

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT

v.

SAN DIEGO COUNTY OFFICE OF
EDUCATION.

OAH Case No. 2018030499

DECISION

Paternal Grandmother, the holder of adult Student's educational rights, on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 12, 2018, naming San Diego County Office of Education. Office of Education filed its response to Student's complaint on March 22, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.) OAH granted the parties' request for a continuance on April 23, 2018.

Administrative Law Judge Alexa J. Hohensee heard this matter in San Diego, California on May 15, 16, 17, and 22, 2018.

Patricia Lewis, Attorney at Law, represented Student. Paternal Grandmother attended the hearing on behalf of Student. Student did not attend the hearing.

Sundee M. Johnson, Attorney at Law, represented Office of Education. Cara Schukoske, Executive Director of Special Education for San Diego County Office of Education, attended the hearing on behalf of Office of Education.

At the parties' request, OAH granted a continuance until June 5, 2018, for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE¹

Did County procedurally and substantively deny Student a free appropriate public education from January 12, 2018 to March 12, 2018, by failing to offer appropriate placement in a residential treatment center upon Student's release from a juvenile detention facility?

SUMMARY OF DECISION

Office of Education's January 12, 2018 individualized education program offer of specialized academic instruction in a general education setting, with wrap-around counseling and speech therapy services, was reasonably calculated to enable Student to make progress appropriate in light of his circumstances upon release from juvenile detention. The special education and related services offered in the January 12, 2018 IEP addressed the academic, social, and emotional needs resulting from Student's mental health condition and learning disabilities upon his release from juvenile detention. Placement in a residential treatment center was not necessary to support Student's educational program. Student's medical, social and emotional problems were not so

¹ Student's issue seeking that Office of Education fund an independent educational evaluation for educationally related mental health services (designated Issue 1(a) in the prehearing conference order) was dismissed as moot upon representation of the parties on the first day of hearing that the requested evaluation had been publicly funded and completed.

intertwined with his educational problems as to require residential treatment. Placement in residential treatment would not have been primarily to aid Student to benefit from special education. Student's reasons for seeking residential treatment were in response to medical, social, or emotional problems, and apart from the learning process. None of the mental health expert witnesses, including Student's private assessors, opined that Student required placement in a residential treatment center upon release for medical, social, or emotional reasons, let alone for educational reasons.

FACTUAL FINDINGS

1. At the time of the hearing, Student was an eighteen-year-old man detained at a juvenile detention facility in San Diego County.
2. Student was found eligible for special education and related services during his detention, and was eligible for special education at all relevant times.
3. Student was born to teenage parents who did not remain in a relationship after Student's birth. Drugs, alcohol, and possibly domestic violence were common in the homes of Student's parents. Student's life was turbulent. He changed homes often, and lived at various times with his father, his mother and step-siblings, Paternal Grandmother and grandfather, and his maternal grandmother.
4. In 2011, Student's mother suffered multiple brain aneurisms in Student's presence and fell into a coma. Student's mother remained in a coma at the time of hearing.
5. In June 2012, Student turned 13 years old and began smoking marijuana. The following year, he began taking methamphetamines.

STUDENT'S HIGH SCHOOL YEARS

6. In 2013, when Student was 14 years old and in ninth grade, his local school district assessed him at the request of Paternal Grandmother. She was concerned that

Student had difficulty with homework. A psychoeducational assessment found Student to have average cognitive ability, with average academic skills. On social emotional scales, Student reported that he "sometimes" felt like his life was getting worse, that no one understood him, that he heard voices in his head, and that he was "often" sad. Student was not found eligible for special education and related services at that time.

7. In ninth grade, Student earned mostly C grades. However, he failed three classes in math and science.

8. In the fall semester of the 2014-2015 school year, Student was in tenth grade and again earned mostly C's, with a B and an F in two English courses. Student transferred to a different school for the spring semester, and earned two C's, one D, and failed his English, math and science classes.

9. At the end of his tenth grade year, Student turned 15 years old. He regularly smoked marijuana and took methamphetamines and other non-prescribed psychotropic drugs. He lived with his maternal grandmother, and ran away from home several times.

10. In fall of the 2015-2016 school year, Student was in eleventh grade and failed every class except Physical Education. Maternal Grandmother arranged Student's transfer to an alternative school and transported him there herself, and Student passed two classes with C's in spring 2016.

11. By the end of the 2015-2016 school year, Student's grandparents were aware that Student had a serious drug use problem. Paternal Grandmother sometimes found Student standing with his back against a wall staring at nothing, and Student sometimes made reference to visual hallucinations. Student entered a substance abuse recovery program, but he refused to complete it.

12. On June 21, 2016, Student's maternal grandmother was driving on the freeway with Student in her car when Student attempted to open the door and leave the

vehicle. His maternal grandmother restrained Student and drove him to a hospital, where Student tested positive for marijuana, methamphetamines, ecstasy, methadone and other drugs. Student was transferred to Aurora Behavioral Health Care, a mental health facility, and admitted for treatment.

13. Student reported to the doctor at Aurora that he was depressed, and had been sad for a long time. Student reported that he smoked marijuana daily, had used methamphetamines for three years, and felt paranoid and experienced hallucinations when he was coming off of the drugs. He also admitted to thoughts of self-harm. Student was not delusional and did not admit to experiencing any hallucinations while at Aurora.

14. Student stayed at Aurora for three weeks, and was treated with medication to stabilize his mood. After he left the program, he moved in with Paternal Grandmother.

15. At the beginning of the 2016-2017 school year, Student was in twelfth grade but rarely attended school. He failed a class in the first trimester. Paternal Grandmother enrolled Student in online-classes at a virtual school, and Student used a computer at Paternal Grandmother's business to complete online course work. By the end of the virtual school's fall semester, Student earned a C in personal finance and an A in physical education (tracking exercise done at home), although he did not complete a course in government.²

16. By spring 2017, Student was using drugs again, and could not remember his password or lessons from day to day. In fact, Student was simply logging in and out

² Student's transcript also shows he earned a B at a charter school in "Tools 4 Success," although it was unclear from the testimony when and how he attended that program.

of the online program, and failed all his classes that semester, except physical education. He was loud and belligerent to Paternal Grandmother and she hid in her bedroom to avoid him. Student never physically harmed Paternal Grandmother, although he frightened her.

17. Although Student was not completing his coursework, he told Paternal Grandmother that he occasionally attended classes at the virtual school's physical campus in a neighboring city. Student had a local trolley (bus) pass, and was able to travel around town on the trolley lines.

18. In January 2017, Student's half-sibling reported that Student had sexually molested him when they were 11 and 9 years old, respectively. The police conducted an investigation, and Student became involved with the juvenile justice system.

19. In April 2017, Student was diagnosed with attention deficit disorder, and prescribed a mood stabilizer for bipolar mood disorder.

20. In June 2017, Student turned 18 years of age, and transferred his educational rights to Paternal Grandmother. Student continued to be considered a juvenile by the Juvenile Court, because he was alleged to have offended as a juvenile.

21. In June 2017, Student began attending sex offender counseling, and at that time, questions were raised about Student's competence to stand trial for his offense.

22. Clinical psychologist E. Warren O'Meara, Ph.D. conducted a court-ordered psychological evaluation of Student in June 2017 to determine his current behavioral and emotional functioning, his intellectual functioning and whether Student had any learning disabilities, as well as the risk that Student would engage in sexually assaultive behavior in the future. In an interview, Student indicated that he had suicidal ideation after the offense was reported, and admitted extensive use of marijuana. Dr. O'Meara diagnosed Student with borderline intellectual functioning, cannabis abuse, unspecified

learning disorder, unspecified communication disorder, and recommended further evaluation to rule out intellectual disability, mood disorder, and attention deficit disorder, and to determine the extent of Student's communication and learning disabilities. Dr. O'Meara concluded that Student was at low risk for recidivism, but needed psychiatric intervention, sex offender treatment, and a referral to the Regional Center for adult support services.

23. In July 2017, Student underwent a court-ordered mental competency evaluation by psychologist Dr. Robert Kelin Psy.D. Student told Dr. Kelin that he used to hear voices, but no longer did, and that those voices had told him to kill himself. Student also reported that his medications caused hallucinations, but those had stopped about a month earlier. He denied current suicidal ideation. Dr. Kelin diagnosed Student with cannabis abuse, amphetamine abuse, and possible hallucinations, confused thoughts, and confused communication. Dr. Kelin recommended further evaluation to rule out intellectual disability, psychotic disorder, and cognitive disorder. Dr. Kelin concluded that Student did not understand the nature of the juvenile court proceedings, and found that Student would be incompetent to stand trial unless he could stabilize his thoughts with psychotropic medication, and communicate more effectively.

24. Student blamed Paternal Grandmother for his problems with the juvenile justice system, and told his Maternal Grandmother that he wanted to "burn down" Paternal Grandmother's house. That threat of harm was the only one he made toward Paternal Grandmother, but as a result of it, Student was no longer welcome in her home.

25. On August 16, 2017, Paternal Grandmother told Student's probation officer that Student could no longer live at her house and would be on the street. Therefore, Student was arrested and placed in juvenile detention. Student's homelessness posed a dilemma for the juvenile justice system because there was nowhere to which he could safely be released pending his delinquency hearing. Student

could not be released to a residential facility for minors because he was an adult. The average stay in juvenile detention in San Diego County was two to four weeks. At the time of the hearing, Student had been in juvenile detention for almost 10 months.³

26. Office of Education was responsible for providing educational services to all students in juvenile detention in San Diego County, whether they were in regular education or required special education services. Office of Education ran the SOAR school at the juvenile detention facility where Student was held, at which detained youths could take general education classes and earn credits towards a high school diploma. Attendance at SOAR classes was voluntary. Student attended classes at SOAR every day, except when he had a court date, counseling appointment, or other valid reason for absence.

27. Paternal Grandmother retained attorney Patricia Lewis and advocate Kathleen Edwards to assist in determining if Student was eligible for special education, and to advocate for a residential treatment center upon his release from juvenile detention.

ASSESSMENTS FOR SPECIAL EDUCATION ELIGIBILITY

28. Ms. Lewis retained clinical psychologist Karen Zappone, Ph.D, to conduct a neurobehavioral evaluation of Student's psychoeducational functioning. Dr. Zappone

³ As further stated below, the juvenile court found the allegation of sexual assault true on December 20, 2017 and Student was adjudicated a delinquent under Welfare and Institutions Code section 602. No evidence was presented regarding the disposition (sentence) imposed by the juvenile court at that or any later time, and Student remained committed to the same juvenile detention facility at the time of this due process hearing.

conducted her evaluation in October 2017. Student told her that he felt sad, but had no suicidal ideation. He reported no delusions or hallucinations at that time. During testing, Student accepted help and direction from Dr. Zappone, but did not ask for help when needed. Dr. Zappone found that Student had cognitive ability in the low average, with verbal skills in the very low range. She believed his previous low cognitive scores were due to drug use, and that his innate cognitive ability would emerge as weaned off drugs and his mood stabilized. Student's social judgment was average, as was his working memory, but his attention was in the low average range. Academically, Student had reading and math skills at the fourth or fifth grade level, and could write at the fifth to eighth grade level. She concluded that his slow processing speed and attention difficulties impaired learning and resulted in a slow learning curve.

29. Dr. Zappone diagnosed Student with anxiety disorder, bipolar disorder, psychoactive substance abuse disorder, possible head injury, learning disorder, language disorder, motor disorder and cognitive disorder. She recommended ongoing psychiatric care and participation in a substance abuse recovery program. Student had a quiet voice, and she also suggested a speech and language evaluation. She found that Student would benefit from special education, and recommended individualized instruction in math and reading, and various classroom and test-taking accommodations.

30. Dr. Zappone was a well-qualified clinical psychologist with over 30 years of experience. She testified at hearing with a professional demeanor and candor. Dr. Zappone's opinion that Student had low average cognition, and her conclusions regarding Student's academic skills and processing abilities in October 2017 were persuasive.

31. At hearing, Dr. Zappone candidly admitted that whether Student required a residential placement due to his mental health problems was beyond the scope of her

assessment. She was unfamiliar with the criteria to be considered in determining whether to make a residential placement for educational purposes. Dr. Zappone recommended that Student be released to a group home setting, an independent living facility, or board and care facility, although she thought a residential treatment facility would be best.

32. Also in October 2017, Office of Education conducted a psychoeducational evaluation of Student. Neither Dr. Zappone nor Office of Education staff were aware that Student was being assessed by the other. However, the respective reports and testimony at hearing established the assessors used different test instruments, except for one test that yielded similar results, and neither assessment was invalidated by the overlap.

33. Patrick Crain conducted the psychoeducational assessment of Student for Office of Education. Mr. Crain was a well-qualified school psychologist with a master's degree in psychology and 30 years of experience as a credentialed school psychologist, 20 years of which were in juvenile detention centers. He was also assigned to be Student's counselor in juvenile detention one month prior to the hearing. Mr. Crain's demeanor at hearing was professional, and in light of his credentials, experience, and familiarity with Student, his opinions regarding Student's educational needs and the program to address those needs were given significant weight.

34. Student earned a very low cognitive score during testing, which Mr. Crain attributed to Student's slow processing speed. He concurred with Dr. Zappone's estimate of Student's cognitive ability in the low average range. Student's results in the areas of memory, processing speed, and attention were also generally consistent with those obtained by Dr. Zappone.

35. Mr. Crain observed Student in the SOAR classroom for 30 minutes. Student was passively engaged in taking notes most of the time, and was actively engaged by asking questions, providing input or working on an assignment for only a few minutes.

The remainder of the time Student was quiet with the appropriate materials on his desk, although not maintaining attention. Student's teacher, Trevor Darling, reported that Student could complete his work with assistance, and expressed good, coherent ideas. Both Mr. Darling and Student's science teacher reported that Student's behavior in class was good, and that Student interacted appropriately with peers and adults. The science teacher thought Student might be at risk for withdrawal and depression, as he sometimes disengaged from others and avoided initiating contact. Both teachers expressed concern with Student's social skills because he preferred to be alone, resisted joining in groups, did not always answer questions clearly, and would get off topic. However, Student did not exhibit significant bizarre or unusual behaviors, and Student denied to Mr. Crain that he experienced hallucinations or delusions.

36. Mr. Crain concluded that Student met the criteria for special education under the category of specific learning disability, due to his memory deficits and limited cognitive processing that affected his reading comprehension and math calculation. Mr. Crain recommended that Student be administered an educationally-related mental health services (ERMHS) assessment, as emotional disturbance was also possibly contributing to Student's slow classwork production and affecting comprehension. In his assessment report, he recommended that the IEP team consider goals and specialized instruction in reading comprehension, math calculation, and in behavior to address developing interpersonal relationships and coping with frustration. He further recommended counseling services, with the amount of service adjusted after release, at which time Mr. Crain believed Student could attend a comprehensive campus.

37. Also in October 2017, Student's advocate Ms. Edwards observed him in class for 40 minutes. Student sat in the back away from others, and did not appear to be doing substantive work on a math assignment. He also fidgeted, tapped his hands on the desk, and stomped his feet. Ms. Edwards tried to speak with Student in the hallway,

but although Student was polite, he did not look at her, responded to her questions slowly, and appeared distracted. Ms. Edwards also spoke briefly with the teacher Mr. Darling, and with Catherine Garcia, a special education teacher in the classroom, who told her that Student could be hard to understand and took time to respond.

38. Ms. Edwards' special education teaching credentials, possibly from another state, had lapsed. She had not held a teaching position for 16 years. She did not assess Student herself, and did not possess the education, training, or experience to conduct a psychoeducational or ERMHS assessment. Her testimony concerning Student's behavior contradicted stronger evidence; for example, she testified that Student had physically harmed his grandparents and was detained for his threats against grandparents, which was contrary to the grandparents' testimony and juvenile court documents. Ms. Edwards testified that she believed Student was unable to perform in his SOAR classes and contended that he obtained answers to fill-in-the-blank classwork from other students, but she did not explain evidence proffered by Student showing Student's complete and detailed calculations on a page of math work. Ms. Edwards did not understand how a very experienced ERMHS assessor had scored one of the assessment instruments, but her testimony that the expert could not explain the scoring to her satisfaction did not reflect adversely on that expert's credibility or assessment. Ms. Edwards disagreed with the conclusions by the licensed and credentialed assessors who assessed Student's mental health needs and how they impacted his education, but her opinions, which were outside of her former practice area, carried little to no weight.

NOVEMBER 3, 2017 IEP TEAM MEETING

39. On November 3, 2017, Office of Education convened an IEP team meeting. Paternal Grandmother, Student, Ms. Lewis, Ms. Edwards, Mr. Crain, Mr. Darling, Ms. Garcia, and Office of Education representatives and counsel attended.

40. Mr. Crain reviewed his assessment results with the team, concluding that

Student's cognitive ability and long-term memory were average, but his short-term ability to hold onto information, reading comprehension, and oral expression were areas of need. He opined that Student had a learning disability and would benefit from specialized academic instruction. He also recommended that the team obtain a speech and language evaluation and referred Student for an ERMHS evaluation. Paternal Grandmother and Student's attorney and advocate also requested an ERMHS evaluation due to Student's auditory and visual hallucinations. The IEP team agreed that Office of Education would conduct both assessments.

41. Mr. Darling reported that Student was engaged and behaved well in class, and accepted help although he did not ask for it. Ms. Garcia reported that Student regularly attended class. Ms. Edwards reported on her observation of Student in Mr. Darling's class, and her concern that Student became frustrated and would disengage.

42. The IEP team found Student eligible for special education and related services under the eligibility category of specific learning disability. The team drafted and adopted goals in the areas of reading comprehension, written language, math, behavior (coping skills), task completion, and developing skills to make and maintain friendships. The team also developed transition goals for Student to learn to complete a job application and create a budget.

43. The IEP team offered Student the following services: 10 hours per week of specialized academic instruction to be provided in English and math, and 600 minutes per year, or approximately 60 minutes per week, of individual counseling.

44. Paternal Grandmother consented to the IEP, with certain exceptions, including a request that Student be assessed for emotional disturbance.

45. Ms. Garcia began providing Student with 10 hours per week of specialized academic instruction in English and math. Ms. Garcia had a master's degree in special education, and was credentialed to teach students with mild to moderate learning

disabilities in multiple subjects. She had been teaching for 17 years, and at SOAR for 10 years. At the time of the hearing, Ms. Garcia had been co-teaching Student with Mr. Darling for almost 10 months, and was very familiar with his academic, social, and behavioral needs. Her opinions regarding his educational needs and the appropriate program to address those needs were accorded substantial weight.

46. Mr. Darling testified at hearing. He was a credentialed special education teacher in math and science, and had been teaching detained juveniles for 11 years. His responses were thoughtful and informative, and he appeared to genuinely enjoy having Student in his classes. Mr. Darling gave thorough explanations of the reasoning behind his opinions, and multiple examples of Student's behavior in his classroom. His opinions on Student's educational needs and the appropriate program to address those needs were very persuasive.

47. Student was in SOAR for most of the 2017-2018 school year. Behaviorally, Student was shy at first, and did not participate or ask for help. As the average juvenile detention was less than a month, Student soon became more familiar with the classroom routine than the other students, and regularly helped other students. His interactions with other students were always positive and respectful, and by the time of the hearing, Student was regularly interacting with his peers and discussing their day. He regularly volunteered to read his journal entries in English, read newspaper passages, shared ideas, and contributed to group conversations.

48. Academically, Student completed all of his assignments, and did them well. His grades were not modified, and Mr. Darling opined that Student could complete grade-level work in math and science with the special education support he received. Ms. Garcia concurred that Student was able to complete grade-level work with her support.

49. Irene Dominguez was assigned to provide counseling services to Student

in accordance with the November 3, 2017 IEP. Ms. Dominguez had a master's degree in Counseling/Clinical Mental Health from the University of California at San Diego, and training and certificates in threat assessment, trauma, relationship facilitation, anger management facilitation, and domestic violence counseling. She had been a mental health case worker with Office of Education counseling juvenile detainees since 2015. Ms. Domiguez had a professional demeanor at hearing, and was careful to alert the parties when, and to what extent, she could not respond to questions concerning her confidential conversations with Student because it would violate the patient-therapist privilege. Her testimony was informative and persuasive, and her opinions regarding Student's educationally related mental health needs and the educational and services necessary to meet those needs was given significant weight.

50. Student was interested in working on his behavior goals and tracking his progress. Initially, Student sought Ms. Dominguez out more than once a week with questions and concerns, and asked for resources and support. Student was respectful and Ms. Dominguez never felt threatened. Ms. Dominguez worked with Student on his behavior goals to learn how to make and maintain friendships, cope with frustration, and use appropriate methods to gain teacher attention. Student and his teachers both reported to Ms. Dominguez that Student had made progress in these areas immediately. Student wanted to make friends, and was easily redirected if needed, and his interactions with his peers were appropriate. Student even began making appropriate small talk with his teachers.

51. Neither Student nor his teachers reported any problems, and Student's detention records only contained positive comments. Ms. Dominguez worked with Student only on his IEP goals. If Student had reported that he felt his medication levels were not right, or that he was disturbed by voices in his head, or that he wanted to harm himself or others, she would have referred him to the juvenile detention team of

psychiatrists and psychologists who provided confidential mental health services to detainees, called the "STAT team," although it was never necessary for her to do so.⁴

ADDITIONAL ASSESSMENTS

52. On November 3, 2017, Student was seen at Rady Children's Hospital to determine if he had physical features consistent with prenatal alcohol exposure. Student did not have sufficient features to diagnose fetal alcohol syndrome, but was found to have alcohol-related neurodevelopmental defects on the spectrum of alcohol spectrum disorder.

53. In December 2017, County Office of Education retained Laura Rogers to conduct an ERMHS assessment of Student. Ms. Rogers had been the senior director of mental health services for a local program serving mentally ill and developmentally delayed youth for six years. Ms. Rogers earned her bachelor's degree in sociology in 1994, and a master's degree in social work in 1999, and had been a licensed clinical social worker since 2004 (since 2011 in the State of California). Ms. Rogers had over 20

⁴ Ms. Dominguez provided Student with educationally-related counseling services. She was not privy to whether, or the extent to which, Student received confidential medical and mental health services or medication to treat hallucinations or stabilize his mood. Although the juvenile detention STAT team was aware of Student's IEP and the counseling goals she was working on with Student, the STAT team did not share treatment information on Student (or any detainee). Ms. Dominguez did not testify about the content of her discussions with Student. Paternal Grandmother held Student's educational rights, but did not produce a waiver of Student's right to medical privacy for purposes of this due process proceeding. No member of the STAT team testified at hearing regarding Student's mental health while in detention

years of experience serving children and youth with substance abuse, in poverty, in crises, in residential treatment, and in juvenile detention. For the past five years, she had contracted with a local school district to conduct assessments of children and youth to ascertain if a mental health disorder was interfering with their education, and to make clinical and treatment recommendations.

54. Ms. Rogers reviewed Student's health and educational records including assessments, interviewed Student and Paternal Grandmother, and consulted with Mr. Crain, Ms. Garcia, and Ms. Dominguez. Student had made friends in juvenile detention, and although he didn't like school, he wanted to earn a diploma. He told Ms. Rogers that he heard a male voice saying inappropriate things (like "bitch" and "fuck you") every day, including during their interview, but no commands to harm himself or others. He denied suicidal or homicidal thoughts. Student reviewed his long history of drug abuse, and stressed that he had not had any positive life experiences and was unhappy. Student was fidgety, easily distracted by his surroundings, and paused before responding as though he was hearing internal stimuli.

55. Ms. Rogers observed Student for 30 minutes during a humanities class. There was a disruptive student, and Student was easily distracted and off-task during most of the observation. The other students appeared to like and respect Student, but his interactions with them were not always appropriate for a classroom. Ms. Garcia reported that Student often left his seat to wander the classroom and generally did not ask for help when needed, although he had begun asking for help with math.

56. Based on interviews with Student, Paternal Grandmother, teachers, and her review of records, Ms. Rogers concluded that Student's mental health conditions, such as bipolar disorder and psychoactive substance abuse, affected his academic performance, attendance, and peer relationships. She opined that treatment goals should focus on reducing hallucinations while increasing attention and concentration

and improving social interactions with peers and adults.

57. At the time of her assessment, Student did not have any clinically harmful behaviors, was not aggressive to other people, and did not put himself in danger. It was Ms. Rogers' professional opinion that Student was able to maintain his own physical safety, posed no risk of harm to others, and was able to engage in activities of daily living. For guidance on the level of care to recommend after Student was released from juvenile detention, Ms. Rogers utilized the Child and Adolescent Service Intensity Instrument (Service Intensity Instrument), a tool that evaluates treatment levels from a community health perspective for children and adolescents with potentially dangerous behavior or vulnerabilities. The seven levels of mental health service intensity identified and weighed by this instrument were: (0) basic services for prevention and maintenance, (1) recovery maintenance and health management, (2) outpatient services, (3) intensive outpatient services, (4) intensive integrated services without 24-hour psychiatric monitoring (day treatment), (5) non-secure, 24-hour psychiatric monitoring, and (6) secure, 24-hour psychiatric monitoring. According to the Service Intensity Instrument results, outpatient services provided Student with the necessary level of intensity of mental health services, based on a scale from basic services to locked 24-hour psychiatric management. Ms. Rogers recommended individual and group therapy, and family education to facilitate the use of appropriate interventions in the home.

58. At hearing, Student questioned Ms. Rogers' choices on the Service Intensity Instrument for Student's levels of different factors: risk of harm, functional status, co-occurrence of conditions such as psychiatric conditions and substance abuse, recovery environment, resiliency and response to services, and involvement in services (e.g., low risk of harm, some risk of harm, significant risk of harm, etc.). However, Ms. Rogers' explanations for her choices on this instrument were well-reasoned, consistent with the evidence, and convincing. Ms. Edwards' disagreement with how Ms. Rogers

scored the Service Intensity Instrument was unpersuasive, as Ms. Edwards was not a mental health professional, and Ms. Rogers testified persuasively that new information that became known after this evaluation, such as a subsequent schizophrenia diagnosis, did not change how she would score Student.

59. In November and December 2017, credentialed speech pathologist Christina Everett conducted a speech and language evaluation of Student and found that Student had deficits in social communication (pragmatics), was challenged when asked to answer questions requiring him to infer information, and had difficulty determining which of two meanings might apply in ambiguous sentences. Ms. Everett was a well-qualified speech and language specialist, and as no other speech and language specialist was called to testify, her opinions were not contradicted.

60. On December 20, 2017, the juvenile court found that Student had committed a sexual offense. Student's probation officer prepared a social study report for a Juvenile Court hearing scheduled on January 24, 2018. In that report, he recommended that the Juvenile Court authorize Student to be released to a residential treatment center to be paid for by a "school district," although it was unknown at that time which school district would be responsible for Student's education after his release from detention. The probation officer made this recommendation because Student did not have a home to return to, and the juvenile system had no authority to fund placement of an adult at an adult facility. Student's probation officer was not familiar with the Individuals with Disabilities Education Act, and did not take into account whether Student needed a residential treatment center to access his education.

JANUARY 12, 2018 IEP TEAM MEETING

61. On January 12, 2018, Office of Education convened an IEP team meeting to review the ERMHS and speech evaluations. Paternal Grandmother, Student, Student's attorney and advocate, Student's probation officer, Mr. Darling, Ms. Garcia, Ms. Rogers,

Ms. Everett, and Office of Education administrators and counsel attended.

62. Ms. Garcia shared that Student had earned 20 credits towards graduation, was completing work at grade level with assistance, volunteering to share work at the board, completing all assignments, and passing all of his classes.

63. Ms. Rogers reviewed her ERMHS assessment with the team. She concluded that Student's educationally related mental health conditions could be treated, and progress made on his existing goals, with therapy to reduce or eliminate hallucinations and focus and engage in positive peer relationships. She recommended an increase in counseling to 900 minutes per year, or 90 minutes per week, and a change in delivery model for the counseling to intensive outpatient services for Student upon his release from juvenile detention. She recommended that the outpatient services include wrap-around services consisting of individual counseling, group counseling, and family counseling and education.

64. Ms. Dominguez told the team that Student had sought her out several times in the first few weeks, but was currently meeting with her one time per week. She reported that Student was making progress on his goals by advocating for himself and learning to use appropriate coping skills.

65. After the reports by Ms. Rogers and Ms. Dominguez, the team changed Student's eligibility to emotional disturbance, with a secondary eligibility of specific learning disability.

66. Ms. Everett reviewed her speech and language assessment with the team. She presented proposed speech goals in pragmatics, inferences, and ambiguous sentences. Ms. Everett recommended that Student receive speech therapy for 2400 minutes per year to work on those goals, or an average of 60 minutes per week, broken down into 45 minutes of individual speech therapy and 15 minutes of consult between the speech pathologist and Student's teachers. The team adopted the proposed speech

goals and recommended level of speech services.

67. The team discussed various placement options for Student. Student's attorney and advocate told the team that they thought Student required a residential treatment center placement upon release from juvenile detention. However, Office of Education team members believed that the November 3, 2017 IEP offer of academic support was sufficient, particularly as Student was doing so well at SOAR, and that Student could access general education classes with that support both during and after detention. Those team members also agreed with Ms. Rogers' recommendation for an increase in counseling minutes and a change in delivery model for the counseling to intensive outpatient services upon release.

68. The January 12, 2018 IEP offered 10 hours per week of specialized academic instruction in English language arts and math, and increased the amount of counseling from 600 minutes to 900 minutes per year of individual counseling by a school therapist to be provided in weekly increments of 90 minutes, with Student to receive the minutes through intensive outpatient services upon release from juvenile detention. The IEP also offered 2,400 minutes per year of speech therapy to be provided in weekly increments of 45 minutes of individual therapy and 15 minutes of consultation with Student's teachers. The team offered to convene again upon notification that Student was to be released from juvenile detention, and to invite the school district of his residence to review the IEP at that time.

69. On February 6, 2018, Paternal Grandmother consented to the implementation of the goals and services in the January 12, 2018 IEP, but disagreed with placement. In an attachment to the IEP, Paternal Grandmother noted that Student needed residential treatment for a number of reasons, including: to treat emotional distress, sexual abuse therapy, attention deficit, medication compliance, and substance abuse; because Student was violent and threatened to burn down grandparents' house;

because Student was unable to drive a car or access transportation; and to address Student's homelessness.

70. On March 7, 2018, Ms. Garcia, in consultation with Mr. Darling and Ms. Dominguez, completed and sent Paternal Grandmother a progress report on Student's vocational, academic, and behavior goals. Student was making progress on his vocational goals by taking an interest inventory, researching careers of interest, and learning to complete a job application. On his independent living goal, he had made progress by completing a sample budget, and discussing his wants versus needs in light of the current minimum wage and his future goals. Student made progress on his reading comprehension, written language, and integrated math goals. In task completion, Student began assignments without prompting, volunteered more often, and required only one prompt to open his book to the correct page. Student also made progress on his behavior goals, by interacting appropriately with peers, asking for breaks when frustrated and returning to class afterwards, and regularly requesting help from his teachers when needed.

71. On March 12, 2018, Paternal Grandmother filed for due process against Office of Education, seeking a residential treatment center placement and a publicly funded independent ERMHS evaluation.

POST-FILING ASSESSMENT AND IEP

72. In April 2018, Paternal Grandmother retained psychologist Kristina Malek, Ph.D, to conduct a psychological assessment of Student. Dr. Malek had been a licensed clinical psychologist since 2012, and had a master's degree in psychology and a doctorate in clinical psychology. She had training in trauma and sexual offending, and for the past 10 years had conducted assessments and provided therapy to high-risk sex offenders on parole or probation. Her demeanor at hearing was professional, and her responses were thoughtful and insightful. Her assessment was not available to the

January 12, 2018 IEP team, but her findings were consistent with prior assessments.

73. Dr. Malek was retained to assess Student's mental health and make specific recommendations for placement. At hearing, Dr. Malek was candid about her lack of familiarity with the IDEA, or the factors to consider in recommending a residential treatment center for educational purposes. Her opinions, although generally persuasive, were considered in light of this limitation.

74. Dr. Malek reviewed records, interviewed Paternal Grandmother, and interviewed and tested Student. Student had difficulty sustaining attention, which Dr. Malek hypothesized could be due to mental illness or hallucinations, but Student was able to complete the assessment instruments with verbal prompts. Dr. Malek did not observe Student in the classroom.

75. Dr. Malek concluded that Student had low average intelligence and low average academic skills. Student's reading comprehension and recall were low, and Student had difficulty with sustained attention. These findings were consistent with the assessments of Dr. Zappone and Mr. Crain.

76. Student's thoughts were coherent and focused, although his affect was flat, he appeared depressed, and often gave one or two word responses. He admitted to anxiety, and rocked back and forth in his chair. Student relayed a recent history of auditory, visual, and tactile (touch) hallucinations. He heard voices in his head saying "bitch" and "fuck you," but denied that he heard them during the interview, although his poor concentration led Dr. Malek to suspect that he was responding to internal stimuli. Student denied current suicidal ideation, intent or plan, or feelings of rage or aggression. Dr. Malek was not given any information about Student's interactions with the STAT team, other than that he was receiving pharmacotherapy, weekly therapy, and psychiatric interventions as needed.

77. Dr. Malek diagnosed Student with unspecified schizophrenia, stimulant

and cannabis use disorder, and trauma and stress-related disorder. She noted that Student been (illicit) drug-free for eight months, but continued to experience psychotic symptoms. She concluded that with Student's history of psychiatric hospitalizations and homelessness, outpatient treatment would be insufficient to meet all of Student's needs. Instead, Dr. Malek recommended an "assertive community treatment" approach, with a multidisciplinary team of professionals working together to ensure Student's stability and reduce the chances of hospitalizations and substance abuse. This would include a psychiatrist, social worker, vocational specialist, and substance abuse treatment specialists, with random drug and alcohol screening to avoid a relapse on drugs or alcohol, psychosocial interventions such as psychotherapy, skills training and cognitive therapy, and medication evaluation and monitoring. She also recommended family psychoeducation on Student's mental illness and participation in his treatment.

78. At hearing, Dr. Malek explained that Student needed to be placed in a structured environment with staff to monitor his medications and mental health symptoms for Student "to remain absent [sic] from drugs/alcohol and to better manage his mental health symptoms." She opined that a continuum of options was appropriate, including a residential program, an independent living facility, or a board and care facility.

79. In May 2018, Office of Education funded an independent ERMHS evaluation by Kiley Dunne Lizama, a licensed marriage and family therapist with North County Family Counseling Specialists. She had a master's degree in counseling psychology and was working on a doctorate degree in social work. She had worked with youth with mental health disorders since 2014, as an assessor and clinician. Ms. Lizama's demeanor at hearing was professional, and her responses were thorough and well-reasoned. Her experience with homeless and schizophrenic youth made her a compelling witness. Although her assessment report was not available to the January 12,

2018 IEP team, her opinions regarding the interplay of schizophrenia, homelessness, and access to education were informative and are referenced in this decision.

80. Ms. Lizama reviewed Student's IEP's and prior assessments; conducted phone interviews with Paternal Grandmother, Student's probation officer, and Ms. Dominguez; and observed Student in the SOAR classroom. Student was shy, but enjoyed the company of others and wanted to socialize. Student reported that taking methamphetamine made voices in his head louder, but smoking marijuana made them quiet. When prompted, he stated that internal voices distracted him while he was in his room, and that he preferred to do schoolwork in the day room or in class. Teaching staff reported that Student participated in class by raising his hand to answer questions, to ask questions, and to share his work. Ms. Lizama observed Student sitting in an art class and appropriately interacting with his peers, requesting adult help with an assignment, and that Student was able to self-regulate and work out conflicts with his peers. Despite earlier assessments indicating that Student was easily distracted, Ms. Lizama observed that Student was able to focus and quickly redirect himself after a distraction.

81. Student declined to allow Ms. Lizama to speak with a STAT clinician, or to discuss the reason for his incarceration. He told her that he wanted to be released from detention, earn his diploma at a regular school, and did not want to attend a residential treatment facility.

82. In her May 5, 2018 ERMHS assessment report, Ms. Lizama referenced Student's recent schizophrenia diagnosis and greater distraction by internal stimuli, but also noted that Student was engaging in positive participation at school, advocating for himself in all settings while in detention, and using assertive and appropriate communication. She reported that with the use of the January 12, 2018 IEP's school-based supports and STAT team services, Student could identify and utilize healthy coping skills when he began to feel overwhelmed or frustrated in the school setting. She

concluded that Student was not exhibiting behaviors or mental health symptomology that would require a more restrictive environment upon release from juvenile detention more than a day treatment program. At hearing, she explained that a day treatment program was one level of intensity in mental health services above intensive outpatient services.

83. On May 3, 2018, Ms. Edwards observed Student in class again. Student was working on an Algebra problem with a tablemate and speaking with him. At hearing, Ms. Edwards concluded that the other student was giving Student the answers, but her testimony was unpersuasive both because it would be natural for tablemates to discuss a problem they were both working on, and because Mr. Darling testified persuasively that Student was able to, and did, show his work on math problems. Ms. Edwards also questioned the choice of class topic that day, because Student had already been exposed to Algebra, but in light of her lapsed teaching credential, stale teaching experience, and failure to discuss the assignment with Mr. Darling, her opinion on the lack of value of the assignment, and her implication that Student did not benefit from the SOAR math classes, was given no weight.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁶ Ed. Code, § 56000, et seq.; Cal.

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless

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 free appropriate public education 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.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme

otherwise indicated.

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. The Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist.* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 137 S.Ct. at pp. 1000-1001, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, 137 S.Ct. at p. 1001.) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. Feb. 14, 2018, No. 15-56452) __ Fed.Appx. __, 2018 WL 847744.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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].) In this matter, Student had the burden of proof on the issue decided.

5. An educational agency’s determinations regarding special education are

based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

ISSUE: APPROPRIATE PLACEMENT IN LEAST RESTRICTIVE ENVIRONMENT IN THE JANUARY 12, 2018 IEP

6. Student contends that the January 12, 2018 IEP failed to offer Student a FAPE because the mental health services were not sufficient to meet his mental health needs. Specifically, Student contends that he needed to receive mental health services in a residential treatment facility because he would not “voluntarily” take his medications or attend school. Office of Education contends that Student’s goals could be implemented, and Student could earn a regular high school diploma, in general education with specialized academic instruction, mental health counseling, and accommodations. It argues that any need for residential placement was primarily due to Student’s medical, social, or emotional problems apart from the learning process.

Limitation of Issue Decided

7. Student’s closing brief argued new claims, which were not asserted in Student’s complaint or addressed at the prehearing conference, specifically: Office of Education committed procedural violations of the IDEA by 1) failing to update progress reports on Student’s annual goals at the January 12, 2018 IEP team meeting, and 2) failing to develop functional skills goals at the May 8, 2018 IEP team meeting. To the extent that evidence potentially relating to the failure to update progress on annual goals at the January 12, 2018 IEP team meeting was introduced at hearing, Student’s

counsel represented at hearing that the evidence was relevant to, and offered to prove, Student's claim that the January 12, 2018 IEP should have offered Student a residential treatment center placement. Accordingly, Office of Education did not question witnesses with respect to failure to update progress reports at the January 12, 2018 IEP, nor address this angle in its closing brief.

8. Student's complaint was filed on March 11, 2018, and did not, and could not, raise substantive or procedural issues regarding the May 8, 2018 IEP. Student did not move to amend his complaint at any time. An expansion of the issues to include a procedural or substantive challenge to the post-filing May 8, 2018 IEP is barred for a number of reasons.

9. First, a party may amend a due process hearing request only if the other party consents in writing to the amendment and is given the opportunity to resolve the issues stated through an informal resolution meeting, or the due process hearing officer grants permission, except that the hearing officer may only grant permission at any time not later than five days before a due process hearing occurs. (Ed. Code, § 56502, subd. (e); 20 U.S.C. § 1415(c)(2)(E)(i).) No such motion was made, timely or otherwise.

10. Second, special education law does not have compulsory joinder of claims, and a party does not waive claims that are not alleged by proceeding to hearing on less than all claims a party may have. A party may later request a due process hearing on new issues, even if they arise from the same school years addressed in a prior decision, because the IDEA does not preclude new filings on issues that could have been raised and heard in the first case, but were not. (Ed. Code, § 56509; 20 U.S.C. § 1415(o).) Therefore, if Student has claims regarding the May 8, 2018 IEP, he may file a request for a due process hearing on those claims because he did not have those issues heard in this proceeding.

11. Lastly, unlike federal courts, special education administrative due process proceedings do not have a procedure for amendment at trial by implied consent, and the other party has to expressly consent. (20 U.S.C. 1415(f)(3)(B); 34 C.F.R. 300.511(d); c.f., Federal Rules of Civil Procedure, Rule 15). The ALJ clarified during the PHC on April 20, 2018, (almost one month prior to the hearing) and on the first day of hearing that the offer of special education and related services in the May 8, 2018 IEP was beyond the scope of Student's complaint, and Student did not seek to have a motion for leave to amend heard, nor did Office of Education agree to expand the issues, either verbally or in writing, at either time. Accordingly, the ALJ is barred from addressing issues regarding the May 8, 2018 IEP.

Applicable Law Regarding Placement

OFFICE OF EDUCATION RESPONSIBLE FOR DETAINED JUVENILES

12. In California, a county office of education is responsible for the provision of a FAPE to individuals while they are confined to juvenile detention within that county. (Ed. Code, §§ 48645.2, 56150.)

RESIDENTIAL TREATMENT CENTERS

13. An analysis of whether a residential placement is appropriate must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir.1990) 903 F.2d 635, 643 (*Clovis*).) If "the placement is a response to medical, social, or emotional problems . . . quite apart from the learning process," then it cannot be considered necessary under the IDEA. (*Ibid.*, accord *Ashland School Dist. v. Parents of Student R.J.* (9th Cir.2009) 588 F.3d 1004, 1009 (*Ashland*).)

14. The Ninth Circuit has articulated three possible circumstances when it is appropriate to impose responsibility for residential placements on the special education

system: (1) where the placement is 'supportive' of the pupil's education; (2) where medical, social, or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1468 (*County of San Diego*).)

15. Local educational agencies are not responsible for residential placements when the primary purpose is for substance abuse treatment or prevention. (See *Forest Grove School District v. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-1239 (*Forest Grove*) [school district's responsibility under the IDEA was to remedy the learning-related symptoms of a disability, not to treat other, non-learning-related symptoms].)

CHANGES IN CALIFORNIA LAW ON RESIDENTIAL PLACEMENT

16. California special education law regarding the placement of students with disabilities in residential treatment centers changed in a process that began almost seven years ago and was complete about five years before the IEP at issue in this case. Prior to July 1, 2011, mental health services related to a pupil's education were provided by a local county mental health agency that was jointly responsible with the educational agency for funding residential treatment. (Gov. Code §7570, et seq.) Once residential care was recommended by the county department of health, the IEP team was required to determine whether residential care was "necessary for the child to benefit from educational services." (Gov. Code, §§ 7572.5, subds. (b)(1)-(2); see also *County of San Diego, supra*, 93 F.3d at p. 1462.) Government Code sections 7572 (c), 7572.5, 7572.55, 7576, 7576.2, 7576.3, 7576.5, 7586.5, 7586.6, 7586.7, and 7588 were repealed by operation of law on January 1, 2012, which transferred the obligation to assess and provide related mental health services to students with disabilities necessary for a FAPE from the State Department of Mental Health and its county designees to the local educational agencies. (See Gov. Code § 7573.) State regulations adopted to implement

the old statutory scheme (Cal. Code Regs., tit. 2, §§ 60000, et seq.) were not repealed until December 24, 2012, including regulations that mandated that a county mental health assessor's recommendation for mental health services, including for residential placement, was required to become the recommendation of the IEP team, and that the county office of education was financially responsible transporting the student to the residential placement. (Gov. Code, § 7587; Cal. Code Regs., tit. 2, § 60045, subds. (f), and (f)(2).)

Analysis

PROBATION OFFICER'S RECOMMENDATION NOT BASED ON EDUCATIONAL NEEDS

17. Student's closing brief argues that Office of Education was required to place Student in a residential treatment center because the Juvenile Court expressed a willingness to release Student to a residential treatment center as part of the disposition of Student's juvenile wardship. However, there was no minute order or other reliable evidence submitted of what disposition the Juvenile Court was willing to make regarding Student's placement, or whether its decision would be based upon Student's educational needs. Instead, Student submitted a "study" prepared by his probation officer prior to a Juvenile Court hearing that recommended Student be "authorized" to reside in a residential facility. In addition, the probation officer was not a credentialed special education teacher or a school psychologist, and was unfamiliar with the IDEA, and his recommendation was not based upon Student's educational needs.

18. In support of his argument, Student references cases decided in whole or in part on California laws and regulations now repealed, and when special education law mandated that recommendations of the local departments of mental health be incorporated into a student's IEP. The San Diego County Department of Mental Health was not a participant in Student's IEP team meetings, and made no recommendation regarding Student's placement, and Student cites no authority that would have required

the Juvenile Court or Office of Education to adopt such a recommendation. (See Welf. & Inst. Code, § 727, subd. (b)(2)[court has no authority to order services unless it has been determined through the administrative process of an agency that the minor is eligible for those services].)

STUDENT WAS MAKING EDUCATIONAL PROGRESS

19. The January 12, 2018 IEP offer, which was in effect throughout the period at issue, was two pronged. It offered Student special education and related services during juvenile detention *and* upon release from detention. Because the offer upon release was a modification of the program offered during detention, a brief analysis of the program offered during detention is included to place the co-occurring post-release offer in context.

20. At the time of the January 12, 2018 IEP, while in juvenile detention, Student was able to participate in and receive educational benefit from a general education classroom with typical peers. Student completed assignments, shared his work, and participated in group discussions, with support in the form of in-class specialized academic instruction in core subjects, such as English language arts and math. Student's cognitive ability was in the low average range, and with individualized instruction to address his memory, cognitive processing, and academic deficits, he was able to pass classes in the SOAR general education program and acquire credits toward graduating with a high school diploma. By the time of the January 12, 2018 IEP team meeting, with the implementation of the November 3, 2017 IEP accommodations and supports, Student had passed all of his classes in the first semester of the 2017-2018 school year and earned 20 credits towards a regular high school diploma.

21. Mr. Darling testified convincingly that with the supports and accommodations in Student's IEP, Student understood his math and science lessons, could show his work, and could articulate and share comments on topic with the class.

Ms. Garcia persuasively testified that Student's participation in English and math greatly improved with academic support. Student wrote daily journal entries for his English class and volunteered every day to share his entries out loud. He also volunteered to read newspaper passages, shared ideas, and contributed to group discussions. Student began looking his teachers and peers in the eye, sought teachers out when he needed assistance, began having conversations in class with his peers, and began working with peers on classroom work.

22. Although Student talked to others during class, passed notes, got out of his seat, and stomped his feet, Mr. Darling and Ms. Dominguez testified convincingly that a classroom in juvenile hall can sometimes be a rowdy place, with many students coping with a recent arrest and coming off of drugs during their brief time in detention. Student's behavior was not out of place under the circumstances and not disruptive.

23. The January 12, 2018 IEP continued the 10 hours per week of specialized academic support, and added 300 minutes per year of individual counseling and 60 minutes per week of speech therapy. Counseling addressed Student's annual goals in task completion, developing friendship skills, coping with frustration, and asking for help appropriately, and the increased individual counseling was reasonably calculated to provide more time for Student to speak with his counselor to focus on his mental health issues that affected learning, including anxiety and internal distractions. The 45 minutes of individual and 15 minutes per week of consultative speech services addressed Student's language goals, and gave his teachers information and techniques to provide support to Student in the classroom. Accordingly, the IEP team reasonably concluded that this level of special education and related services was sufficient to enable Student to make progress appropriate in light of his circumstances while in juvenile detention.

24. Upon release from juvenile detention to any situation other than a different type of incarceration, Student could continue to access general education

courses with specialized academic instruction for English and math, and speech therapy, at his school of residence and provided by his school district of residence. However, the January 12, 2018 IEP team acknowledged that Student would require the support to meet his behavior goals to be delivered in a different form that took into account that he would be living in the community. The team considered Ms. Rogers' report of the Service Intensity Instrument results on the level of treatment intensity Student would need outside of detention, and her recommendation that Student's counseling minutes be accessed as intensive outpatient services, to include individual therapy, group therapy, and coordination and education with Student's family. Student's maternal and paternal grandparents had been stable influences in Student's life, and were expected to continue to be involved with Student and supportive of Student after release, so it was reasonable for Ms. Rogers to include family support in her recommendation. Ms. Rogers testified persuasively that intensive outpatient therapy would have provided Student with the educationally related mental health services he needed to control his anxiety and frustration, to tune out the voices in his head, to make progress on his annual goals of asking for help appropriately and when needed, to establish long-term friendships, and to cope with frustration. The Office of Education members of the January 12, 2018 IEP team reasonably calculated that 900 minutes per year of intensive outpatient services was sufficient to enable Student to make educational progress appropriate in light of his circumstances in the event he was released from juvenile custody.

25. Accordingly, the January 12, 2018 IEP offer of general education with the support of specialized academic instruction, counseling, and speech therapy offered Student a FAPE under the *Rowley* standard as articulated by *Endrew F.*, both during his juvenile detention and in the event of release from custody. As discussed below, Student did not meet his burden of proving that placement in a residential treatment center was a necessary component of a FAPE upon release from juvenile detention.

NO NEED FOR RESIDENTIAL PLACEMENT

26. The seven levels of mental health service intensity identified and weighed by the Service Intensity Instrument put residential treatment in perspective. For a juvenile released into the community, the levels of support vary from basic services for prevention and maintenance to secure 24-hour psychiatric monitoring.⁷ This scale of mental health services is consistent with Ms. Lizama's testimony that residential treatment, or 24-hour monitoring, was at the far end of the continuum of treatment options and required for the most severe cases of mental illness. It is also consistent with the continuum of placement options in special education law identifying residential treatment as one of the most restrictive placements available. (34 C.R.R. § 300.115; *Carlisle Area School v. Scott P.* (3rd Cir. 1995) 62 F.3d 520, 523.)

27. Preliminarily, Student did not call any witnesses familiar with residential treatment centers to describe the components of the placement Student contends was necessary for a FAPE. Student's closing brief described residential treatment as a structured setting where Student would be directed to attend school and take his

⁷ A locked mental health or educational facility after release was not an option in Student's situation. Student was an adult and not conserved. As noted by Dr. Malek, once Student was no longer incarcerated for his offense, he could leave any residential program, and could decline to take his medication, at any time. No evidence was submitted to the contrary. Although Student might have been placed on a program of probation and subject to judicially imposed conditions of probation such as remaining in his residential program or remaining medication compliant, the fact that he could experience a consequence such as his probation being revoked (being re-incarcerated) would not be any actual barrier to Student leaving a residential program or refusing medication.

medications, because he would not do so on his own but would comply with “guidance.” Such a level of support, amounting to regular reminders, can be provided without 24-hour monitoring and treatment.

28. The testimony of Student’s mental health experts did not support Student’s contention that at the time of the January 12, 2018 IEP he required placement in a residential treatment center upon release from juvenile detention. In October 2017, Dr. Zappone reported that Student’s educational needs could be met with individualized instruction and classroom accommodations. For Student’s mental health, she recommended ongoing psychiatric care and participation in a sobriety and recovery program, not residential treatment. At hearing, Dr. Zappone opined that when Student left juvenile detention, he would need close monitoring, drug testing, substance abuse services, and a highly structured environment, which she defined as close supervision and someone to administer his medication. She opined that a residential placement would be “best” because Student needed to remain off of drugs and alcohol, but she was not familiar with criteria for determining placement under the IDEA. Dr. Malek assessed Student in May 2018, and her report and opinions were not available to the January 12, 2018 IEP team. Dr. Malek testified that Student would need monitoring and care for the rest of his life, but could learn to cope with his hallucinations. She opined that he would need a regular counseling regimen upon release and was not yet at the level where he could function independently, but with wrap-around services such as counseling and monitoring, Student could be released to board and care or a group living facility, and did not necessarily require residential treatment.

29. Office of Education’s assessors and independent evaluator Ms. Lizama testified persuasively that Student did not require residential treatment upon release. School psychologist Mr. Crain assessed Student in October 2017, attended Student’s IEP team meetings on November 3, 2017, and January 12, 2018, and had extensive

experience working with juveniles. He heard Ms. Rogers' ERMHS assessment report at the January 12, 2018 IEP team meeting, and agreed with her recommendation that intensive outpatient services would be sufficient support for Student to make progress on his annual goals after release. Ms. Rogers assessed Student in January 2018 for educationally related mental health needs, and at hearing she convincingly testified that at as of January 2018, Student did not require residential treatment upon release. Student was able to maintain his own physical safety, did not pose a serious risk of harm to others, was able to independently engage in activities of daily living, and could be expected to access school and intensive outpatient care on his own. Ms. Rogers was an experienced ERMHS assessor, and the January 12, 2018 IEP team reasonably relied upon her recommendations in making the offer for intensive outpatient services upon Student's release from detention. Ms. Lizama did not conduct an independent assessment of Student until May 2018, and the January 12, 2018 IEP team did not have the benefit of her assessment results. Although her opinion was limited to Student's educationally related mental health needs in May 2018, and she recommended day treatment rather than intensive outpatient therapy, her opinion was consistent with the other expert witnesses that Student did not require residential treatment. Ms. Lizama was adamant that Student had no intent or plan to harm himself, could independently engage in activities of daily living, and his success in academics with the support already in place did not warrant placement in a residential treatment center.

30. Contrary to the expert opinions at hearing, Student contends that he requires residential treatment. Student argues that he needs placement in a residential treatment center because he will not voluntarily: seek out classes, attend individual or group counseling, obtain medication from professionals, or take his medications. Student contends that he will fall back on his prior lifestyle of drug abuse and homelessness if he is not placed in a residential treatment center. However, the evidence

demonstrated that Student voluntarily sought out SOAR classes and counseling with Ms. Dominguez and Mr. Crain although he was not required to do so, and the January 12, 2018 IEP team reasonably calculated that Student would continue to access these services after release from juvenile detention. Further, medication management, abstinence from drugs and alcohol, and avoidance of homelessness, are not educational needs that require residential placement, as illustrated by Ninth Circuit cases with similar facts.

31. *Clovis* involved a student who was a “seriously emotionally disturbed” and had been placed in a residential treatment center by the local school district due to her destructive behavior. The residential treatment center informed the parents that its staff could no longer control the student, and the parents placed her in an acute care hospital and sought funding from the school district. The Ninth Circuit rejected the argument that when a child is psychologically or psychiatrically handicapped, the child’s educational needs cannot be segregated from the child’s needs for treatment and are therefore “related” to education. (*Id.* at p. 644.) It found that the student’s residential psychiatric program was necessary for her continued mental health, and not for educational purposes, and so was not a “related service” for which the school district was responsible. (*Id.* at p. 645).

32. In *County of San Diego*, the Ninth Circuit found a residential treatment center placement necessary for educational benefit because the record showed that a less restrictive day treatment placement had been tried, but the student had made no progress on her goals with that level of service. The student exhibited violent outbursts in response to class reports and was assigned little to no homework as it was too stressful for her. (*County of San Diego, supra*, 93 F.3d at pp. 1462 and 1463.) The court found residential placement necessary under three possible tests for determining when to impose responsibility for residential placement on the special education system: (1)

whether the placement was “supportive” of the pupil’s education, (2) whether medical, social or emotional problems that required residential placement were intertwined with educational problems, and (3) whether the placement was primarily to aid the student from benefiting from special education. It found that the student needed the structure, discipline and support of a residential treatment program to achieve her IEP goals, that the student had substantial educational problems as well as non-educational problems, and that the primary purpose of the therapeutic placement was educational. (*Id.* at p. 1468.)

33. In *Ashland*, a special education student who was earning A’s and B’s and doing well in school was defiant at home, sneaking out of the house at night to visit male friends and her parents feared that she would run off with the school custodian. The parents placed the student in a residential facility and sought to have the school district pay for that placement. The Ninth Circuit noted that the IDEA defined “special education” as specially designed instruction, and “related services” as services required to assist a child with a disability to benefit from special education, and reiterated its directive from *Clovis* that the focus should be on whether a residential placement was necessary to meet educational needs. (*Ashland, supra*, 588 F.3d at p. 1010.) It found substantial evidence to support the district court’s finding that the student did not require residential placement for any educational reason and that the residential placement stemmed from issues arising at home, and therefore apart from the learning process. (*Ibid.*).

34. In *Forest Grove*, the school district evaluated the student in ninth grade and found him ineligible for special education as a child with a specific learning disability, but failed to inform the parents that its staff suspected the student might have an attention disorder and be eligible for special education under a different category. In eleventh grade, the student began using marijuana multiple times per day, viewing

pornography, and running away from home. A psychiatrist diagnosed the student with attention deficit hyperactivity disorder, depression, and marijuana addiction, and the parents placed him in a private residential treatment facility and sought reimbursement. The district court found that the student was placed in the residential treatment facility solely because of his increasingly severe drug addiction and behavioral problems, and the Ninth Circuit upheld the district court's decision to deny reimbursement because the residential placement was not required for educational reasons. (*Forest Grove, supra*, 638 F.3d at p. 1241.)

35. Here, the weight of the evidence did not establish that a residential treatment center placement was necessary to provide Student with special education and related services. Student was not a danger to himself or others. Student was passing all of his classes and earning credit towards his high school diploma with in-class specialized academic instruction. With individual counseling, he made progress on his behavior goals of asking for help appropriately and when needed, completing assignments, advocating for himself, working through difficult situations and making friends. Student voluntarily attended classes. He sought out counseling, and took the initiative to seek counseling more often than scheduled when counseling services were first implemented. On these facts, Student received educational benefit and made progress on his goals with the special education and related services provided during the school day. The January 12, 2018 IEP added additional counseling services and speech therapy that licensed and credentialed members of the team opined were sufficient to address educationally-related mental health and language needs identified at that meeting. Accordingly, the placement and related services Office of Education offered in the January 12, 2018 IEP upon release were reasonably calculated to continue to confer educational benefit on Student.

36. When the facts of this case are analyzed under each of the Ninth Circuits

tests for whether placement in residential treatment is necessary, the evidence does not support the need for residential treatment for Student.

RESIDENTIAL TREATMENT NOT SUPPORTIVE OF EDUCATIONAL PROGRAM

37. As to the first Ninth Circuit test, whether a residential treatment placement is supportive of Student's education, the weight of the evidence demonstrated that residential treatment was not required to support Student's education.

38. Student was making progress on academics and his transition plan with general education instruction plus specialized academic instruction for 10 hours per week, and was improving peer relations, communication, and the ability to ignore internal distractions with 60 minutes per week of individual counseling and 60 minutes per week of speech services. Student was earning passing grades and class credit, and approximately three semesters away from earning a regular high school diploma with the supports offered in the January 12, 2018 IEP. He was making good progress on his educational goals, including making friendships, interacting with peers, learning to assert himself and ask for help, and successfully utilizing techniques to cope with frustration. There was no persuasive evidence that Student needed additional services, let alone residential treatment, to receive educational benefit and make progress in light of his circumstances.

39. Student seeks treatment for illicit drug and alcohol use, and sobriety and recovery programs for his mental health. However, the Ninth Circuit has rejected the argument that medical services are *per se* "supportive" of a child's education as too inclusive. It cited with approval a district court case that declined to find residential treatment necessary to support a schizophrenic child who might otherwise have been unable to attend and participate at school, and explained, "If [the schizophrenic student] had not been medically treated, she would have been unable to take advantage of and receive any benefit from her education, but the same would apply to any illness." (*Clovis*,

903 F.2d at p. 643, citing *McKenzie v. Jefferson* (D.D.C. 1983) 566 F.Supp. 404, 413.) Here, Student had dependency and mental health problems that needed treatment as any illnesses would, but that did not make the best mental health treatment for his problems necessary under the IDEA to assist Student to benefit from special education.

40. Student also argues unconvincingly that a residential placement supports his education because he will engage in harmful conduct if he is not monitored 24 hours per day. Every witness who had worked with Student in juvenile detention testified that Student was polite and respectful to peers and adults. He received only one very minor conduct citation during almost 10 months in detention. Once the January 12, 2018 IEP was implemented, Student voluntarily sought out additional counseling to discuss his social relationships and how to cope with frustration. Prior to detention, Student never physically harmed his Paternal Grandmother, and his threat to burn her house down was an isolated comment. Student never acted on any command from the voices in his head. Other than the sexual assault of his step-sibling when Student was 11 years old, there was no evidence that Student ever harmed anyone. Student gave conflicting stories to various assessors about whether his attempt to open the door on the freeway was an actual suicide attempt or not, and other than that one incident, he denied ever having an intent or plan to harm or kill himself.⁸ There was no persuasive evidence that upon release Student would be a danger to himself or others. Accordingly, Student did not require a residential placement with 24-hour monitoring for the safety of himself, his family, or the public in order to receive educational benefit.

⁸ Paternal Grandmother's testimony that Student banged his head on the wall because she "heard" banging on the wall while Student was taking a shower was speculative and unpersuasive. There was no evidence that Student had suffered a head injury.

NON-EDUCATIONAL NEEDS NOT INEXTRICABLY INTERTWINED

41. As to the Ninth Circuit's second test, Student did not establish that his medical, social, or emotional problems required residential placement, let alone that the need for residential treatment was so intertwined with his educational needs as to require residential treatment for educational purposes. Dr. Zappone's report recommended supports available on an outpatient basis, including ongoing psychiatric care, additional medical evaluations, and participation in a sobriety and recovery program. Although Dr. Malek did not think outpatient services were sufficient for Student to remain sober from drugs and alcohol or to better manage his mental health symptoms, she fell short of opining that he required residential treatment. Dr. Malek explained that Student's mental health symptoms could be managed in a structured facility where staff could monitor his medications and symptoms, such as an independent living facility or board and care home. The facts here are also distinguishable from cases such as *County of San Diego*, which found the student's medical, social, or emotional problems inextricably entwined with educational needs because schoolwork caused the student anxiety and was a trigger for destructive behavior. Student voluntarily attended and participated in SOAR classes, and contributed and socialized with his peers in those classes. Student told various assessors that he looked forward to earning his high school diploma. He performed well academically and socially with the supports of the January 12, 2018 IEP. Student's substantial problems with inappropriate sexual urges, substance abuse, and hearing voices were not related to his education.

RESIDENTIAL PLACEMENT NOT PRIMARILY TO AID IN EDUCATION

42. Lastly, Student did not meet the Ninth Circuit's third test of establishing that a residential placement was primarily to aid him in benefitting from his education. Paternal Grandmother told Office of Education at the January 12, 2018 IEP team meeting

and in her letter addendum to the January 12, 2018 IEP that Student required residential treatment for sexual predator recovery, medication management, and substance abuse treatment. These are not educationally-related problems. (See *Forest Grove, supra*, 638 F.3d at pp. 238-1239 [local educational agencies are not responsible for residential placements when the primary purpose is for substance abuse].) Dr. Zappone and Dr. Malek disagreed on whether Student had schizophrenia, but per the reasoning of *Clovis*, the fact that Student had a diagnosis of schizophrenia did not require treatment for mental illness to be a component of Student's educational program. Student was making educational progress appropriate in light of his circumstances with instruction, counseling and speech therapy provided during the school day. A 24-hour residential placement to treat Student's medication needs, sexual urges and dependency on alcohol and illicit drugs is not primarily to aid Student to benefit from special education.

43. Student seeks placement in a residential treatment center in response to medical, social, or emotional problems quite apart from the learning process. For example, Student contends that he needs someone to tell him to take his medications, but that is not an educational purpose. Even if it were, whether and to what extent Student was on medication, whether and to what extent Student would need monitoring of his medications, the purpose of the medications and the consequences of interruptions in medication management were not placed in evidence. None of Student's medical professionals, including psychiatrists or members of his STAT team, testified at hearing. Neither Dr. Zappone, Ms. Rogers, Ms. Dominguez, Mr. Crain, nor Dr. Malek had personal knowledge of medications Student was taking, if any, and each of them deferred to Student's treating psychiatrist when questioned about Student's need for medical monitoring.

44. Paternal Grandmother's January 12, 2018 IEP addendum letter delineated multiple non-educational reasons that she believed warranted Student's placement in a

residential treatment facility upon his release, including sexual abuse therapy, medication compliance, and substance abuse therapy. As found above, Student's educational needs resulting from his IDEA-defined disabilities of emotional disturbance and specific learning disability were addressed by the special education and related services offered in the January 12, 2018 IEP. Student's need for sex offender treatment, medication compliance, and substance abuse therapy are precisely the types of non-educational purposes for which a local educational agency is not responsible.

45. Accordingly, Student's primary therapeutic need is not educationally-related, and he is not entitled to placement in a residential treatment center for that reason.

HOMELESSNESS IS NOT A MEDICAL CONDITION REQUIRING TREATMENT

46. Student contends that he has nowhere to go upon release from juvenile detention, and requires placement in a residential treatment center to prevent homelessness. However, providing Student with a place to live is not a support needed for him to achieve his IEP goals, is not related to his educational needs, and is not a problem related to his education. The IDEA is an education statute, not a housing statute. Just as the IDEA does not require local educational agencies to pay the costs of a child's room and board at home, it similarly does not require them to pay the room and board costs at a residential treatment center that is not necessary for educational purposes. (See *Clovis, supra*, 903 F.2d at p. 647.)

47. At hearing, Ms. Rogers made the common sense observation that homelessness is not a mental health condition that needs treatment. Ms. Lizama, who counseled mentally ill homeless students who slept at shelters or slept outside each evening, testified movingly that her students' homelessness did not prevent them from going to school every day, or from seeking out mental health services. The mere fact that Student might become homeless upon release from juvenile detention did not

mean that he would be unable to access the services offered in the January 12, 2018 IEP, or warrant placement in a residential treatment center.

48. In summary, the weight of the evidence established that placement in a residential treatment center was not necessary for educational purposes upon Student's release from juvenile detention at the time of the January 12, 2018 IEP team meeting. Student seeks residential treatment for medical, social, or emotional problems apart from the learning process.

49. Student has experienced significant hardship and trauma during his short eighteen years, and may have psychiatric conditions that require care and monitoring for the rest of his life, apart from the learning process. Student may well be entitled to funds from other social agencies to cover the costs of having a place to live and ongoing treatment, but Office of Education is not the proper agency for that relief. (See, e.g., *Clovis, supra*, 903 F.2d at p. 647.)

50. Student did not meet his burden of proving by a preponderance of the evidence that he required placement in a residential treatment center upon release from juvenile detention at the time of the January 12, 2018 IEP.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on the sole issue decided.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all

parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 9, 2018

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings