

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

PLACER COUNTY MENTAL HEALTH  
DEPARTMENT.

OAH CASE NO. 2010020003

**DECISION**

Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings, State of California, heard this matter in Roseville, California, on May 10, 11 and 12, 2010.

F. Richard Ruderman, Attorney at Law, represented Student. Student's mother (Parent) was present during the hearing.

Kristina Shramek, Attorney at Law, represented Placer County Mental Health Department, hereinafter referred to as Placer County Children's System of Care (PCCSC).<sup>1</sup> Michael Lombardo, Assistant Director of PCCSC, was present during the hearing on behalf of PCCSC.

Student filed her due process hearing request (complaint) on January 29, 2010, naming Placer County Mental Health Department.<sup>2</sup> On February 5, 2010, PCCSC was identified as the proper party and filed a response to Student's complaint. OAH granted a continuance on March 11, 2010. At the close of the hearing on May 12, 2010, the matter was

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<sup>1</sup> PCCSC was referred to in the complaint and during the hearing as Placer County Mental Health Department.

<sup>2</sup> Student's complaint initially named Roseville Joint Union High School District (District) and Placer County Mental Health Department. In addition, on February 19, 2010, District filed a separate complaint against Student (OAH Case Number 2010021004). OAH consolidated the two complaints on March 2, 2010. Student and District reached a settlement agreement prior to hearing and the case was dismissed as to the District only. The case proceeded against PCCSC, and only the issues pertaining to PCCSC were heard at hearing.

continued to June 4, 2010, for the submission of closing briefs. The parties submitted their closing briefs on June 4, 2010, and the matter was submitted for decision.<sup>3</sup>

## ISSUES<sup>4</sup>

Did PCCSC deny Student a free appropriate public education (FAPE) during the 2009-2010 school year through the present by:

- 1) Failing to assess Student following a referral to PCCSC;
- 2) Failing to adhere to statutory timelines in assessing and communicating with Parent; and/or
- 3) Failing to offer Student a residential treatment program?

## PROPOSED REMEDIES

Student requests \$2,000 reimbursement from PCCSC for the cost of an independent assessment, as well as the cost of Student's residential and mental health care for \$28,504.84.

## CONTENTIONS OF PARTIES

Student contends that during the 2009-2010 school year, PCCSC failed in its duty to assess Student. Student asserts that Parent consented to a mental health assessment referral to PCCSC on June 1, 2009, but PCCSC refused to assess Student and Parent obtained an independent assessment. The independent assessment concluded that Student suffered from severe mental health problems that created concerns about her personal safety at home and at school. The assessment recommended placing Student in a residential treatment program. Student stated that her mental health deteriorated and, in January 2010, Parent was required to place Student in a residential treatment program.

PCCSC contends that Student did not meet the referral criteria for a mental health assessment and, therefore, it did not have an obligation to assess Student. PCCSC states that it initially believed the Student's referral package sent by District was incomplete. Further, PCCSC states that it reasonably relied upon District's information that Student did not meet

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<sup>3</sup> To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Student Exhibit 32, and PCCSC's brief has been marked as PCCSC Exhibit 27.

<sup>4</sup> For clarity, the ALJ has revised and re-numbered the issues to follow the order of the evidence presented at hearing.

the referral criteria. PCCSC asserts that an individualized education program (IEP) meeting in October 2009 found that Student was no longer eligible for special education services since her emotional issues were not significantly interfering with her educational progress, and that she was on track to graduate.

PCCSC further contends that even if Student had met the referral criteria, Student did not require a residential placement to make meaningful educational progress in the least restrictive placement, as other services available to Student had not been implemented.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is a 17-year-old girl who resides with Parent within the geographical boundaries of PCCSC. Student is in her senior year (12th grade) for the 2009-2010 school year. Student started her senior year at Granite Bay High School, where she had attended since the 2008-2009 school year. On June 10, 2008, an IEP team found Student eligible for special education services under both the eligibility categories of other health impairment (OHI) and emotional disturbance. Parent preferred that Student's primary eligibility label be OHI, with emotional disturbance as the secondary eligibility category. In accordance with Parent's wishes, the IEP team designated Student eligible for special education under OHI.

2. On January 6, 2010, Parent placed Student in TLC Child & Family Services (TLC), a non-public, state-certified residential treatment center in Sebastopol, California. Student began attending Journey High School, a TLC affiliate. Student lived at TLC since January 6, 2010, and expects to complete her senior year at Journey High School.

3. PCCSC is a public agency as defined in Education Code sections 56500 and 56028.5, and is a community mental health service agency responsible for providing mental health services to children with disabilities under Government Code chapter 26.5, division 7, title 1, section 7576.

4. Student has an extensive mental health history. Over a period of several years, Student participated in individual therapy, had several suicide attempts, psychiatric hospitalizations, and was in residential and day treatment programs. Student received grief counseling from Susan Rold, Marriage and Family Therapist (MFT), since September 2000 due to the death of her father, and the serious illness and loss of close relatives. Student was diagnosed with depression, attention deficit hyperactivity (ADHD) and bipolar disorders. Student was hospitalized for attempted suicide in 2006 and 2007.

5. Student exhibited a pattern of starting the school year well with energy and focus, then rapidly deteriorating, resulting in inattention and nonparticipation in class.

6. At the June 10, 2008 IEP meeting, the IEP team discussed referring Student to PCCSC for an assessment and mental health services under Government Code Chapter 26.5, commonly known as a “26.5 mental health assessment.” Parent declined the mental health referral, explaining at hearing that at that the time she did not understand what the referral meant and because Student was already receiving private therapy from Ms. Rold.

7. On August 19, 2008, the IEP team meeting reconvened and recommended that Student be referred to PCCSC for mental health services. Parent signed the IEP agreeing to the educational services offered by the District, but did not agree to the mental health referral. Parent explained at hearing that she wanted her brother, who is an attorney, to review the IEP prior to her decision on whether to agree with the entire document.

8. In September 2008, Student had an emotional incident at home, including a suicide attempt. In October 2008, Parent placed Student in Center for Discovery, a private residential treatment program in Southern California. Student returned home in December 2008. In January 2009, Student attended a private outpatient treatment program at the Sutter Hospital Center for psychiatry. Student returned to Granite Bay High School in January 2009. Parent requested District convene an IEP team meeting due to the emotional incident and suicide attempt that had previously occurred.

9. On March 28, 2009, before an IEP team meeting was convened, Parent emailed Jan Lucas, District Special Education Coordinator, and accepted the special education services offered in the August 19, 2008 IEP. Parent also agreed to change Student’s primary eligibility category to emotional disturbance.

10. On April 17, 2009, District drafted an IEP that stated Student qualified for special education as emotionally disturbed. Parent received the draft with the understanding that the IEP team meeting would be held in June 2009. On June 1, 2009, Parent signed consent for District to refer Student to PCCSC for an assessment to determine the need for mental health services. On June 5, 2009, Parent authorized District to conduct another psychological assessment to update Student’s IEP since her recent return from the Center for Discovery.

11. On June 8, 2009, District convened an IEP team meeting, which Parent attended. The IEP form indicated that Student was eligible for special education services due to emotional disturbance as her primary eligibility category. Parent verbally agreed with the IEP, but did not sign it. At hearing, Parent indicated that she wanted her brother to review the IEP before she signed it.

12. Consistent with prior years, Student began the 2009-2010 school year with enthusiasm. In September 2009, a few weeks into the new school year, Angela Sanchez, District psychologist, gave Student a psycho-educational assessment in preparation for the IEP team meeting scheduled on September 8, 2009. Although Ms. Sanchez was a new District employee, she had worked as a school psychologist for seven years at another school district. Ms. Sanchez had experience working with the mental health referral process.

13. Ms. Sanchez received a questionnaire from Parent, but did not personally interview Parent or Student for the assessment. Ms. Sanchez did not interview Student's private therapist, and acknowledged at hearing that it would have provided useful information. Ms. Sanchez did interview Student's teachers at the time of her assessment, but acknowledged they would have only known Student for a few weeks, which was not necessarily enough time to give reliable data. Ms. Sanchez interviewed one of Student's teachers from the 2008-2009 school year, but since approximately two months had passed, Ms. Sanchez opined that the reliability of information from other previous teachers would have been questionable. Ms. Sanchez was unaware of Student's prior history of suicide attempts and psychiatric hospitalizations, but testified that her assessment findings would have been the same even with that information. On September 4, 2009, Ms. Sanchez prepared the 26.5 mental health referral package to send over to PCCSC. At hearing, Ms. Sanchez could not recall if she had reached any psychological conclusions or if the assessments were in progress when she prepared the referral package.

14. On September 8, 2009, another IEP team meeting was held. Ms. Sanchez's assessment indicated that Student did not fall within any criteria that would qualify her for special education. Student's Government/Economics teacher, Jarod Westberg, reported no behavioral issues that influenced Student's educational progress. Student's English teacher, Mrs. Kars, reported in writing that Student was getting a B-minus grade, participated in class, and did not need special accommodations. Student's special education tutor, Michelle Restani, reported that Student did not require extra help for English class, worked independently during tutoring sessions, and did not need special accommodations. Cynthia Young, District Speech and Language Pathologist, reported that Student did not require speech services. Parent alerted the team to Student's history of emotional issues in her freshman and sophomore years that were documented in her health record.

15. Relying on Ms. Sanchez's assessment and teacher input, District members on the IEP team found Student not eligible for special education. However, because Parent disagreed with the determination that Student no longer qualified for special education, District continued to provide Student with special education services pursuant to the August 19, 2008 IEP.

#### *District's Mental Health Referral to PCCSC*

16. On September 8, 2009, PCCSC received the mental health referral package from District. Debby Lum, PCCSC's 26.5 Program Coordinator, received and reviewed the referral package. Ms. Lum testified that she noted the referral package seemed to be missing several pages and did not have a signed IEP recommending a 26.5 mental health referral.

17. In addition, Ms. Lum noticed two handwritten notes. One was posted on the August 19, 2008 IEP, which stated that this is the "Only signed IEP we have." The other note was on the IEP dated June 8, 2009, which stated, "Parent did agree to 26.5 referral in this IEP. However, the parent did not agree to this IEP. And this IEP was not completed on

6-8-09. A new IEP will be held 9-8-09.” Ms. Sanchez acknowledged that she wrote these notes before she sent the referral package to Ms. Lum.

18. Ms. Lum returned the package to Ms. Sanchez because the package was incomplete. Ms. Lum stated that the only signed IEP she saw in the package was from August 19, 2008, where Parent consented to the educational services, but not the 26.5 referral.

19. Ms. Sanchez was not surprised when Ms. Lum called her on September 11, 2009, to inform her that the referral was being returned. Ms. Sanchez stated that it was standard practice in the school district where she previously worked for mental health to return referrals as incomplete if the Parent had not signed the most recent IEP.

20. Mike Lombardo, PCCSC’s assistant director for children’s mental health services, testified that Ms. Lum contacted him upon receiving the package, and told him that the current IEP was unsigned and the only signed IEP in the package stated that Parent did not want a mental health referral. Mr. Lombardo instructed Ms. Lum to return the package to District. On October 13, 2009, Ms. Lum sent a letter to Parent notifying her that PCCSC had returned the mental health referral package to District without taking any action because it was an “incomplete referral.” Ms. Lum’s letter stated that the package was incomplete because there was no parent signature on the IEP recommending the 26.5 referral. At hearing, Ms. Lum also indicated her realization that the reason for rejecting the referral due to lack of a signed IEP may have been invalid.

21. On or about October 17, 2009, Student physically attacked Parent at home and broke a garage door window with a hammer. Parent notified the police.

22. On October 20, 2009, Parent’s legal counsel notified PCCSC that Parent intended to place Student in a residential treatment facility due to her increasing difficulties in school and the violent episode at home.

23. On October 22, 2009, PCCSC’s legal counsel notified Parent that it did not have a signed consent for the 26.5 referral. On October 22, 2009, Parent’s legal counsel sent PCCSC’s legal counsel a copy of the consent for assessment that Parent signed in June 2009. Copies of the consent form presented at hearing showed that Parent’s signature did not photocopy. However, Parent produced at hearing a color copy of the consent form, which showed her signature. Parent established that she easily obtained the legible copy from Granite Bay High School on the Friday prior to the start of hearing.

24. On October 27, 2009, District convened another IEP team meeting. Mr. Westberg reported that Student was missing four homework assignments due to a recent illness, but was very capable, participated in class, and worked well in groups. Ms. Restani reported that Student participated and worked with others, like the other students at the high school. Parent shared Student’s pattern of starting the school year well, then falling behind. Parent was concerned that Student may not meet entrance requirements to attend state

college after graduation. Parent told the team of her concerns over Student's escalating outbursts at home.

25. Craig Garabedian, Director of Special Education, stated that Student was receiving educational benefit, attending school regularly, complying with rules, interacting appropriately with others, passing all classes, potentially graduating early, and could continue to benefit from her education without special education services.

26. Mr. Lombardo attended the meeting to explain the mental health referral process and clarify Parent's consent to the referral. Mr. Lombardo believed at the time that there might have been an error on the copy of the consent form he saw in that it appeared to lack Parent's signature. Prior to the meeting, Mr. Lombardo was unaware that District had evaluated Student and found that she was no longer eligible for special education services.

27. Mr. Lombardo stated that the information discussed at the meeting indicated that Student was an average student and was on track to graduate. Except for the incidents at home described by Parent, there was no indication of anti-social behaviors at school. With that information, Mr. Lombardo believed that it did not seem appropriate to accept Student's mental health referral. At hearing, Mr. Lombardo acknowledged that the apparent error with Parent's consent form could have been clarified by telephone and that an IEP lacking a signature was not a valid reason to reject a mental health referral as incomplete.

#### *Independent Assessment and Residential Treatment*

28. Email exchanges between Parent and Student's teachers and school officials in October and November 2009, showed that Parent continued to be concerned with Student's behavior and performance at home and school. Parent expressed her concern that Student was having difficulty making up school assignments when she was out due to illness. Student had an incomplete grade in Government/Economics due to missing four assignments. Student was also sleeping in class due to inadvertently taking nighttime medication during the day that made her drowsy.

29. On or about November 9, 2009, Parent hired Dr. Paula Solomon, Ph.D., to conduct an independent psychological evaluation. Dr. Solomon has 19 years of experience as a clinical director and 15 years of experience in private practice, with extensive experience working with teenagers who have IEPs. Dr. Solomon assessed Student in November and December 2009.

30. Dr. Solomon administered several standardized tests to Student and also interviewed Student, Parent, Ms. Rold, and Student's psychiatrist, Dr. Harry Wong, M.D., to obtain a detailed mental health history.

31. Dr. Solomon found Student to be bright and talented, with characteristics of an attention deficit disorder, and testified that Student at times denied she has a mental health disorder. Dr. Solomon agreed with Student's therapist and psychiatrist that Student suffers

from a bipolar disorder, characterized by intense mood swings. Dr. Solomon established that Student would show a pattern of doing well on educational tests early in the school year, but her grades would later plummet as the year progressed.

32. Dr. Solomon did not repeat academic tests done at school, but noted that her achievement scores were all higher than grade level. Dr. Solomon focused on Student's emotional issues, since her conditions for ADHD, high intellect, and achievement were well documented and therefore without need to repeat. Student had very high spatial (upper one percent) and cognitive (upper four percent) reasoning which would indicate high academic achievement potential. Student had poor processing speed, executive function, and organizational skills, which were consistent with attention deficit hyperactivity disorder.

33. Dr. Solomon did both subjective and objective tests to get a complete profile. Testing consisted of Achenbach Youth Self Report (Student did not return), Achenbach Child Behavior Checklist (parent form), Achenbach Teacher Report Form (not returned by Parent or Student), Adolescent Apperception Test, Asperger's Symptom Diagnostic Scale (parent form), Draw-A-Person, Incomplete Sentences, Millon Adolescent Clinical Inventory (objective test), Reynolds Adolescent Depression Scale-II, Rorschach Ink Blot Test (objective test), and Three Wishes.

34. The tests' results revealed that Student had low self-esteem and severe, chronic, endogenous depression consistent with a major disorder, resulting in pessimism, anxiety, fatigue, feelings of hopelessness, and sleep disorders. Student also lacked the interpersonal skills to handle social stress or cope with challenges in daily life.

35. Dr. Solomon also confirmed Student's history of suicidal ideations and attempts. Dr. Solomon's summary found Student to be a high-risk teenager with the potential for decompensation, discontinuing medication, and committing violent acts. She would likely become suicidal or dangerous to others. Dr. Solomon's report stated that Student required twenty-four-hour supervision, including the school setting, and that only a residential treatment center would be able to provide the type of environment that would meet Student's needs.

36. In December 2009, Parent reported another violent episode at home. Parent confronted Student when she discovered Student attempting to make a sexually provocative recording for male classmates to show on the Internet. In a tirade that lasted several hours, Student verbally assaulted Parent. Student also verbally and physically assaulted Student's sister, which included a death threat. On January 6, 2010, Parent unilaterally placed Student in TLC, a residential treatment facility.

37. Student's grades for the first quarter in the 2009-2010 school year were: Academic Lab, C; English, C-plus; Government, D; and Pre-Calculus, C. As discussed above, during November 2009, Parent expressed her concern that Student was having difficulty making up schoolwork due to illness and sleeping in class due to inadvertently taking nighttime medication during the day. At the end of the first semester in December

2009, just prior to being placed in a residential facility, Student's grades were: Academic Lab, A-minus; English, C-plus; Economics, F; and Pre-Calculus, C-minus.

38. Anna Richmond, a TLC clinician, testified to Student's residential therapy since January 2010. Ms. Richmond was a credible witness due to her familiarity with Student and her experience participating in IEP team meetings for other students. Ms. Richmond's testimony was consistent with Dr. Solomon's testimony regarding Student's emotional explosive outbursts, mood swings, and lack of self-control and social boundaries, due to her bipolar condition. Ms. Richmond established that Student's suicide attempt following her admission to TLC in January was an example of high-risk behavior characteristic of Student, although it was unlikely an intent to kill herself. Ms. Richmond opined that Student's behavior would not be confined to home, but would manifest at school, therapy, and other group situations.

39. The cost for Dr. Solomon's assessment was \$2,000. Parent received the invoice for \$2,000 and paid the bill in full.

40. Parent received monthly billing statements from TLC for the months of January through May 2010, for board and care.<sup>5</sup> TLC's monthly rate for board and care was \$5,891. For January 2010, Student's cost for 26 days was \$4,940.84. For February through May 2010, Student's total costs were \$23,564 (\$5,891 per month, multiplied by four months). Student's total expense at TLC during the relevant period is \$28,504.84.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. As the petitioning party, Student has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *Elements of a FAPE*

2. Under the Individuals with Disabilities Education Improvement Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

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<sup>5</sup> School costs were not at issue in this hearing.

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require local educational agencies (LEAs), to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts (and by extension, county mental health agencies) are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 949-954.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the determination of whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the decision of whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, at pp. 1141, 1149.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding of a FAPE denial. A procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. Education Code section 56346, subdivision (e) states that a parent may consent in writing to special education and related services in an IEP without consenting to all of the components of the IEP. Those components of the IEP to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.

### *Referral and Assessment*

7. Government Code section 7576, subdivisions (b)(1) through (b)(5), sets forth the requirements for a local educational agency (LEA), an IEP team, or a parent, to refer a student suspected of needing mental health services to a community mental health service for an assessment. The requirements are also contained in California Code of Regulations, title 2, section 60040, subdivisions (a)(1) through (a)(5). The student must meet the following requirements:

a) The student was assessed by school personnel in accordance with Article 2, commencing with Section 56320, of Chapter 4 of Part 30 of the Education Code;

b) The LEA has obtained written parental consent for the referral to the community health service, for the release and exchange of all relevant information between the LEA and the community mental health service, and for the observation of the student by qualified mental health professionals in an educational setting;

- c) The student has emotional or behavioral characteristics that:
- a. Are observed by qualified educational staff;
  - b. Impede the student from benefitting from educational services;
  - c. Are significant, as shown by their rate of occurrence and intensity;
  - d. Are associated with a condition that cannot be described solely as a maladjustment, as shown by deliberate noncompliance with accepted social rules, a demonstrated ability to control unacceptable behavior, and the absence of a treatable mental disorder; and
  - e. Are associated with a condition that cannot be described solely as a temporary adjustment problem that can be resolved with less than three months of school counseling;

d) As determined using educational assessments, the student's functioning, including cognitive functioning, is at a level sufficient to enable the student to benefit from mental health services; and

e) The LEA has provided counseling, psychological, or guidance services to the student and the IEP team has concluded that the services do not meet the student's educational needs, or where the services are clearly inappropriate, the IEP team has documented which of these services were considered and why they were determined to be inappropriate.

8. According to Government Code section 7576, subdivisions (c)(1) through (c)(4), the LEA or IEP team shall provide the following documents:

a) Copies of current IEPs, all assessment reports by school personnel in all areas of suspected disabilities, and other relevant information, including reports by other agencies;

b) Copy of the parent's consent;

c) Summary of the student's emotional or behavioral characteristics; and

d) A description of the counseling, psychological, and guidance services, and other interventions provided to the student.

9. California Code of Regulations, title 2, section 60045, subdivision (a), states that within five days of receipt of a referral, a community mental health service shall review

the recommendation for a mental health assessment and determine if one is necessary. If an assessment is determined to be unnecessary or the referral is inappropriate, the community mental health service shall notify the parent and LEA (i.e., District), of this within one working day. In contrast, if the referral is determined to be incomplete, the reasons shall be documented by the community mental health service. The community mental health service shall notify the LEA within one working day and shall return the referral.

10. When referring a student to a community mental health service, the LEA or IEP team shall provide a copy of the parent's consent. (Cal. Code Regs., tit. 2, § 60040, subd. (b)(2).)

11. An IEP required as a result of an assessment shall be developed within a total time not to exceed 60 calendar days, not counting days between the student's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's or guardian's written consent for assessment, unless the parent or guardian agrees in writing to an extension. (Ed. Code, § 56043, subd. (f)(1)).

12. A parent has the right to obtain, at public expense, an independent assessment from qualified specialists, if the parent disagrees with an assessment obtained by the public agency. The public agency has the right to defend its assessment at a due process hearing. If the assessment is found valid, then the parent has the right to an independent assessment, but not at public expense. (Ed. Code, § 56329, subd. (b) & (c).) A parent is entitled to only one independent assessment at public expense each time the public agency conducts an assessment with which the parent disagrees. (Ed. Code, § 56329, subd. (b); Gov. Code, § 7572, subd. (d)(3).)

*Did PCCSC deny Student a FAPE during the 2009-2010 school year through the present by failing to assess Student?*

13. Student contends that her history of behavioral episodes related to her emotional disturbance and ADHD put PCCSC on sufficient notice that Student might require mental health services that gave rise to a duty to assess her. PCCSC asserts that it did not have any reason to assess Student because PCCSC did not have a signed IEP recommending a referral and Student was found by her IEP team to be not eligible for special education. Further, Student made adequate educational progress with regular educational resources and she exhibited no behavioral issues at school that impeded her progress.

14. According to Factual Findings 16 through 20 and 27, the evidence showed that PCCSC returned Student's mental health referral because it did not include a signed IEP recommending a mental health referral. PCCSC's letter to District returning the referral package dated September 11, 2009, stated that the reason for the return was there was no signed IEP recommending a 26.5 referral. In addition, District's letter to Parent dated October 13, 2009, notified her of the rejection for the same reason, that the referral package lacked a signed IEP recommending the 26.5 referral. Both Ms. Lum and Ms. Sanchez testified that it was their understanding and practice that mental health referrals include a

signed IEP recommending a referral. However, the requirement contained in Government Code section 7576 requires that the package contain a parent's consent to the referral, not that a mental health referral must have a signed IEP recommending the referral.

15. There was confusion over which IEP was in effect when PCCSC received the referral package because Parent had provisionally approved educational services in the June and August 2008 IEP, but withheld consent for a mental health referral. However, as shown in Factual Findings 7 through 11, Parent consented to the tutorial terms in the June and August 2008 IEP, and subsequently provided written consent to a mental health referral on June 1, 2009. Therefore, a current IEP and Parent's consent were both contained in the referral package.

16. District's and PCCSC's confusion over the status of the IEP and legible consent form were unpersuasive. District and PCCSC were in the best position to access the information and documentation. PCCSC did not explain why it did not contact either the District or Parent when it perceived the referral lacked the required parental consent. As shown at hearing, District had a legible copy of Parent's signed consent form. PCCSC could have confirmed the status of the consent and obtained a copy of Parent's written consent to the assessment.

17. As determined in Factual Findings 10, 20, 23, and 27, Parent signed and provided a consent form authorizing Student's referral to PCCSC for a mental health assessment on June 1, 2009. The reason for PCCSC's rejection of the referral was invalid.

18. PCCSC asserted that because District had assessed Student, and District IEP team members found her to be no longer eligible for special education services on September 8, 2009, it had no duty to conduct a mental health assessment. As indicated in Factual Findings 6 through 9, Student was previously found eligible for special education services due to emotional disturbance at the August 19, 2008 IEP team meeting. Parent subsequently approved Student's eligibility status via email on March 28, 2009. The IEP team meeting on June 8, 2009, acknowledged Student's eligibility for special education due to emotional disturbance. Parent never consented to change Student's designation that she was no longer eligible for special education services. Because Parent disagreed with the determination that Student was no longer qualified for special education, District continued to provide Student with special education services. Student's eligibility did not terminate at that point, and she remained eligible for special education.

19. PCCSC also contended that it was not required to assess Student because she was not receiving in-school counseling services as required by Government Code section 7576, subdivision (b)(5). Student did not receive any school-based counseling services. However, private mental health services are an alternative to school-based counseling when considering whether a mental health referral was necessary or appropriate. As discussed in Factual Findings 4 and 6 through 11, Student had a long history of private mental health services that were well documented in the IEP notes from June 2008 and openly discussed at meetings.

20. The evidence in this case showed that PCCSC received the referral package on September 8, 2009. PCCSC did not determine whether an assessment was necessary within five working days. Rather, PCCSS determined the package to be incomplete and notified District on September 11, 2009. However, for the reasons discussed above, PCCSC's rejection of the referral as incomplete was invalid. Therefore, as stated in Legal Conclusion 17, PCCSC had a legal duty to determine whether an assessment was necessary.

21. PCCSC received Parent's consent on September 8, 2009. Absent a determination that an assessment was unnecessary, an assessment should have been done in time to develop an IEP by November 7, 2009.

22. Since no assessment was done and the reason for the refusal was determined to be invalid as discussed above, Parent was justified to arrange for an independent assessment on November 9, 2009, with Dr. Paula Solomon.

23. PCCSC's contentions are well reasoned, but unconvincing and after-the-fact. The only written reason it gave for rejecting the referral package was due to lack of a signed IEP recommending the referral. Therefore, PCCSC was obligated to assess Student for mental health services during the 2009-2010 school year. Since it did not, PCCSC denied Student a FAPE for the time period alleged.

#### *Reimbursement and/or Compensatory Education*

24. Parents may be entitled to reimbursement for the costs of services they have procured for their child to fill the vacuum when a school district, LEA, county mental health service, regional center, or other agency, has failed to provide a FAPE and the private placement or services are determined to be proper under the IDEA. (*School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996]; *Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1496; *Florence County School District v. Carter* (1993) 510 U.S. 7 [114 S.Ct 361].)

25. When a LEA fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education, supra*, at pp. 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).)

26. As a remedy for the FAPE denial found in Issue One, Student seeks reimbursement for \$2,000 for the independent assessment conducted by Dr. Solomon. As determined in Factual Findings 29 through 35, Dr. Solomon was a highly qualified psychologist and conducted a thorough mental health assessment. For the FAPE denial alleged in Issue One, Parent is entitled to reimbursement from PCCSC for the cost of the independent assessment. Parent submitted an invoice from Dr. Solomon dated December 31, 2009, for \$2,000, the cost of the psychological assessment. The invoice noted that the bill was paid. Therefore, Parent is entitled to reimbursement in the amount of \$2,000.

*Did PCCSC deny Student a FAPE during the 2009-2010 school year through the present by failing to adhere to statutory timelines in assessing Student and communicating with Parent?*

27. As determined in Factual Findings 18 and 19, PCCSC notified District of their rejection of the mental health referral on September 11, 2009, which was three workdays after receipt, when it was required to notify the District within one working day. PCCSC notified Parent of the rejection on October 13, 2009. However, there is no requirement for PCCSC to notify a parent when rejecting a referral as incomplete. Therefore, there is no procedural violation regarding communicating with Parent.

28. In addition, even if this were a procedural violation, as stated in Legal Conclusion 5, a procedural violation denies a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. There is no evidence to show that the lack of communication with Parent impeded Parent's opportunity to participate in the decision-making process or caused Student educational harm. As indicated in Factual Findings 20 and 23, once Parent received PCCSC's notice that the referral package was returned as incomplete, Parent provided a copy of the signed consent. As determined in Factual Findings 24 through 27, Parent attended and participated in the subsequent IEP team meeting on October 27, 2009. Therefore, Parent was able to participate in the decision-making process and there was no indication of a deprivation of educational benefit to Student.

29. PCCSC did not deny Student a FAPE by failing to adhere to the statutory timelines and communication with Parent.

#### *Mental Health Services and a FAPE*

30. The LEA, usually the local school district, and the community mental health service jointly manage a special education student's placement in a residential treatment facility. The LEA is responsible for special education and non-mental-health services. The community mental health service is responsible for the residential and mental health services associated with the placement. (Cal. Code Regs., tit. 2, § 60110, subd. (b)(2); § 60200).

31. 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; and

(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.

32. 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 . . . .

33. The Government Code sections addressing residential placements are implemented through the California Code of Regulations, title 2, section 60100, which governs a LEA's 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.

34. 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 a 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 reasons why they were rejected. (Cal. Code Regs., tit § 60100, subd. (c).)

35. The process of obtaining special education mental health services is not designed for an emergency. (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).)

36. As stated in Factual Findings 6 through 11 and 28, the evidence showed that by November 2009, Student needed a mental health assessment and subsequent IEP to review her educational and mental health needs. This did not happen. As indicated in Legal Conclusion 23, PCCSC improperly rejected District's referral package. As such, Parent was left with no alternative but to seek an independent assessment. Dr. Solomon corroborated Student's extensive mental health history, academic pattern of starting out the school year strong, then plummeting as the year progressed, engaging in high-risk, inappropriate behavior, which required Student be placed in a residential treatment facility.

37. The information presented at the IEP team meeting on October 28, 2009, was inaccurate and misleading. The meeting was held shortly after the start of the school year where Student predictably would still appear to function well to those who were unfamiliar with her pattern. The school psychologist had little contact with Student, was unfamiliar with her suicide attempts and extensive mental health history, and did not obtain information from her regular education teachers from the previous school year. A cursory review by PCCSC of the District assessment would have shown that it was not adequate to change the earlier IEP team's decision that Student was eligible as severely emotionally disturbed. The psychologist's report was unpersuasive and given minimal weight.

38. PCCSC contends that they relied on the District's information in accordance with the referral criteria in Government Code section 7576.<sup>6</sup> However, there was also ample information discussed at the IEP meeting from Parent to put PCCSC on notice that the information presented by the District did not take into account Student's extensive mental health history and pattern of academically spiraling downward as the year went by. A subsequent mental health assessment and corresponding IEP would have confirmed this as

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<sup>6</sup> The requirements are also contained in California Code of Regulations section 60040.

the evidence showed. Because PCCSC failed to assess Student, Parent obtained a credible and appropriate independent mental health assessment, which recommended residential treatment that Parent implemented.

39. However, although the evidence established that Student had emotional episodes at home, and that Parent and Student's sibling suffered and were threatened with personal harm by Student, there is insufficient evidence to show that Student needed residential treatment due to her inability to access her education. The evidence establishing Student's emotional problems did not show a sufficient nexus with Student's behavior at school. In fact, Student's teachers and school officials at the IEP team meetings on September 8, 2009, and October 27, 2009, persuasively established that Student exhibited no behaviors that impeded her educational progress at school. Student had emotional problems at home, resulting in psychiatric hospitalizations, but those issues were not seen at school.

40. In *Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635 (*Clovis*), the Ninth Circuit set forth the analytical framework for determining whether a residential placement under the 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 because her behavior became so bizarre that she required placement 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*, at p. 643.)

41. In *Clovis*, the Ninth Circuit 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*, at p. 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 the 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*, at p. 643; *Field v. Haddenfield Bd. of Educ.* (D.N.J. 1991) 769 F.Supp. 1313, 1327.) (See *Student v. Riverside County Department of Mental Health* (2009) Cal.Ofc.Admin.Hrngs. Case No. 2008100383; *Student v. San Mateo Unified High School District and San Mateo County Mental Health* (2008) Cal.Ofc.Admin.Hrngs. Case No. 2007110023.)

42. Here, the evidence indicated that Student performed at school and that none of the extreme emotional and violent behaviors she exhibited at home were exhibited in school. 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 student's IEP goals, does not qualify for a residential placement under student's IEP.

43. 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*, 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.

44. In *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, a student was hospitalized following a violent outburst at home which was directly related to her being 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 were additional violent outbursts at home related to the student's inability to complete writing assignments. Student was declared truant and forcibly taken to school at times.

45. 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. The student's behaviors were related to her refusal or inability to complete schoolwork or to attend school, as well as her inability to make progress toward meeting her IEP goals.

46. In this case, as indicated in Factual Finding 37, Student's grades may have been disappointing, but to justify a residential placement, Student must demonstrate that her home behavior had influenced her ability to function in the school environment. Here, Student has not met her burden of proof that her ability to function at school, to access her education, or to progress in her goals, during the 2009-2010 school year and through the present, has been impeded by her emotional and violent episodes at home. Parent's decision for unilateral residential placement was motivated by a real, desperate concern. Parent was trying to deal with a child, almost a lawful adult, whose mood swings and angry tirades seem directed towards those at home, to the point where Parent's safety and that of her other daughter were thought to be at risk. However, a violent student at home does not necessarily

