

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

RIVERSIDE COUNTY DEPARTMENT OF
MENTAL HEALTH.

OAH CASE NO. 2008100383

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings (OAH), State of California, heard this matter in Riverside, California on February 17 and 18, 2009.

Christian Knox, Esq., of the Law Office of F. Richard Ruderman, represented Student and his Mother. Mother was present for the entire hearing. Student's older Brother was present for a substantial part of the hearing. Student did not attend.

Sharon Watt, Esq., of Filarsky & Watt, LLP, represented the Riverside County Department of Mental Health (CMH). Roxana Khan, an associate attorney with Ms. Watt's firm, was present each day of the hearing. Dianne Radican, a supervisor for CMH's Children's Case Management division, was present throughout the hearing.

Mother filed a due process hearing request (complaint) on October 14, 2008.¹ On December 4, 2008, OAH granted the parties' joint request for a continuance of the hearing. The hearing started on February 17, 2009, and concluded on February 18, 2009. The record remained open for the receipt of the parties' closing briefs, both of which OAH timely received on February 27, 2009, at which time the ALJ closed the record.

¹ Student also originally named his school district as a respondent in this case. However, he and the District settled the issues Student had raised as to the District and OAH dismissed the District as a respondent at the parties' request in an order dated January 23, 2009.

ISSUES²

Did CMH deny Student a free appropriate public education (FAPE) for the 2008 – 2009 school year by failing to provide him with appropriate mental health services, including family therapy, individual therapy, and a residential placement?

As a remedy, Student requests an order that he is entitled to a residential placement at an appropriate facility to be determined by his individualized education program (IEP) team.

PROCEDURAL ISSUES

In its prehearing conference statement, CMH limited the issue to be decided at hearing to whether it had provided Student “with appropriate mental health services from August 1, 2008, until October 14, 2008.” CMH selected October 14, 2008, as the end point of the issues in this case because it was the date Student filed his due process complaint. However, since Student’s complaint specifically stated the issues as encompassing whether CMH had failed to provide appropriate mental health services to Student during the entire 2008 – 2009 school year, the ALJ ruled at the prehearing conference, and reiterated at hearing, that she considered the issue to encompass CMH’s provision of mental health services, or lack thereof, for the time period up to the hearing. However, as discussed more fully below, that analysis necessarily includes a discussion of whether CMH was aware of pertinent facts that impact its legal obligations to Student.

Additionally, Student raised an issue with regard to the prehearing conference order. The ALJ issued her Order Following Prehearing Conference (PHC) on February 6, 2009. In that Order, she directed Student to demonstrate what the residential placement should be if he prevailed on the issues in his complaint. Student subsequently filed a motion to amend the Order, to which CMH filed an opposition. Student argued in his motion to amend that he was not legally required to identify the residential placement he might need if the ALJ found in his favor on the issues raised in his complaint. He further argued that the decision as to the residential placement, if ordered, should rest with CMH, which would comprise part of his IEP team, since CMH and his team rather than Student or his Mother, have the expertise

² The issue is that identified in the PHC order dated February 6, 2009, which clarified the issues that Student originally raised in his complaint. In his closing brief, Student argues for the first time that CMH denied him a FAPE by failing to timely and adequately assess him for a residential placement. However, since Student did not specifically raise that issue in his complaint, it was not included in the PHC order, and the parties did not litigate it at hearing, the ALJ cannot address the issue in this Decision. See Title 20 United States Code section 1415, subsection (f)(3)(B), and Education Code section 56502, subsection (i), which provide that a petitioner is not permitted to raise at hearing issues that the party did not raise in the due process petition, unless the other party consents. See also Title 20 United States Code section 1415, subsection (c)(2)(E), and Education Code section 56502, subsection (e), which provide that a petitioner is permitted to amend a petition only if the Administrative Law Judge grants permission, or by consent of the opposing party to the filing of an amended petition. Student neither moved to amend his petition nor obtained the consent of respondent to the addition of any issue regarding the timeliness or adequacy of a CMH assessment of Student for residential placement.

to determine which of the many residential placements might meet Student's needs. On the first day of hearing, the ALJ orally granted Student's motion to amend in substantial part, finding his arguments persuasive. She orally amended the PHC order to direct that Student state the type of placement he needed rather than identify what the placement should be.

CONTENTIONS OF THE PARTIES

Student contends that CMH failed to provide him with mental health services during the 2008 – 2009 school year, which he required in order to benefit from his education. Student further contends that he required a full-time residential placement at an appropriate facility that treats emotionally disturbed children who are unable to access their education through programs provided by their local school district. Student maintains that he was unable to benefit from his education due to requiring psychiatric hospitalizations, which prevented him from attending school. Student contends that his personal mental health issues stemming from his problems in his home environment are entwined with and affect his functioning in the school environment. Student therefore contends that he requires a residential placement to treat all his mental health issues. Student contends that the decision of CMH that he did not require a residential program denied him a FAPE.

CMH contends that Student's mental health issues all relate to problems that he is experiencing at home rather than issues Student is having at school. CMH points to the fact that all of Student's psychiatric hospitalizations have occurred because of incidents at his home which did not involve issues of Student's education. CMH contends that it is not responsible for providing services through the IEP process for a student's mental health issues that are solely based on familial problems, and that Student is not eligible for an IEP – based residential placement since the source of his problems are not educationally based and do not interfere with Student's ability to function appropriately at school, to access his education, or to meet his IEP goals.

FACTUAL FINDINGS

Background

1. As of the date of this hearing, Student was almost 16 years old. He resides with Mother and, at times his older brother, within Riverside County. Student is qualified to receive special education and related services as a student with emotional disturbance. Student was first found eligible for special education services on December 19, 2006.

2. A school district may refer a special education student suspected of being in need of mental health treatment to the local county mental health agency for that treatment. The county mental health agency is responsible for the provision of mental health services to the student if required in the IEP of the student. These services are commonly known as "Chapter 26.5 services" or "AB2726 services." CMH first found Student eligible for mental

health services pursuant to Chapter 26.5 on June 5, 2007, based upon Student's intense anger and aggressive behavior, which were impacting his academic and home functioning.

3. After assaulting Mother in their home, Student was placed under the care of the juvenile justice system. The juvenile probation department ultimately placed Student in a residential treatment program which Student completed in the spring of 2008. Student was hospitalized for psychiatric reasons for nine days in March 2008, just after being released from the juvenile probation residential placement.

Failure to Offer a Residential Placement

Student's April 17, 2008 IEP

4. Student's IEP team developed an IEP for him which is dated April 17, 2008. The team placed Student at the Alessandro School, which is a school within the Moreno Valley Unified School District (Moreno Valley). The school serves only children with special needs, including those who have been designated as emotionally disturbed. There are no general education classes at the school. Counseling sessions are among the many specialized services available to children attending Alessandro. The counseling services are provided through the Special Education Local Plan Area (SELPA) to which Moreno Valley belongs.

5. The April 17, 2008 IEP placed Student in a special day class (SDC) for emotionally disturbed children for his entire academic school day. The IEP also provided Student with 50 minutes a week of individual counseling through September 4, 2008. CMH was to provide the 50 minutes of counseling to Student, with transportation for Student from school to CMH to be provided by Moreno Valley. CMH was also to provide case management and medication management services to Student under this IEP.

6. Student's present levels of education performance (PLEPS) noted that he had fully met three of his seven previous goals, had partially met one goal, and had not met one goal. The IEP team was not able to confirm whether Student had met two of his other goals.

7. Student's PLEPS indicated that reading comprehension and mathematics were areas of need for Student but that he had no needs in the area of written language.

8. With regard to social, emotional and behavior skills, the IEP noted that Student was not showing any signs of disruptive, combative, or non-compliance behaviors. However, the IEP noted that Student did appear to be withdrawn and did not often interact with other students or with school staff unless he was approached. His IEP therefore indicated that improving peer and staff relationships was an area of need for Student.

9. The IEP developed three goals for Student. The first addressed improving his reading comprehension since Student, although in 10th grade, comprehended at a ninth grade

level. Student only comprehended 40 percent of what he read. His IEP goal was to raise his comprehension to 70 percent by April 2009.

10. Student's second goal was in the area of mathematics, specifically in Algebra I. The IEP determined that Student should improve his ability to master linear equations to an accuracy of 70 percent by April 2009.

11. Student's third goal addressed his social and emotional needs with regard to interpersonal relationships. The goal stated that by April 2009, Student would identify characteristics of peers he finds to be like his own (such as enjoying reading, music, sports, etc.) and with direct help of his teacher, would select two peers and interact three times a week in a five-minute conversation without staff prompting in four out of five trials, as measured through a charting system. Since the IEP team did not note any behavior problems at school, there were no goals that addressed any misbehavior of Student. Because of the lack of behavior problems at school, the IEP does not include a behavior support plan for Student. Student does not contend that this, or any other of his subsequent IEPs, should have included a behavior support plan.

12. On May 8, 2008, Mother authorized the implementation of the April 17, 2008 IEP. However, Mother also wrote in an IEP addendum that she believed the IEP was inappropriate. Among other issues, Mother indicated that she felt the goals did not address all of Student's needs or accurately address his present levels of performance. She also felt that Student needed a social skills class, that he needed goals in the areas of coping skills, and that Student needed a goal to develop staff relations. Mother also stated that the IEP should have included group and family counseling services from CMH. Mother did not raise the issue of a residential placement in this addendum.

Student's Settlement of OAH Case Number 2008010799

13. Student had filed an earlier due process request in January 2008, in OAH case number 2008010799, naming various educational agencies and CMH as respondents. Student entered into a settlement agreement with all respondents in late July and early August 2008, resolving all issues between all parties through July 31, 2008. In pertinent part, Moreno Valley agreed to provide Student with two social skills groups twice a week for six weeks at Alessandro and agreed to conduct a psycho-educational assessment of Student prior to the end of the 2007 – 2008 extended school year.³ Although the settlement agreement contemplated that Student would continue attending Alessandro, it also anticipated that Student actually needed a *less* restrictive environment than the all-special needs classes at Alessandro. The settlement thus included a provision that Student therefore would begin to transition to a general education comprehensive high school in the fall of

³ It is unclear whether the agreement to complete the assessment before the end of the 2007 – 2008 school year was a typographical error since that school year was almost completed by the time the parties executed the settlement agreement and it would be almost impossible to complete the assessment in the time indicated. However, this assessment is not at issue in the instant case.

2008, starting with one elective class. However, there was no evidence presented at hearing that Student ever began that transition.

14. With regard to mental health services, the settlement agreement provided that through September 1, 2008, CMH would continue to provide Student with the 50-minute per week individual counseling session as per his April 17, 2008 IEP, and that Moreno Valley would continue to transport Student to the counseling sessions, as per the IEP. In the settlement, CMH also agreed to provide family therapy to Mother twice a week, for 50 minutes each session, through September 1, 2008.

15. Although Mother had agreed to the implementation of the April 17, 2008 IEP in her addendum dated May 8, 2008, she reiterated her consent to that IEP in the settlement agreement.

16. Although Student's complaint in OAH Case Number 2008010799 stated that he required a residential placement and requested one as a remedy, there is no reference to a residential placement in the settlement agreement.

17. As discussed below, although Mother, Moreno Valley school psychologist Susan Zapasnik, and Alessandro School Principal Karen Tomei all presented testimony at hearing regarding Student's functioning at school starting in approximately mid-August of 2008, neither they nor any other witness addressed Student's performance at school during the spring or summer of 2008. There is no evidence that Student had any problems or difficulties in school during that time.

Abby Oursler's Mental Health Re-Assessment of Student

18. CMH completed an updated mental health assessment for Student between May and September 2008; Mother gave her consent for CMH to conduct the assessment. The assessment report is dated September 29, 2008. It was prepared by marriage and family therapist Abby Oursler, who is employed by CMH as a clinical therapist. Oursler has a bachelor's degree in psychology and a master's degree in clinical psychology, both from California State University, San Bernardino. She has approximately 20 years experience as a therapist. Oursler has worked at CMH since 1999.

19. For the assessment, Oursler contacted Student's educational providers, reviewed his educational records and past CMH assessments, and spoke with Mother. Oursler also reviewed her clinical progress notes of her sessions with Student. She did not contact any of Student's other mental health providers because she did not have signed waivers from Mother permitting her to do so.

20. Oursler noted that the purpose of her assessment was to determine if Student was continuing to have a mental health issue that impacted his academic functioning. She found that he did not. School staff at Alessandro informed her that Student was performing well at school and that their only concern for him was Student's limited social interaction.

The staff informed Oursler that this limited social interaction did not appear to be impacting Student's academic functioning. During the assessment period, no one at Student's school informed Oursler that Student had any behavior issues at school, that his academics were suffering, that he was unable to access his education, or that he was engaging in any behavior that prevented him from meeting his IEP goals. Oursler contacted school staff again in September 2008 and was told that Student continued to do well overall. Mother reported that Student had failed one of two summer school classes, but she attributed Student's failure to a personality conflict with the teacher.

21. Oursler also reported that Student was a member of the Sea Cadets⁴ and that he had successfully completed a 10-day event during the summer of 2008 in which Student travelled with the Cadets on a trip to Hawaii. The information imparted to Oursler was that Student maintained well during the trip and interacted socially with the others in the group although he was a relatively new member. There is no evidence that Student had any behavioral problems or issues during the trip to Hawaii or during any other meetings or activities with the Cadets.

22. Finally, Oursler noted in her assessment report that Student had only minimally participated in his therapy sessions. Student told her on various occasions during therapy that he did not want to attend the sessions and that he felt that he had talked about everything that he needed to address when he was in his juvenile court placement. Oursler noted that Student resisted engaging in the therapy treatment process. She also noted that Student, in his conversations with her, did not give any indication of any problems or mental health issues that were impacting his academic functioning.

23. Based upon the information provided to her, consisting of school reports that Student had no behavioral issues at school which impacted his educational functioning, the fact that Student was able to participate in the Sea Cadets without problems, and the lack of any information that indicated that Student was not able to access his education at school or advance toward meeting his IEP goals, Oursler, on behalf of CMH, determined that Student no longer met the criteria to receive mental health services from CMH through his IEP.

Student's September 15, 2008 and September 30, 2008 IEPs

24. Student's IEP team met on September 15, 2008, to discuss mental health services for Student.⁵ Although Oursler had not yet completed her assessment report, the IEP noted that CMH had found Student no longer met eligibility for AB2726 services. The IEP team discussed providing counseling to Student at school. The team, including CMH,

⁴ Sea Cadets are generally members of a Sea Cadet Corps, a formal cadet organization of young people with an interest in their national navy. The organization may be sponsored by the Navy or Naval supporter's organization. It is not an organization sponsored by a school district or otherwise affiliated with a school district.

⁵ According to Alessandro Principal Tomei, school had started August 13, 2008, for the fall semester.

decided to continue providing Student with therapy sessions at CMH while simultaneously transitioning him to therapy sessions at the school site. Therefore, Student would receive an hour of therapy at Alessandro as well as the 50-minute per week session he was already entitled to through CMH services. This is indicated on the IEP as Individual Counseling and Counseling and Guidance. The IEP also indicated that the school district would explore providing family therapy services as well.

25. Although Mother noted at the September 15, 2008 IEP meeting that Student continued to have behaviors that were manic based upon depression and anger, there is neither any indication in the IEP document nor was there any testimony presented at hearing which indicated that Student was exhibiting any improper behaviors at school or was otherwise unable to access his education or work toward his IEP goals at the time of the meeting.

26. On September 22, 2008, Mother submitted an addendum to the September 15, 2008 IEP. In the addendum, she authorized Alessandro to provide the on-site counseling to Student, authorized CMH to continue providing the services once a week to Student, and indicated that she disagreed with the cessation of CMH services.

27. Mother requested another IEP team meeting based on issues that had arisen at home on September 24, 2008, when Student lost control of his behavior. Mother emotionally and credibly testified at hearing, and notes she made the day after the incident corroborate, that Student came home about 12:35 p.m. that day and immediately confronted Mother and grandmother with harsh words and behaviors because he could not find any cheese in the refrigerator. His behavior escalated after his grandmother left. Student followed Mother to her room and kicked her door, all the while shouting and cursing at her. He threatened to harm Mother, and then threatened to kill her, moving menacingly toward her as he yelled. Student refused to leave the room. He picked up a chair and threw it at a bookshelf, causing its contents to fall. Mother ultimately called 911 to request police assistance. Student calmed down before the police arrived and Mother called back to cancel her 911 call. However, the police still sent an officer to respond about an hour after Mother made her first call. The officer spoke with Mother and Student and determined that Student was not at the moment a danger to himself or others. He therefore took no action to remove Student from the home. After the officer left, Student again lost control of his behavior, and threatened Mother with a knife. Mother eventually was able to calm Student down and get him to go to his room where he fell asleep.

28. Student's IEP team convened on September 30, 2008, in response to Mother's request for another meeting. Mother read out loud her notes of the September 24, 2008 incident with Student and discussed her concerns with the IEP team that Student had the ability to hurt someone when he was in one of his episodes. She stated that she believed that Student required hospitalization to address his issues. Mother requested a residential placement for Student at this time although the IEP notes do not reflect this request.

29. By the time of the September 30, 2008 IEP meeting, Oursler had finished her assessment report and she presented it to the IEP team at the meeting. Based upon the report, and the fact that the Alessandro school staff, including Principal Karen Tomei, who was present at this IEP meeting, continued to state that Student was functioning well at school, CMH stated that Student no longer qualified for services from CMH through his IEP. CMH representative John Van Campen⁶ told the IEP team that county mental health did not step in unless a child's education was impacted by mental health issues. Since Student was functioning at school, his mental health concerns at home were not impacting his education, and, therefore, Student did not qualify for services. Van Campen did explain to Mother that there were other mental health services outside of the IEP process for which Student might qualify.⁷

30. There is no documentary evidence in the record and there was no testimony at the hearing to indicate that Student was experiencing behavioral problems at school or that his problems at home were based upon frustration with school, at any time from his April 17, 2008 IEP team meeting, up to the September 30, 2008 IEP meeting. Nor is there any evidence that Student was missing classes, missing assignments, acting aggressively to other students or to school staff, or in any way engaging in any behaviors that interfered with his ability to access his education or meet his IEP goals. To the contrary, Alessandro Principal Karen Tomei testified, as Student admitted in his closing brief, that Student was actively participating in his education, was a leader at school, and was generally successful in school up to this point. Student continued to receive counseling through CMH, was receiving counseling services at his school site, and was functioning well in school.

31. Furthermore, Student presented no evidence that the counseling services at Alessandro, which are provided through the SELPA, were inadequate to meet Student's needs. Student presented no evidence at all with regard to those services. As explained more fully below, the obligation of CMH to provide mental health services to a student through his or her IEP only exists if the student's school district is unable to meet the student's needs through its own programs. Student presented no evidence whatsoever that mental health services for Student or family services for Mother could not be met by Alessandro through the SELPA - provided therapy sessions.

32. Therefore, the weight of the evidence does not support a finding that CMH improperly found Student ineligible for CMH-provided services through his IEP or that Student required a residential placement as of the date of the September 30, 2008 IEP.

⁶ Van Campen did not testify at the hearing.

⁷ None of these options were described at the hearing.

Student's December 18, 2008 IEP

33. Student continued attending school at Alessandro. Since Mother had not consented to termination of the CMH counseling services, they were continued, as were the counseling services now provided at Alessandro by the SELPA. On October 7, 2008, Student again had a behavioral episode at home. Mother credibly testified that he struck her with a BB gun, tried to push her down the stairs, and expressed suicidal ideation. Mother called the police, and Student was placed on a three-day psychiatric hold during which time he was hospitalized. Student returned home on October 10, 2008, but was re-hospitalized on October 12, 2008, at the Loma Linda University Behavioral Medicine Center (Loma Linda), again due to mental health problems at home. Student remained fully hospitalized at Loma Linda until October 24, 2008. At that time, Loma Linda placed Student in its partial hospitalization program. Student attended the program from 8:00 a.m. until 3:00 p.m. on a daily basis from October 27, 2008, until November 7, 2008, going home in the afternoon after the program ended each day. Loma Linda then placed Student in its intensive out-patient program starting November 10, 2008. The intensive out-patient program is given in the late afternoons and early evenings, after regular school hours. Once Student started the out-patient program, he returned to Alessandro for classes. Glenn Scott, a clinical social worker from Loma Linda, testified that the Loma Linda programs included group therapy, individual therapy, and family therapy, in all of which Student participated.

34. On December 7, 2008, during the time he was attending Loma Linda's out-patient program, Student assaulted Brother at home. Brother's injuries required medical intervention. Mother had to call the police because of Student's assault on Brother and Student was again placed on a psychiatric hold by the police. Student thereafter returned both to school and to the Loma Linda out-patient program.

35. None of the hospitalizations for Student were the result of any of his behaviors at school. All stemmed from incidents that occurred in his home as a result of issues there. No evidence was adduced at hearing that any of the incidents stemmed from issues concerning events at school, from Student's frustrations with school, from his inability to complete assignments, or from anything having to do with his education.⁸

36. At some time during the fall semester, 2008, Alessandro Principal Tomei twice requested that Mother pick Student up from school due to his behavior. Tomei was not certain exactly when the incidents occurred, although she believed one occurred before October 1, 2008, and the other after that date. Tomei stated that it was the procedure at Alessandro to visually assess each child as he or she got off the school bus each morning to determine if anything out of the ordinary could be detected regarding each student. On two occasions she noted that when Student got off the school bus he did not appear to be

⁸ Student presented no evidence to explain what the underlying causes of his violent behaviors at home were. Dr. Stinnett, one of Student's treating physicians at Kaiser Hospital, may have been able to offer insight to the triggers of Student's behavior. However, as explained below, Student subpoenaed Dr. Stinnett to testify at the hearing but she failed to comply with the subpoena.

“normal.” Tomei took Student into her office both times. He became agitated and verbally threatening. When she could not calm Student down enough for him to go to class, Tomei called Mother to take Student home. On both occasions, Student did not threaten other staff or any other student and he did not become physically aggressive with Tomei. Tomei did not believe it necessary to suspend or expel Student or to discipline him in any way because of his behavior. Nor did she believe it necessary to call the police.

37. There is no evidence that the two incidents at Alessandro impacted Student’s education there. Tomei believed they did not. She stated at hearing that she observed Student in the classroom various times and that he was engaged in the curriculum, that he was compliant at school, that he was making friends, particularly after it became known that he was in the Sea Cadets. Nothing in Student’s behavior were significant enough to consider removing him from his placement at Alessandro.

38. Glenn Scott was Student’s clinical social worker at Loma Linda’s out-patient program. He was not involved with Student while Student was attending the in-patient program there. Scott stated that none of the adolescents in the out-patient program want to be there and that all are resistive to the program. Student was no different, but did what he was asked for the most part. Scott noted that Student was able to participate in the program on most days and was able to follow through with all tasks required of him. However, on two occasions, Scott had to ask Student to leave the program based upon his poor behavior. On both occasions, Student was not getting along with other group members; on one of the occasions, Student almost got into a fight with another participant. However, Student’s behaviors did not impede his overall participation in the program and he eventually graduated from it in mid-December 2008.

39. Dianne Radican, CMH supervisor for Children’s Case Management, testified that Loma Linda and county psychiatric hospitals are required to provide children hospitalized at those institutions with access to education. Radican is familiar with Loma Linda and the county hospitals and has seen the classrooms there. Student offered no evidence that he was not given access to educational programs while he was hospitalized on any occasion, and no evidence that even if educational programs were available, he was unable to access them due to his mental illness. To the contrary, in a letter prepared at Mother’s behest, clinician Scott stated that Student attended Loma Linda’s day school while he participated in its partial hospital program subsequent to his in-patient hospitalization in October, 2008.

40. As part of a triennial assessment, and pursuant to the settlement between the parties discussed in paragraphs 13 through 16 above, Moreno Valley, through school psychologist Susan Zapasnik, administered a psycho-educational assessment to Student in December 2008. Zapasnik’s report was completed on December 12, 2008.

41. Zapasnik noted that Student did not have any relevant health issues that affected his academic progress. All medical issues were controlled with medication and treatment. Part of Zapasnik’s assessment included an interview of Student. He informed her

that he had friends and tried to get along with everyone. Zapasnik also interviewed Student's teachers at Alessandro. They informed her that Student needed constant redirection to complete tasks, but was easily redirected. They further stated that Student was compliant in class and completed class work most of the time. The teachers stated that Student had only had a few days when he was non-compliant or exhibited mood swings, which had generally occurred when he was sleepy in class. During Zapasnik's assessment, Student was polite, friendly, and gave prompt responses. He willingly participated in the assessment process and easily established a rapport with her.

42. Zapasnik administered the Weschler Individual Achievement Test (WIAT) to Student. While the results of Student's testing are not at issue here, it is significant to note that Zapasnik found Student's scores on the WIAT to be above his suggested ability level with the exception of mathematics, which has always been an area of need for Student. With regard to language communication, Zapasnik found that Student did not comprehend as much as he was able to verbalize. She found that social-emotional functioning could be hindering Student's grasp of information, which could affect him educationally. However, Zapasnik also confirmed that Student's educational environment at Alessandro addressed social-emotional concerns on a daily basis.

43. Zapasnik also administered the Behavior Assessment Scale for Children (BASC) to Student. The BASC is a standardized behavioral assessment system designed to assist in the diagnosis and classification of a variety of emotional and behavioral disorders in children and to aid in designing treatment plans. The test consists of a series of questions that are answered by a student's teachers, parents, and the student himself.

44. According to Zapanik's report, the ratings given by Student's teacher Ms. Timmons (who did not testify at the hearing) indicated only that Student was at high risk for hyperactivity. The only other response area from Ms. Timmons that was of any significance was that Student was sometimes easily annoyed by others.

45. In contrast, Mother's responses on the BASC regarding Student's behavior indicated that Student demonstrated clinical significance in the areas of externalizing problems, internalizing problems, behavioral symptoms, hyperactivity, aggression, anxiety, depression, and atypicality. Mother's responses also indicated that Student was at-risk in the areas of conduct problems, somatization,⁹ withdrawal, and attention problems.

46. Student's self-report on the BASC also was significantly different than the results given by teacher Timmons. Student's self-report ratings found him clinically significant in the areas of attitude toward teachers, loss of control over things, social stress, depressions, sense of inadequacy, and relationship with parents. Student's self-reporting found him at risk in the areas of school problems, internalizing problems, emotional symptoms, personal adjustment, sensation seeking, hyperactivity, and self-reliance.

⁹ In psychiatry, somatization is the conversion of an emotional, mental, or psychosocial problem to a physical complaint.

47. Zapasnik indicated that Student displayed some mood swings in class, but that his social-emotional concerns were being addressed in his current educational environment on a daily basis. She observed Student in his classroom and at recess as part of her assessment. She never saw any unusual behaviors. Student was attending in class and his behavior was appropriate there as it was during her formal assessment of him. The majority of Student's at risk and clinically significant issues were evidenced at home, not at school. Although Zapasnik found that Student continued to qualify for special education under the classification of emotional disturbance, and found that his IEP team might want to consider continuing counseling for him, Zapasnik did not recommend that Student needed a residential placement in order to access his education or to meet his IEP goals. At hearing, Zapasnik credibly stated that at the time she administered her assessment to Student, the results of her testing indicated that Student's then-current environment at Alessandro was serving him and that he did not need a more restrictive environment. Zapasnik found that Student's difficulties were therefore centered in the home environment and not in the school environment. Student presented no evidence of any kind that contradicted the results of Zapasnik's testing.

48. Student's IEP team met again on December 18, 2008, to review the triennial assessment administered by Zapasnik. Based upon the assessment, the IEP team found that reading was no longer an area of need for Student, that written language continued not to be an area of need, and that mathematics did continue as an area of need. With regard to his social, emotional and behavioral skills, the team continued to find that Student had needs in those areas based upon the fact that he was occasionally withdrawn in class and did not always redirect himself to complete classroom assignments. The team noted that Student needed to improve his relationships with school staff and with peers. The team also noted that, with the exception of time when he was hospitalized, Student was on time to school and regularly attended classes.

49. The IEP team developed two goals for Student: one to address his deficits in mathematics and one to address his social and emotional needs. The latter goal focused on teaching Student to use strategies to communicate his needs and concerns when he was anxious, frustrated, or upset. The IEP offered Student continued full-time placement in an SDC at Alessandro along with 30 hours of individual counseling and 25 hours of intensive individual services over the period of a year. CMH continued to take the position that Student was no longer eligible to receive AB2726 services but also continued to offer Student medication management services once a month and case monitoring services once a month. Mother has never agreed to this IEP.

50. There are no notes attached to the December 18, 2008 IEP document and there was little testimony at hearing about the discussion the IEP members had during the meeting. There is no evidence that Principal Tomei, who attended the meeting as the administrative designee for Moreno Valley, discussed the two incidents where she requested Mother to take Student home from school at this meeting, and there is no evidence that CMH was ever aware of the incidents prior to the litigation in this case. In any case, Tomei never

recommended at the IEP meeting that Student needed a residential placement and, at hearing, stated that she felt Alessandro was able to meet Student's needs at the time of the IEP meeting, based upon Zapasnik's assessment, her observations of Student on campus, his participation in the Sea Cadets, and the fact that Student was making friends at school, as well as on the fact that therapists at Alessandro were able to address Student's mental health needs.

51. Although Student had been hospitalized at Loma Linda and had fully participated in both its in-patient and out-patient programs by the time Student's IEP team met on December 18, 2008, there is no evidence that any reports or information concerning his participation in those programs was shared at the IEP meeting. No one from Loma Linda participated in the meeting.¹⁰ There was no indication that the information that Student had not been able to participate during two out-patient sessions at Loma Linda was discussed at the meeting. It is unclear from testimony at the hearing or from the documentary evidence whether CMH or Moreno Valley had any specifics regarding the hospitalizations, other than the fact that CMH had become aware that Student had been hospitalized at some point, as acknowledged in Oursler's letter to Mother requesting that Mother contact her to reinstate Student's therapy sessions when he was discharged from the hospital and had returned to school. The only information that CMH had at the time of the IEP meeting, other than Mother's information about Student's conduct at home and his hospitalizations, was from its assessment of Student, Zapasnik's assessment, and input from the team participants. The information available was that although Student continued to have substantial problems at home, he was functioning well at school, was making friends, did not exhibit any significant behavior problems, and was meeting his IEP goals. The individual transition plan included in the December 18, 2008 IEP indicates that Student's grade point average at the time of the meeting was 2.8.

52. Other than Mother's testimony, which focused on her request for a residential placement based upon the very real and substantial problems she unfortunately experienced with Student at home, the only other support for a residential placement in evidence is a letter written "to whom it may concern" by Dr. Catherine Stinnett, who is one of Student's treating physicians at Kaiser Hospital. In this letter, dated October 7, 2008, Dr. Stinnett notes that Student has been diagnosed with a mood disorder, not otherwise specified, and with oppositional defiant disorder, and that Student was currently being treated with medications for those disorders. She further notes that Student had responded poorly to out-patient treatment and to medication. Dr. Stinnett then states that she supports Mother's pursuit of a residential placement for Student.

53. However, Dr. Stinnett never appeared to testify at hearing despite having been subpoenaed by Student. Her letter therefore is of little persuasion since it is unclear on what information she based her support of a residential placement, whether she was aware of the

¹⁰ In any case, Loma Linda clinician Glenn Scott testified at hearing that he is not qualified to make recommendations regarding residential placements.

criteria for a residential placement under the California Government Code, and if she was aware of and considered the educational and mental health supports Student was receiving at Alessandro. Furthermore, there is no evidence that Dr. Stinnett's letter was ever shared with the IEP team, in particular with CMH, or discussed at the December 18, 2008 IEP team meeting.

54. The weight of the evidence thus failed to show that Student was unable to access his education or advance in meeting his IEP goals from September 2008 until the IEP meeting of December 18, 2008. Student's placement in a residential program was therefore not necessary to ensure that he made progress in school. The evidence has only proven that if Student requires a residential placement at all, it is only to treat his emotional problems with his family and not in order for him to function in an educational setting or to meet his IEP goals. Student has therefore failed to meet his burden of proof that he required a residential placement as of the December 18, 2008 IEP team meeting and that CMH should have offered him such a placement at that time.

Provision of Individual Counseling Services

55. Student contends that CMH failed to provide him with individual counseling services during the 2008 – 2009 school year. It appears from Student's closing brief that this contention is based upon the fact that Student never established a good report with therapist Oursler, that CMH did not provide all sessions to which he was entitled, or that the quality of the therapy provided by Oursler was inadequate. However, the evidence does not support Student's contentions. Although CMH took the position that Student was not eligible for counseling services through CMH because Moreno Valley could provide the services to him, CMH attempted to provide the services to Student, first as part of the settlement agreement between the parties, and later as a form of stay put based upon the failure of Mother to agree to a cessation of CMH counseling services.

56. Therapist Oursler's progress reports note that she attempted to provide Student with counseling services but that he refused to participate. On August 13, 2008, the day the fall school semester started, Oursler attempted to provide Student with therapy session, but he informed her that he did not want to be in therapy. Student informed Oursler that he "remains out of trouble" and that he was using better coping skills. Oursler noted that Student's academic functioning was not being impacted by any of Student's mental health needs.

57. On August 20, 2008, Oursler had another weekly therapy session with Student, who again informed her that he had nothing to work on in therapy and that he was stable with his anger management and depression. Oursler held another session with Student on August 27, 2008, at which time Student again had nothing to talk about, stating that he did not want to attend therapy and that he had already dealt with all his issues while in his juvenile court residential placement. Student also stated that things were well at home, that his Mother was satisfied with his behavior, and that he was doing well at school.

58. Oursler held another session for Student on September 10, 2008. Student again stated that did not want to attend therapy and refused to identify any issues to discuss with Oursler. Student was scheduled for a therapy session on September 14, 2008, but Moreno Valley failed to transport him to the session. Student did not show up for the therapy session scheduled with Oursler for October 1, 2008.

59. Student was either hospitalized or in Loma Linda's day school program during most of the month of October 2008, and was therefore unable to attend therapy sessions at CMH. On November 8, 2008, Oursler wrote to Mother indicating that she was aware Student was participating in the Loma Linda program, that CMH could not provide services to Student until he returned to school, and that Mother should notify her of Student's return to school so that therapy sessions could be resumed.

60. Mother notified Oursler that Student would be able to resume therapy sessions the week of November 19, 2008. On November 19, Oursler again attempted to provide a therapy session to Student, but he refused to participate. Oursler later informed Mother that Moreno Valley would not provide transportation to Student during the winter break, but that she would continue providing therapy if Mother transported Student to the CMH offices during that time. Mother did not do so.

61. Due to the lack of rapport between Oursler and Student, Student had requested that CMH provide him with a different therapist. Although Student does not have a right to choose the provider of his IEP related services, CMH agreed to change his therapist. However, there were only two therapists assigned to the CMH office serving Student. The second therapist, Ana Loza, was on maternity leave during the fall of 2008, and was initially unavailable. However, once Loza returned to work right before Student's December 18, 2008 IEP, CMH reassigned Student's case to her. Loza attended the December IEP meeting. Neither Student nor Mother contacted CMH with regard to continuing Student's therapy sessions in December or January, either during or after Alessandro's winter break. Nor did anyone transport Student to CMH during that time in order for him to attend therapy. Ana Loza was available to provide the services had Student accessed them.

62. As stated below, Student began attending Oak Grove, a non-public school, sometime in January 2009, pursuant to a settlement agreement between him and Moreno Valley. Oak Grove provides on-site individual, group, and family counseling to its students when necessary. There is no evidence that the settlement agreement required Oak Grove to transport Student to CMH for therapy, and no evidence that he required therapy in addition to that which he received as part of his attendance at Oak Grove.

63. CMH never refused to provide therapy to Student except when he was hospitalized or receiving services from a source other than his school. It is Radican's opinion that California law and ethical considerations prevent CMH from providing duplicate mental health services to clients such as Student who are otherwise receiving therapy from another provider. There is no evidence that contradicts this assertion. Additionally, Student has produced no evidence in support of his contention that a student's

failure to establish a rapport with his therapist amounts to a denial of FAPE, or that a failure to uncover all a patient's problems, particularly where the patient is refusing to communicate with his therapist, amounts to a denial of FAPE. Finally, Student has failed to produce any evidence whatsoever that the therapy services provided by Alessandro for Student were inadequate and did not meet his mental health needs. Student has thus failed to meet his burden of proof that CMH failed to provide him with individual therapy during the 2008 – 2009 school year to such an extent that it denied him a FAPE.

Provision of Family Counseling

64. Student also contends that CMH failed to provide him with family counseling services during the 2008 – 2009 school year. However, Student has failed to meet his burden of proof as to this issue. CMH is only required to provide mental health services when a school district cannot meet a student's needs. Student has presented no evidence that Moreno Valley was unable or unwilling to provide Student and/or Mother with family counseling or that such services were unavailable at Alessandro. Nor were family therapy services ever specifically designated as a related service on any of Student's IEPs during the time period relevant to the instant due process hearing. Student has thus failed to show that CMH had a legal obligation to provide him with family therapy and thus the failure to provide him with the services did not deny him a FAPE.¹¹

Events Subsequent to the December 18, 2008 IEP Team Meeting

65. Student also contends that CMH should be required to provide him with a residential placement based upon problems he has continued to have at home since the beginning of 2009 as well as based upon problems he has experienced in his school placement since mid-January 2009.

66. Unbeknownst to CMH, Student was engaged in settlement discussions with Moreno Valley during the latter part of 2008 and/or the beginning of 2009. Student and Moreno Valley entered into a settlement agreement sometime in the first part of January 2009. There is no evidence that CMH was invited to be part of the settlement discussions or was informed of the settlement terms before the parties executed the agreement.

67. As part of the settlement agreement, Moreno Valley agreed to place Student at Oak Grove. Peggy Reed, Moreno Valley's Director of Special Education, testified that Student's placement at Oak Grove was only done pursuant to the settlement agreement and not because Student needed a more restrictive placement or because Moreno Valley believed

¹¹ The settlement agreement in OAH case number 2008010799 provides that CMH would provide family therapy services two times a month through September 1, 2008. It is unclear whether those services were ever provided. However, even if they were not provided pursuant to the settlement agreement, that issue was never raised in the instant due process claim. Additionally, OAH does not have authority to enforce a settlement agreement. (See *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

that Alessandro could not meet Student's needs. School psychologist Zapasnik and Alessandro Principal Tomei both stated the same.

68. Student contends that he was unable to access his education while at Oak Grove and that his placement there does not meet his mental health needs. The only evidence Student has produced to support his contentions are three daily task sheets from Oak Grove for January 22, 23, and 26, 2009, indicating that Student was either off task or sleeping in class, and therefore not participating. There is no evidence that Student was disruptive in class, was misbehaving in class or anywhere on the school, was a danger to himself or others, or in any other way was unable to access his education. Likewise, there is no evidence that Student's grades at Oak Grove were not acceptable or that he was not able to meet IEP goals while there.

69. Dr. Michael Brown, Oak Grove's Director of Education, testified at hearing concerning Student's attendance there and the programs his school provides. He indicated that Oak Grove provides individual counseling, group counseling, and family counseling to students should they need such services. However, Dr. Brown was unaware of the specifics of Student's educational program at Oak Grove and did not know if Student was participating in its extended day program which provides after school social skills groups, and drug and alcohol therapy groups, depending on a student's unique needs. Dr. Brown indicated that Student was a "nondescript student" who was not disciplined during the short time he attended Oak Grove or in any way had called attention to himself by any of his actions while he attended Oak Grove. Dr. Brown stated that Student could return at any time.¹²

70. On January 29, 2009, Student again was placed on a psychiatric hold due to threats to Mother and suicidal ideation. The incident did not take place at school. Student returned home on February 3, 2009. Within two hours of returning home, Student again became highly agitated, threatened Mother, and began turning over furniture in Brother's room. Student was again placed on a psychiatric hold by the police. From an emergency placement, Student was then admitted to Canyon Ridge, a psychiatric hospital, where he was diagnosed with bipolar disorder and placed on medication to treat that disorder.

71. Student remained at Canyon Ridge until February 12, 2009. At the time of his discharge from Canyon Ridge, the discharging doctor found that Student no longer was a danger to himself or others and did not then meet the criteria for involuntary hospitalization. However, within four days of returning home, Student had another incident there. He became agitated, and informed Mother that he was going to leave to go look for a gun, come back and kill the family. Student then left the house. He returned two and a half hours later in an agitated state. Mother searched him to assure herself that he had no weapons and then let Student into the house. When Student entered, he pushed Brother against a wall and then

¹² Oak Grove also has a residential component but there is no evidence that Moreno Valley ever offered Student placement there.

informed Mother that he would no longer participate in the Sea Cadets and that he would no longer attend school. Student then threatened Mother with a pool cue and later grabbed a knife from the kitchen. Mother called the police and Student was again placed on a psychiatric hold. As of the last day of hearing, Student was still hospitalized.

72. It is apparent that Student's mental health has continued to deteriorate. Given his stated intent not to return to school, it may well be that Student's mental health issues are now impacting his ability to access his education or advance in his IEP goals. The problem is that none of these events had occurred at the time Student filed the instant due process complaint and there is no evidence that CMH was aware of these facts prior to the hearing in this case. CMH has not had an opportunity to review Student's records from his latest hospitalizations, to discuss the issues with Student's health providers, to assess Student, or to make any determination concerning Student's mental health needs because CMH was not privy to any of the events regarding Student's placement at Oak Grove or his subsequent hospitalizations until approximately the time of the hearing in this case. As elaborated below, a local educational agency is only required to base IEP and placement decisions on what was objectively reasonable when an IEP was developed. In this case, CMH had no knowledge of Student's placement at Oak Grove, had no knowledge of whether that placement could meet Student's needs, and was not aware of Student's hospitalizations in February until after the fact. In any case, AB2726 services are not meant to meet a Student's emergency needs. In light of this, Student has failed to prove that CMH was under any obligation to offer Student a residential placement from the date of the December 18, 2008 IEP team meeting to the date of the hearing.

LEGAL CONCLUSIONS

Burden of Proof

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Requirements of a FAPE

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the state's educational standards, and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that are needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include in pertinent part developmental, corrective, and supportive services, such as mental

health counseling services, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the ALJ must determine whether the district has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*)). Second, the ALJ must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

4. To determine whether CMH offered Student a FAPE, the analysis must focus on the adequacy of the CMH's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley*, at p. 207.) Nor does the IDEA require school districts (and by extension, county mental health agencies) to provide special education students with the best education available or to provide instruction or services that maximize a student's potential. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if a student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

5. A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.) A school district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) A child's progress must be evaluated in light of the child's disabilities. (*Rowley, supra*, 458 U.S. at p. 202; *Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1996) 103 F.3d 1114, 1121.)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (hereafter *Adams*)). "An IEP is a snapshot, not a retrospective." (*Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992; *Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hannover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Roland M. v. Concord Sch. Comm., supra*, 910 F.2d at p. 992.)

7. A school district must include "related services" in an IEP if those services may be required to assist a child with a disability to benefit from special education. (20 U.S.C. §§ 1401(26)(A), 1414(d)(1)(A)(i)(IV); Ed. Code, §§ 56345, subd. (a)(4)(B), 56363, subd. (a).) Related services are:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, *and medical services, except that such medical services shall be for diagnostic and evaluation purposes only*) ...

(20 U.S.C. § 1401(26)(A)(emphasis supplied).) State law adopts this definition of related services, which are called "designated instruction and services." (Ed. Code, § 56363, subd. (a).) The regulation that defines "mental health services" for the purpose of Chapter 26.5 includes psychotherapy. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

8. A local educational agency also has the right to select the choice of service provider, as long as the provider is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216; *B.F., et al., v. Fulton County School District* (N.D. Ga. Sept. 9, 2008) 2008 WL 4224802, 51 IDELR 76, 108 LRP 57335.)

Chapter 26.5 services and Residential Placements

9. Chapter 26.5 of the Government Code (§§ 7570 et seq.) sets forth a comprehensive system by which a school district may refer a special education student suspected of being in need of mental health treatment to the local community mental health agency for such treatment. Government Code Section 7572.5 describes the process by which an IEP team determines whether a residential placement is required for a student:

(a) When an assessment is conducted pursuant to Article 2 (commencing with Section 56320) of Chapter 4 of Part 30 of the Education Code, which determines that a child is seriously emotionally disturbed, as defined in Section 300.8 of Title 34 of the Code of Federal Regulations, and any member of the individualized education program team recommends residential placement based on relevant assessment information, the individualized education program team shall be expanded to include a representative of the county mental health department.

(b) The expanded individualized education program team shall review the assessment and determine whether:

(1) The child's needs can reasonably be met through any combination of nonresidential services, preventing the need for out-of-home care.

(2) Residential care is necessary for the child to benefit from educational services.

(3) Residential services are available that address the needs identified in the assessment and that will ameliorate the conditions leading to the seriously emotionally disturbed designation.

10. The community mental health agency's responsibility is derivative of that of the school district; Government Code section 7576, subdivision (a) states that:

The State Department of Mental Health, or a community mental health service, as described in Section 5602 of the Welfare and Institutions Code, designated by the State Department of Mental Health, is responsible for the provision of mental health services, as defined in regulations by the State Department of Mental Health, developed in consultation with the State Department of Education, if required in the individualized education program of a pupil. A local educational agency is not required to place a pupil in a more restrictive educational environment in order for the pupil to receive the mental health services specified in his or her individualized education program if the mental health services can be appropriately provided in a less restrictive setting. It is the intent of the Legislature that the local educational agency and the community mental health service vigorously attempt to develop a mutually satisfactory placement that is acceptable to the parent and addresses the educational and mental health treatment needs of the pupil in a manner that is cost effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment

11. The Government Code sections addressing residential placements are implemented through the California Code of Regulations, title 2, section 60100, which governs a local education agency's (LEA) identification and placement of seriously emotionally disturbed pupils and states the procedures that should be followed when an IEP team member recommends a residential placement for a student who is designated as emotionally disturbed. First, when a request for residential placement is made an expanded IEP team meeting shall be convened within 30 days with an authorized member of the community mental health service. (Cal. Code Regs., tit. 2, § 60100, subd. (b)(1).) When either the community health service or the LEA determines that additional mental health services are needed the LEA and the community health service shall proceed in accordance with sections 60400 and 60045.

12. Prior to the determination that a residential placement is necessary for the pupil to receive special education and mental health services, the expanded IEP team shall consider less restrictive alternatives, such as providing a behavioral specialist and full-time behavioral aide in the classroom, home and/ other community environments, and /or parent training in these environments. The IEP team shall document the alternatives to residential placement that were considered and the reason why they were rejected. (Cal. Code Regs., tit § 60100, subd. (c).)

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

Determination of Issues

Request for Residential Placement

14. Student contends that his manic episodes at home required him to be hospitalized for psychiatric treatment which, in turn, caused him to miss significant portions of his school year. Student contends that this constitutes sufficient evidence that he was unable to function at school and access his education. Student further contends that he has failed at all his educational placements and therefore requires the more structured and more restrictive environment of a residential placement in order to make progress in his education.

15. Although it is obvious that Student is often uncontrollable at home, that Mother and Brother have suffered considerably, and that they are at personal risk of being harmed by Student, Student has failed to meet his burden of proof with regard to the need for a residential placement *under the auspices* of his IEP for several reasons. First, with regard to the period from the beginning of August 2008 (the time period after which the settlement agreement in OAH case number 2008010799 is no longer applicable) to the date of Student's IEP team meeting of September 30, 2008, there is no evidence that Student engaged in behavior either at school or at home that would warrant the provision of a residential placement. There was no evidence that Student had any manic or violent episodes at home during this time and no evidence that he had any incidents at school that caused his education there to suffer. Indeed, there is no evidence of any such incidents at school or at home during the time from Student's IEP team meeting of April 17, 2008, to the date of the September 30, 2008 IEP team meeting. As stated in Legal Conclusion 6 above, an IEP must be evaluated in terms of what was objectively reasonable when it was developed. There was simply no reason for CMH to have believed, based upon the facts available to it at the September 30, 2008 IEP team meeting, that Student required a residential placement at that time. (Factual Findings 4 through 23; Legal Conclusions 1 through 15.)

16. Student also contends that by his December 18, 2008 IEP team meeting, CMH was aware that his behavior at home had declined to such an extent that he was hospitalized a

number of times in psychiatric placements because he was a danger to his family and, potentially, to himself. Student asserts that the fact that he lost so much time at school (although he did not present any evidence that his grades declined to any extent during that time frame) is prima facie evidence that his educational functioning at school was severely impacted. Student's argument fails for several reasons.

17. First, Student has failed to demonstrate that he was unable to access his education or make progress on his IEP goals during this time. To the contrary, the evidence presented at hearing indicates that Student's ability to function at school was not impaired by his hospitalizations. Student states in his closing brief that there is no evidence that he was receiving educational benefit from his hospitalization. However, Student with that statement misstates the applicable burden of proof. As stated in Legal Conclusion 1, since Student has filed this case, it was *his* burden to demonstrate that he has *not* received educational benefit from any of his hospitalizations; it was *not* CMH's burden at hearing to prove that Student *did* receive educational benefit. Student did not present any evidence with regard to whether educational programs were available to him while he was hospitalized or whether his mental health concerns prevented him from accessing programs even if they were available.

18. Secondly, Student has failed to prove that a student whose emotional problems are affecting his home life, resulting in psychiatric hospitalizations, is legally entitled to a residential placement to address those home-based issues where the student's behavior at school is not at issue and where the student has not shown he is failing to meet his IEP goals.

19. In *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, the Ninth Circuit set forth the analytical framework for determining whether a residential placement under IDEA constituted an educational or mental health placement for which a school district was responsible, or a medical placement not within the definition of a related service. In *Clovis* the student was receiving residential mental health services for her emotional disturbance when her behavior became so bizarre that she had to be placed in an acute care psychiatric hospital. In finding that the school district was not responsible for the hospital placement, the court rejected the argument that the student's parents were entitled to reimbursement for her psychiatric placement because the placement was "supportive" of the child's education. The court found that argument far too inclusive:

If a child requires, for example, ear surgery to improve his hearing, he may learn better after a successful operation and therefore in some respects his surgery is "supportive" of his education, but the school district is certainly not responsible for his treatment. Similarly, a child who must be maintained on kidney dialysis certainly cannot physically benefit from education to the extent that such services are necessary to keep him alive, but again, it is not the responsibility of the school district to provide such maintenance care.

(*Clovis, supra*, 903 F.2d at 643.)

20. In *Clovis, supra*, the Ninth Circuit also rejected the argument that since the student's medical, social and emotional problems that required hospitalization were intertwined with her educational problem, the school district was responsible for her treatment. "Rather," said the court, "our analysis must focus on whether [the student's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process." (*Clovis, supra*, 903 F.2d at 643.) The court found that because the student's placement was primarily for medical, not educational, purposes, it was not a related service, but instead was excluded as a medical service under IDEA. (*Id.* at 645; see also, *Kruelle v. New Castle County School Dist.* (3d Cir. 1981) 642 F.2d 687, 693.) The medical nature of the service does not turn on whether it may be provided by persons other than physicians, but on the nature of the service. (*Clovis, supra*, 903 F.2d at 643; *Field v. Haddenfield Bd. of Educ., supra*, 769 F.Supp. at 1327.)

21. Student cites various cases in his closing brief to support his contention that his behaviors at home requiring psychiatric hospitalizations were sufficient to support a finding that his educational functioning was impacted and that he therefore requires a residential placement. However, none of the cases cited by Student stand for the proposition he offers and none, therefore, are helpful in determining whether Student is entitled to a finding that CMH must provide him with the residential placement he seeks.

22. *Honig v. Doe* (1988) 484 U.S. 305 [108 S. Ct. 592, 98 L.Ed.2d 686] stands for the proposition that a suspension from school in excess of 10 days constituted a change in placement for a child with an IEP. *Honig* has no bearing on the facts in the instant case because it did not deal with a residential placement. Furthermore, CMH here did not change Student's placement. Student also cites the case of *Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045. However, the primary issue of that case was whether mainstreaming was appropriate in every case for every special education student. There are no contentions in this case that Student is or should be fully mainstreamed in a general education classroom environment.

23. Nor is the unpublished case of *Board of Education of Montgomery County, Maryland v. S.G.* (4th Cir. 2007) 230 Fed.Appx. 330, 2007 WL 1213213 (hereafter *S.G.*), apposite to the instant case. First, the *S.G.* case involved a determination as to whether the student therein was eligible for special education under the category of emotionally disturbed. The case did not concern the student's eligibility for a residential placement. Second, the facts in *S.G.* demonstrated that the student's behaviors manifested at school as well as at home. The student heard voices in her head while at school as well as at home and was threatening to commit suicide at school. She was unable to complete her school assignments and her grades were slipping significantly as a result. The student's teachers noted that she was "zoning out" in class, was "in a daze," was "out of it," "withdrawn" and "distracted." The Fourth Circuit upheld the ALJ's finding that the student was eligible for special education due to emotional disturbance. Notably, neither the ALJ nor the court found that the student required a residential placement, only that her emotional disturbance necessitated a therapeutic classroom. Finally, the court found that the administrative record demonstrated that the classroom environment aggravated the student's symptoms and

contributed to her mental illness. None of these factors are present in the instant case. To the contrary, the evidence has demonstrated that Student performs well at school and that none of the extreme manic and violent behaviors he exhibits at home are exhibited in the school environment.

24. Finally, Student cites to *County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500 (hereafter *Smith*). While *Smith* offers insights regarding the inability of a county to force a parent to pay for the cost of a juvenile court placement where the court places her child, who has an IEP, in a special education placement, it offers no guidance as to whether the county was required in the first instance to residentially place the student based on his mental health issues which resulted in his engaging in criminal conduct. In *Smith*, the student began showing signs of mental illness in the fourth grade when he attempted to hang himself at school. The student was failing all his classes. He was found eligible for special education and placed in an SDC with counseling supports. The student was suspended from school for inappropriate behavior, including violent incidents. He was never assessed by his school district for a residential placement. The student began running away from home and committing crimes and eventually became a ward of the juvenile court. The court ultimately placed the student in a residential facility that had been certified by the Los Angeles County Department of Mental Health. All the residents of the facility, like the student, had IEPs. The court found that the parent of a ward, who normally is required to repay the county for the costs of her child's juvenile court placement, is not required to do so if the child has an IEP and the juvenile court places him a special education facility. The court did not make any findings as to whether the Los Angeles County Department of Mental Health should have found the student eligible for a residential placement prior to his entry into the juvenile justice system.

25. Conversely, CMH cites to numerous cases which support its contention that a student who only exhibits misbehaviors or violent tendencies at home and whose behaviors do not manifest at school or otherwise affect the student's ability to function at school or meet his IEP goals, does not qualify for a residential placement under his IEP. In *Gladstone School District v. A.M.*, (unpublished, 9th Cir. 1996) 1996 WL 738585, the mother's request for reimbursement for her unilateral residential placement for her child was denied. The court found that the student only required a residential placement due to psychological and emotional difficulties at home and, therefore, the residential placement was not educationally necessary. Citing *Clovis, supra*, the court found that a school district (and, therefore, by extension, a county mental health agency) was not required to pay for a residential placement necessitated by medical, social or emotional problems apart from the learning process.

26. The facts in *Robert M., et al. v. State of Hawaii* (unpublished, D.C. Hawaii 2008) 2008 WL 5272779, are very similar to those in the instant case. There, the student was eligible for special education due to his attention deficits and oppositional defiant disorder. Although violent at home and experiencing some behavior problems at school, the student continued to make educational progress in his SDC and was meeting his IEP goals. After escalating violent behavior at home, the student was admitted for 10 days to a residential treatment facility. He was later hospitalized for three weeks based on home behavior. The

student's parents ultimately placed him in a residential facility and requested reimbursement for the costs of the placement. In denying their reimbursement request, the court noted that there was no evidence that the student exhibited severe emotional problems at school that would affect his ability to be educated. Student's IEP, which placed him in an SDC, and later added mental health supports, was found to be legally sufficient in supporting the student to achieve his academic and behavioral goals.

27. Another case cited by CMH which is contrary to Student's position in the instant matter is *Ashland School Dist. v. Parents of Student R.J.* (D.Or. 2008) 585 F.Supp.2d 1208, (hereafter *Ashland*) which also concerned the parents' request for reimbursement of a residential placement. In *Ashland*, the student, who was in high school, began to have emotional problems following her parents' divorce. She had problems at home and with a boyfriend. Because of these personal matters, her schoolwork suffered. The student exhibited signs of depression, had brief suicidal ideation, and on at least one occasion, mutilated herself by sticking herself with safety pins. She refused to turn in class assignments from classes in which she was not interested. Although the student was academically capable of doing her class work, her grades began faltering due to her failure to complete class assignments and homework. Student eventually failed three classes due to missed assignments. Student was defiant at home, would leave home without permission, and continued a relationship with an older man in spite of directions from her parents that she had to terminate the relationship. Student began refusing to participate at school and was often late for classes. The school district responded to the student's issues by providing her with modifications and accommodations at school and providing family and individual counseling. Ultimately, however, concerned about her behaviors at home, the student's mother placed her at two different residential treatment facilities, one of which was out-of-state. In reversing the ALJ's finding that reimbursement for one of the residential placements was warranted, the district court found that a residential placement was not necessary to meet the student's educational needs.¹³

28. In contrast, cases which have found that a student *is* entitled to a residential placement cite to the ways in which the student's access to his education or ability to accomplish his IEP goals has been impeded. For example, the court in *Seattle School District No. 1 v. B.S., supra*, 82 F.3d 1493, which was not cited by either Student or CMH, found that the student's parents were entitled to reimbursement for her residential placement because student was disruptive in class, was verbally and physically assaultive at school, and was not able to participate in the regular school environment.

29. Finally, the case the ALJ has found to be most on point to Student's circumstances (but which was not cited by either Student or CMH) is *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458. There, the child was hospitalized following a violent outburst at home which was directly related to her being

¹³ The *Ashland* court cited a number of cases which stand for the proposition that a student's emotional or behavioral problems at home do not ipso facto warrant a residential placement under the student's IEP.

required to prepare a science report. The student was unable to complete homework because of the stress it caused her. Her school district placed her in a day school program, but that failed when the student began refusing to attend school. There followed more violent outbursts at home related to the student's inability to complete writing assignments. Student was truant and had to be forcibly taken to school at times. The Hearing Officer found, and the Ninth Circuit affirmed, that there was no evidence that the student had made progress toward her IEP goals. The court also determined that the student's day treatment program did not provide enough support to allow the student to benefit from her education. The court found that the student's problems were educationally related and that a residential placement was therefore warranted. This case however, is not ultimately beneficial to Student's analysis because of the fact that the bulk of the student's behaviors, unlike those of Student here, were directly related to her refusal or inability to complete school work or to attend school, as well as her inability to make progress toward meeting her IEP goals.

30. The common thread of all cases cited above is that to warrant a residential placement, a student must demonstrate that he is unable to benefit from his educational placement and unable to progress toward meeting his IEP goals, even if his behaviors at home result in psychiatric hospitalizations. Only where the student's home behavior has impacted his or her ability to function in the school environment has a court found that an IEP-based residential placement was warranted. Here, Student has not met his burden of proof that his ability to function at school, to access his education, or to progress in his goals, from the beginning of the fall school semester in 2008, until his December 18, 2008 IEP team meeting, has been impeded by his hospitalizations which were the result of manic and/or violent episodes at home. Mother's plea for a residential placement is emotional, heartfelt, and real. She is burdened by a child whose anger and frustration seem inexplicably directed toward the home environment, and has been placed in a situation where her safety and that of her other son are at risk. However, that a student is violent at home does not necessarily mean that the IEP process is responsible for resolving those personal issues. To accept Student's premise that his assaultive behaviors at home, which result in psychiatric hospitalizations are in and of themselves enough to warrant a finding that CMH (or his school district) is required to provide a residential placement would create a precedent that any emotionally disturbed child who required psychiatric hospitalization due to problems such as assaultive behaviors that almost solely manifested themselves in the home environment ipso facto requires a residential placement. The ALJ however does not read the pertinent statutes or case law as requiring such a broad result. Student has therefore not met his burden of proof that he is entitled to a residential placement through the IEP process. (Factual Findings 4 through 23, and 33 through 54; Legal Conclusions 1 through 14, and 16 through 30.)

31. Furthermore, as noted in Factual Finding 72, Student has failed to meet his burden of proof that CMH should have offered him a residential placement from December 18, 2008, until the time of the due process hearing. Student raised several issues that were never presented at an IEP or in any formal manner to CMH, to wit, his placement at Oak Grove, his subsequent hospitalizations, and his intent to refuse to attend school. CMH was not involved in Student's placement at Oak Grove and it appears was only made aware of

Student's hospitalizations in late January and February 2009 through the due process hearing. IEP decisions and offers, including placement decisions, can only be made considering information available to a party at the time it makes a particular IEP decision. It is not objectively reasonable to hold CMH responsible for failing to offer a residential placement when it was not involved in or even made aware of a placement decision, and had no knowledge of Student's subsequent hospitalizations, the reasons for them, or the possible impact Student's actions and statements may or might have on his ability to access his education. (Factual Findings 4 through 23 and 65 through 72; Legal Conclusions 1 through 14 and 31.)

Alleged Failure to Provide Individual and Family Counseling

32. Student has also failed to demonstrate that CMH did not provide him with individual counseling. To the contrary, the evidence demonstrates that CMH continued to attempt to provide Student with services, and even acceded to changing his therapist to accommodate his needs. Student either did not engage with the therapist during his sessions based upon his stated belief that he did not have anything to talk about in therapy or failed to show up for therapy sessions. During the times Student was hospitalized, CMH ceased providing therapy based upon its view that it could not statutorily or ethically duplicate mental health services that Student was receiving from another source; Student has failed to present any argument countering CMH's position or reading of the pertinent statutes. Finally, Student has failed to show that his educational placements, be it at Alessandro School, at his psychiatric hospital placements, or, most recently, at his Oak Grove placement, failed to provide him with legally adequate mental health services to the extent that CMH was required to supplement or replace them. (Factual Findings 4, 5, 22, 24, 31, 33, 55 through 63, and 69; Legal Conclusions 1 through 14, and 32.)

33. Similarly, Student has failed to meet his burden of proof that CMH was required to provide him and/or Mother with family therapy. Student's IEPS did not indicate a need for family therapy and none of Student's witnesses at hearing, other than Mother herself, specifically addressed whether the need existed. Most significantly, Student failed to prove that family therapy services were not available to him through his school placement and, therefore, that CMH was required to provide them to him in order for him to receive a FAPE. (Factual Findings 4, 5, 22, 24, 31, 33, and 64; Legal Conclusions 1 through 14 and 33.)

ORDER

Student's request for an order finding that CMH failed to provide him a FAPE and request for an order that CMH is required to provide him with a residential placement are denied.

