, not Probation's duty, to do so.

ISSUES 3A AND 3C: PROVISION OF SPECIAL EDUCATION SERVICES

28. Student asserts that during those times in which Probation was the responsible public agency for academic services, Probation denied him a FAPE by not implementing his IEP. Probation asserted that during those periods that it had legitimate security and safety reasons to prevent County aides from serving Student either because it did not have adequate staffing to safely monitor Student and the aide, or because Student had engaged in conduct that justified his placement in one of the security categories.

29. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van*

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Duyn v. Baker School Dist. (9th Cir. 2007) 502 F.3d 811, 815.) For example, a brief gap in the delivery of services may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal. May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, p. 7.)

30. The IDEA has a specific statutory provision permitting an LEA to modify an IEP of a special education student incarcerated in an adult facility, including placement, if a legitimate security or compelling penal reasons is established. However, the IDEA has no equivalent provision for students incarcerated in a juvenile justice facility. (20 U.S.C. § 1414(d)(7)(B); see *State of New Hampshire v. Adams* (1st Cir. 1998) 159 F.3d 680, 686; *State Correctional Institution Pine Grove* (PA SEA May 1, 2013) 113 LRP 32792.) Common sense dictates that if a LEA cannot safely educate a student on a particular day that the LEA need not provide special education services, provided the LEA follows the applicable legal requirements for removals for more than 10 school days. (34 C.F.R. §§ 300.530 – 300.536.)

31. The County's work logs for Student established that there were 17 days in which Student did not attend Mt. McKinley while on a security level and in which Probation refused to permit the County aide to serve Student. Probation was not responsible for those days in which Student was not available when he was in court because his presence was required by the juvenile court, when Student refused to see the County aide, or when County did not provide the tutoring by its own accord. Finally, Probation did not limit the time for any visit when County aide's provided services.

32. For the 17 days Probation refused County access to provide educational services, Probation contended that Student presented too great a risk due to his hallucinations, erratic behavior, and belief that people where spitting on his food or flicking mucus at him. However, on the 11th day that Probation prevented County aides from seeing Student because of the security risk he posed, Probation should have undertook steps to request a hearing to change Student's placement if he could not

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safely attend Mt. McKinley or have County personnel tutor him. Additionally, Dr. Leone was convincing in establishing the myriad of options available to Probation to ensure safety and security during a student's instruction, and that County personnel could safely have provided academic instruction to someone like Student. Additionally, state regulations[9] require Probation to ensure that wards receive certain services, such as education, while on a security level. Finally, Probation failed to demonstrate that Student presented such a safety and security risk that the County aides could not safely serve Student, especially when Student was able to attend Mt. McKinley after his return from the psychiatric hospitalization with appropriate staffing even though he was still having auditory and visual hallucinations.

33. Probation's obligation was to make Student available for educational services by County when Student was on a security level and not permitted to attend Mt. McKinley. When Probation did not permit County to provide these services, Probation had the obligation to provide these special education services if it could do so safely. In this case, the only special education service that Student did not receive was specialized academic instruction on 17 days for which Probation did not establish that it was unsafe to educate Student. Probation's placing Student on security level did not prevent the provision of any counseling services from either the school or Mental Health, nor did it interfere with the ability of County to assess Student and develop an IEP. Therefore, the evidence established that the only special education services or processes that Probation did not permit County to provide and for which it was responsible involved 17 days of specialized academic instruction.

[9] California Code of Regulations, title 15, sections 1300 et seq.

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REMEDIES

34. Student requested that Probation be ordered to provide special education services as set forth in his IEP whenever Probation prevents County from providing him with special education services. He also requested training of Probation staff as to their duties to provide special education services. Student also sought compensatory education based on the total number of school hours that he missed while not permitted to attend Mt. McKinley while on a security level in areas of group and individual mental health counseling, including family counseling, positive behavior intervention services and educational therapy, plus transportation to these compensatory services.[10] Student requested compensatory education for two hours of service, either educational instruction or other special education service, for each hour lost. Probation contended that even if it prevented Student from receiving any of the education services specified in his IEP, that he made meaningful educational progress and therefore does not require compensatory education.[11]

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[10] Before hearing, Probation submitted a motion to limit Student's proposed resolutions to what Student requested in the complaint to preclude an award of counseling related services. However, Probation's request need not be addressed as Student did not establish that he was entitled to compensatory counseling services.

[11] Before hearing, Probation submitted a motion that requested the introduction in evidence of the settlement agreement between Student and County. Student objected to the introduction of the settlement agreement because it was a confidential agreement and had no relevancy to any of the issues for hearing. The ALJ ruled that the settlement agreement was admissible and relevant only to the awarding or implementation of any possible remedy.

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35. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

36. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra,* 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) 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 ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup , supra,* 31 F.3d at p. 1497.) 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." (*Reid ex rel. Reid v. District of Columbia*, *supra*, 401 F.3d at p. 524.)

37. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training is an appropriate remedy. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [Student ,who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so.].) Appropriate relief in light of the purposes of the IDEA may include an order that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*)

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38. Carina Grandison, Ph.D., testified on behalf of Student as an expert and opined as to the type and amount of special education services Student required as compensatory education.[12] Dr. Grandison assessed Student on August 2013 and prepared a detailed assessment report. She reviewed all available educational records, including prior educational and mental health assessments, IEP's and County work logs, and she interviewed Student over two days while he was in the psychiatric hospital. Dr. Grandison did not interview any County educator familiar with Student. Based on her assessment and review of prior assessment data, Dr. Grandison persuasively opined that Student had failed to make meaningful educational progress from the time he first entered Juvenile Hall. Dr. Grandison then opined that the amount of compensatory education should be two hours for each hour of service that Student missed.[13]

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[12] Dr. Grandison is an Assistant Clinical Professor at the University of California, San Francisco School of Medicine, in its Department of Psychiatry. Dr. Grandison's specialty is developmental neuropsychology. She has been a licensed clinical psychologist in California since 1996. From 1994 through 1995, she was a Clinical Instructor, Department of Psychiatry, Harvard Medical School; from 2003 through 2006, she served as the Director of the Neuropsychology Assessment Service, Children's Hospital, Oakland, California, and currently at UCSF since 1997. Since 2006, she has worked exclusively in private practice conducting assessments of children

[13] Dr. Alice Parker, Student's expert in the jurisdictional hearing, opined that one hour a day from a credentialed special education teacher would be appropriate for a student not permitted by Probation to attend Mt. McKinley. Dr. Parker oversaw the California Department of Education's quality assurance process from 1997 through 2005, which oversees complaints made against public agencies regarding special education services. Student accepted in that hearing that one hour of tutoring would be

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39. However, Dr. Grandison's formulaic proposal of two hours of educational service for one hour of missed education service is not supported by any research or other evidence. Additionally, Dr. Grandison did not separate how much of Student's lack of educational progress was caused by County as opposed to Probation, or distinguish between educational loss caused by arguably unqualified teachers from hours of instruction missed.

40. While Dr. Grandison's opinion as to amount of compensatory education Student requires is not persuasive, Probation's contention that Student made adequate educational progress was not supported by the evidence either. Probation failed to produce adequate evidence to rebut Dr. Grandison's opinion about Student's lack of progress.

41. Student's IEP's and County's and Dr. Grandison's assessments established his academic deficiencies and lack of meaningful educational progress, which was caused in part by Probation's conduct in preventing County from serving Student. Therefore, it appears equitable that Student receive 17 hours of specialized academic instruction through a qualified person of Student's choice, such as the non-public agency providing tutoring in the settlement agreement with County.

ORDER

1. As compensatory education, Probation shall fund and ensure delivery by June 30, 2014, of 17 hours of individual academic tutoring by a credentialed special education teacher or certified non-public agency of Student's choice.

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appropriate for a missed school day, and Probation did not present any evidence to the contrary. To the extent that there is any conflict between Dr. Parker and Dr. Grandison, Dr. Parker is more credible based on her more extensive knowledge of special education instruction, as noted in the jurisdictional hearing, than Dr. Grandison.

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2. To determine if Probation is a responsible public agency for wards on a security level, Probation shall keep accurate records of any time it cannot safely and securely provide special education services, and the reasons for its decision to prevent County from doing so and comply with applicable legal requirements for any exclusion that exceeds ten days in any school year.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student partially prevailed on Issues 3a and 3c. Probation partially prevailed as to Issues 3a and 3c. Probation prevailed on Issues 1a, 1b 1c, 2a, 2b, 2c, 2d, 3b, and 3d.

RIGHT TO APPEAL THIS DECISION

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

Dated: January 10, 2014

/s/

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings

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