

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

EDUCATIONAL RIGHTS HOLDER ON
BEHALF OF STUDENT,

v.

CONTRA COSTA COUNTY PROBATION
DEPARTMENT.

OAH CASE NO. 2013080449

DECISION

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

Administrative Law Judge (ALJ) Peter Paul Castillo heard this matter in Martinez, California, on October 28, 29, and 30, 2013.¹

Elisa Pandolfi and Ryan Neir, Attorneys at Law, represented Student. Student was not present at the hearing, except when testifying.

Christina Ro-Connolly and Cameron Baker, attorneys at law, represented Probation. Bruce Pelle, Probation director, was present for the entire hearing.

The hearing commenced on October 28, 2013, and oral and documentary evidence were received. At the conclusion of the hearing, the matter was continued to December 4, 2013, at the parties' request to submit written closing briefs. The record closed with the parties' timely submission of closing briefs and the matter was submitted for decision.

¹ This matter was heard concurrently with OAH Case. No. 2013080471.

ISSUES²

Issue 1: During those times in which Student was in the security program and Probation prevented Student from receiving education services from Contra Costa County Office of Education (County) from August 9, 2011 through the present (Juvenile Hall incarceration), did Probation deny Student a free appropriate public education (FAPE) by not providing comparable services to the extent practicable in accord with Student's last agreed upon and implemented individualized educational program (IEP) without first obtaining parental consent or informing Parent of the change in placement?

Issue 2: During Student's Juvenile Hall incarceration, did Probation fail to develop an IEP that met Student's unique needs because Probation failed to:

- a. Consider a continuum of placements to meet his unique needs;
- b. Offer Student special education services to meet his unique needs, including specialized academic instruction, psychological and mental health services and counseling, assistive technology and behavior services;
- c. Establish measurable goals to meet Student's unique needs in the areas of attendance, academics, and behavior;
- d. Develop a plan to meet Student's behavioral needs; and
- e. Include any services to implement Student's individual transition plan?

Issue 3: During Student's Juvenile Hall incarceration, did Probation deny Student a FAPE by failing to:

- a. Have qualified personnel provide Student with special education services;
- b. Convene IEP team meetings when Student did not meet his IEP goals;
- c. Provide Student with individualized academic instruction and special education services;
- d. Conduct a functional behavior assessment?

² The issues were framed in the October 21, 2013 Order Following Prehearing Conference. The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

SUMMARY OF DECISION

On October 17, 2013, OAH determined that Probation is a responsible public agency for providing Student with a FAPE when Student was in a security program and Probation prevented him from receiving education services from County.³

Student asserts that Probation denied him a FAPE on nearly 200 days in which he could not attend Mt. McKinley School (Mt. McKinley), operated by County in Juvenile Hall, because Probation placed him on security restriction. He contends that, during those periods, he did not receive the special education services required by his IEP, which caused him to fail to make meaningful educational progress. Additionally, during those instances when Probation prevented Student from accessing educational opportunities, Student contends that Probation was required to assess him and develop an IEP that would provide him with a FAPE.

Probation contends that Student grossly overestimated the days in which he did not receive educational services while on security restriction. Additionally, Probation argues that it provided Student with necessary mental health services, which allowed him to make adequate progress in this area, and it never prevented County from providing counseling services. Probation also claims that Student is not entitled to any relief because he made educational progress while in Juvenile Hall.

This Decision finds that Probation, while rightfully concerned about the safety and security of all Juvenile Hall residents and personnel, has the legal obligation to ensure that its eligible wards receive special education, even when disciplined or placed in protective custody. Probation once prevented County from sending an aide into the housing unit to serve Student while on security restriction, which denied him a FAPE because he did not represent a security and safety threat. While Probation prevented County personnel from providing specialized academic instruction, it never prevented the delivery of counseling services, or prevented County from assessing him or developing appropriate IEP's.

FACTUAL FINDINGS

Jurisdiction and Factual Background

1. Student is a 17-year-old boy in the 12th grade, now incarcerated in Juvenile Hall, which is the educational responsibility of County, which operates Mt. McKinley within Juvenile Hall. Student entered Juvenile Hall on November 2010. From January 2011 through June 2011, Student was in Fresno County juvenile hall and group home placements, and returned to Contra Costa Juvenile Hall in June 2011. Student was released from Juvenile

³ Student had named County as a party. Student settled his matter against County and dismissed County as a party on October 2, 2013.

Hall on September 9, 2011, and returned on September 30, 2011. He was next released on November 11, 2011, and returned to Juvenile Hall on February 25, 2012. His last release from Juvenile Hall was from June 14, 2012, through August 16, 2012, and he has remained to date in Juvenile Hall and attended Mt. McKinley. The County is the only agency that has developed an IEP for Student since July 2011.

2. Student has been eligible for special education services before and during his detention in Juvenile Hall. The West Contra Costa Unified School District found Student eligible for special education services on March 8, 2005, under the category of specific learning disability. In an October 2009 (IEP) team meeting, the Fresno Unified School District determined that Student was eligible for educationally related mental health services, but retained his eligibility based on only specific learning disability. While Student's special education eligibility categories have not changed since, his unique needs must be met.

Jurisdictional Hearing

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

Mt. McKinley School

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

Wards in Security Program

5. Probation's security program is a disciplinary program for major rule violations, a pattern of minor rule violations or for wards who present an immediate threat to another person. Probation recognizes that if a minor is segregated from the rest of the population, the ward is entitled to a hearing to contest being put on a security level or upgrade in the security level. This is applicable to wards on any of the three levels of security separation. Only wards on Special Program have the opportunity to attend Mt. McKinley. Probation Bulletin 502 does not discuss access for County personnel to

provide services if the ward on a security level is not permitted by Probation to attend Mt. McKinley.

Special Program

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

Security Risk

7. Probation places wards on Security Risk who present a safety risk or as a step down from Maximum Security. Wards on Security Risk cannot participate in any housing unit activity, including attending Mt. McKinley. As with wards on Special Program, Probation retains ultimate authority to determine when a ward may return to Mt. McKinley or if a County aide may enter the housing unit to provide instruction.

Maximum Security

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

Special Education Services

9. Student contended that, during the times he was on one of three security levels and Probation prevented County from providing special education services, Probation had the legal obligation to implement his IEP and to comply with other special education requirements, such as conducting assessments and determining whether Student might require additional special education goals, services or placement.⁴ Probation, while not conceding that it had to provide Student any special education services, asserted that Student failed to demonstrate that he missed anywhere close to 200 days of special education services based on Probation's actions and that he had made meaningful educational progress.

⁴ Student attempted to argue at this hearing that Probation denied him a FAPE anytime it prevented him from attending Mt. McKinley. However, this contention was rejected in the jurisdictional hearing and is not considered in this decision.

10. After Student returned to Juvenile Hall in June 2011, County developed a new IEP on July 12, 2011, to which Parent consented. This IEP provided Student with specialized education instruction in a small group three times a week, for 45 minutes a session. Student was also to receive individual counseling from a school psychologist, once a week for 30 minutes in his housing unit. Finally, Student would receive educationally related mental health counseling from a Contra Costa County Mental Health (Mental Health) therapist once a week for an hour.

11. After a later return to Juvenile Hall, Student's next IEP was developed on September 12, 2012. The September 12, 2012 IEP continued the special education services as in the July 12, 2011 IEP; the only change was that the counseling provided by County and Mental Health was to be provided at Mt. McKinley. Parent also consented to this IEP. This IEP was also Student's triennial IEP, before which County would normally have assessed Student. However, Parent agreed with County's request, that sufficient information existed so that County need not reassess Student.

12. The most recent IEP team meetings for Student occurred on September 18 and October 1, 2013. County proposed increasing Student's specialized academic instruction to 90 minutes a school day, to be provided by a special education teacher or instructional aide under this teacher's supervision, to be provided in the general education Mt. McKinley classroom. Student would also receive specialized academic instruction outside of the classroom three times a week, for 30 minutes a session. County at this time was providing Student educationally related mental health counseling, so Student's combined counseling with a school psychologist was three times a week, for 30 minutes a session. Parent did not consent to the IEP offered on October 1, 2013.

Counseling Services

13. The evidence established that Student received counseling services when Student was on any of the three security levels. Suzanne Heim-Bowen, school psychologist with County, established that, except for rare situations, she has provided counseling services in the housing unit, including to Student. As to counseling provided by Mental Health, Student did not present evidence that Mental Health therapists could not enter the housing unit to provide counseling services when a student was on a security level or that Mental Health failed to provide any counseling to Student. Therefore, Student did not establish that he did not receive counseling services in his IEP when prevented from attending Mt. McKinley because he was on a security level.

Academic Services

14. County's procedure at all times relevant to this action was for one of the instructional aides to telephone the probation counselor on each housing unit to find out which students would not attend Mt. McKinley. At times relevant, the probation counselor informed the instructional aide of the particular security level for the student. The

instructional aides made a plan to visit students to provide the specialized academic instruction in the housing unit. They prepared a log sheet for each student that stated the date; the reason why the student did not attend Mt. McKinley, including the particular security level; the amount time the aide worked with the student, if any; which aide worked with the student; the housing unit; and, if the aide could not provide the academic instruction, the reason why. Probation only documented the underlying incident that caused Probation to place the student on a security level, not how long the student remained on a security level or whether that status prevented County from providing education services.

15. County instructional aide Leslie Bruin was convincing that she and her colleague, who trained her, followed this procedure and recorded each day an eligible student did not attend Mt. McKinley and therefore needed to receive tutoring in the housing unit. Student's work log established that there were four days on which County was to provide tutoring to him in the housing unit during the 2012-2013 and 2013-2014 school years, and only one day out of those four in which Probation did not permit an aide to see Student. Additionally, there were days on which a County aide provided less than one hour of instructional services, but the decision to provide less than one hour was made by the County, not Probation. Student did not introduce any credible evidence regarding lost educational services for the 2011-2012 school year.

16. While Student attempted to demonstrate from the Mt. McKinley attendance records that he missed almost 200 days based on documented unexcused absences in school records and that those days were days in which he was on a security program, he did not prove that claim. Mt. McKinley principal Rebecca Corrigan established that an unexcused absence did not mean that a student missed school because he or she was on a security level. Before the 2013-2014 school year, County considered nearly all absences as an unexcused absence, such as illness or a court visit. Additionally, Ms. Bruin was convincing that she or her colleague documented each time one of them would attempt to see the student in the housing unit unless told by the probation counselor that they could not, and they would document if they did or did not see the ward.

17. While Student testified that he has been in a security level for nearly 200 days, during which he could not attend Mt. McKinley, his testimony is not as credible as that of Ms. Bruin, who persuasively testified as to the procedure that she and her colleague followed. Student did not establish that Ms. Bruin and her colleague failed to document on the work log all times when Probation informed them that Student would not attend Mt. McKinley, or that the four days of missed instruction on County work log was not accurate. Therefore, Student only established that Probation prevented Student from receiving one day of specialized academic instruction when it placed him on a security level and did not permit him to attend Mt. McKinley.

Assessments and IEP Offers

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

team meetings to update his IEP's. Probation asserted that even if it was required to provide educational services because it would not permit County to serve Student, County was still able to assess Student and conduct IEP team meetings.

19. Student did not establish that Probation's actions prevented County from assessing Student or obtaining information regarding his suspected disabilities based on information from Ms. Corrigan and Ms. Heim-Bowen. Probation did not keep County personnel from seeing Student for extended periods. While Probation and Mental Health had important information regarding Student's emotional problems that affected his ability to make meaningful educational progress, County made little or no effort to obtain such information from Probation or Mental Health. While County invited Probation to attend IEP team meetings where Probation could have shared information, Probation did not attend. However, County could have obtained the same information by speaking to Probation staff before the IEP team meetings and reporting the information. County could have done the same by contacting Mental Health therapists, who provided service on contract with Probation, after obtaining a release of information. Also, County decided not to make placement offers other than in a general education classroom. Therefore, while Probation and Mental Health had important information concerning Student, Probation did not hide this information and County could have easily obtained it during those times when Student could not attend Mt. McKinley. Accordingly, Probation was not required to assess Student or hold IEP team meetings to update or develop IEP's while Student was in a security level and prevented from receiving educational services.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

⁵ Unless otherwise indicated, the legal citations in the Introduction and Juvenile Hall Responsibilities sections are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services.]) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs and academic and functional goals related to those needs. It contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining goals, making progress in the general education curriculum, and participating in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950) (*Mercer Island*) Although the required educational benefit is sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases refer to the same *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Juvenile Hall Education Responsibility and Duties

5. Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to “the public agency involved in any

decisions regarding a pupil.” (Ed. Code, § 56501, subd. (a).) A “public agency” is defined as “a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs.” (Ed. Code, §§ 56500, 56028.5.)

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

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

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

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

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

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

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

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

a) School Programs

The County Board of Education shall provide for the administration and operation of juvenile court schools in conjunction with the Chief Probation Officer, or designee. The school and facility administrators shall develop written policy and procedures to ensure communication and coordination between educators and probation staff. The facility administrator shall request an annual review of each required element of the program by the Superintendent of Schools, and a report or review checklist on compliance, deficiencies, and corrective action needed to achieve compliance with this section.

(b) Required Elements

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

¶ . . . ¶

(c) School Discipline

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

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

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

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

(d) Provisions for Individuals with Special Needs

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

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

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

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

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

[¶] . . . [¶]

(j) education.

Issue 1: During Student's Juvenile Hall incarceration, did Probation deny Student a FAPE by not providing comparable services to the extent practicable in accord with Student's last agreed upon and implemented educational program without first obtaining parental consent or informing Parent of the change in placement?

14. Student asserts that Probation should have provided her with an educational program comparable to that in his previous IEP between his return to Juvenile Hall in June 2011 through the present, as Parent never consented to a change in his IEP. Probation asserts that the County had the obligation to develop a comparable IEP upon his return from Fresno.

15. When a student who has an IEP transfers into an LEA from another LEA in another special education local plan area (SELPA) within the same academic year, the LEA shall provide the student with a FAPE, including services comparable to those described in the previously approved IEP, in consultation with the parents, for a period not to exceed 30 days. By the expiration of the 30-day period, the LEA shall adopt the previously approved IEP, or shall develop, adopt, and implement a new IEP that conforms to federal and state law. (Ed. Code, § 56325, subd. (a)(1).) The 9th Circuit has recently held that the term "previously approved IEP" in Education Code section 56325, subdivision (a)(1) refers to the last IEP that was actually implemented. (*A.M. v. Monrovia Unified School Dist.* (9th Cir. 2010) 627 F.3d 773, 779.) Education Code section 56325, subdivision(a)(1) is modeled upon 20 U.S.C. section 1414(d)(2)(C)(i)(I), which provides that when an exceptional needs student who "had an IEP that was in effect in the same State" transfers to and enrolls in a new school, the school shall provide services comparable to the "previously held IEP."

16. Student did not establish any obligation on Probation to develop a comparable IEP because Parent consented to an IEP developed by the County in July 2011. Additionally, Student presented with no evidence that Probation prevented County from serving Student before then, and no other school district has developed an IEP for Student since then.

Issue 2a: During Student's Juvenile Hall incarceration, did Probation fail to develop an IEP that met Student's unique needs because Probation failed to consider a continuum of placements to meet his unique needs?

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

18. An LEA must ensure that "To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This "least restrictive environment" (LRE) provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically

developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) An LEA must have a continuum of alternative placements, available, that proceed from “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” (34 C.F.R. § 300.115(b); see also Ed. Code, § 56342, subd. (b).)

19. Student failed to establish that Probation undertook any actions to prevent County from considering a continuum of placements when making a decision where to educate Student. The fact that County did not apparently consider any placement options other than its general education classroom at Mt. McKinley was not the responsibility of Probation, even though Student was incarcerated. County still had the obligation to consider all placement options, including a non-public school. (*Student v. Sacramento City Unified School District and Sacramento County Office of Education* (2013) Cal.Off.Admin.Hrngs. Case No. 2013010137.) Accordingly, Student did not establish that Probation had a legal obligation under the IDEA to consider other placements during those times in which it prevented Student from receiving educational services from County.

Issue 2b: During Student’s Juvenile Hall incarceration, did Probation fail to develop an IEP that met Student’s unique needs because Probation failed to offer Student special education services to meet his unique needs, including specialized academic instruction, psychological and mental health services and counseling, assistive technology and behavior services?

Issue 2c: During Student’s Juvenile Hall incarceration, did Probation fail to develop an IEP that met Student’s unique needs because Probation failed to establish measurable goals to meet Student’s unique needs in the areas of attendance, academics, and behavior?

Issue 2d: During Student’s Juvenile Hall incarceration, did Probation fail to develop an IEP that met Student’s unique needs because Probation failed to develop a plan to meet Student’s behavioral needs?

Issue 2e: During Student’s Juvenile Hall incarceration, did Probation fail to develop an IEP that met Student’s unique needs because Probation failed to include any services to implement Student’s individual transition plan?

Issue 3b: During Student’s Juvenile Hall incarceration, did Probation deny Student a FAPE by failing to convene IEP team meetings when Student did not meet his IEP goals?

20. Student contended that Probation was required by law to assess him and develop IEP’s that met his unique needs, especially his academic, mental health and behavioral needs, during those times in which Probation prevented him from receiving educational services from County. Probation asserted that it never prevented County from developing appropriate IEP’s during those times so any failure to develop IEP’s was only County’s responsibility.

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

22. Student did not establish that during those times in which Probation prevented County from providing educational services that Probation prevented County from developing IEP's that met his unique needs. County developed three IEP's for Student since July 2011. While these IEP's may not have met Student's unique needs, that was County's responsibility. County never stated that Probation's conduct prevented it from developing an appropriate IEP. Therefore, Probation did not deny Student a FAPE because it was not Probation's responsibility and Probation did nothing to prevent County from obtaining information needed to develop an appropriate IEP.

Issue 3d: During Student's Juvenile Hall incarceration, did Probation deny Student a FAPE by failing to conduct a functional behavior assessment?

23. Student asserted that during those times when Probation was the responsible public agency for academic services that Probation should have assessed him in all areas of suspected disabilities. Probation contended that it never prevented County from assessing Student during the time in question.

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

25. County decided in 2012, with Parent's approval, not to conduct Student's triennial assessment. Student did not establish that Probation undertook any activity that prevented County from assessing Student. Accordingly, Student did not establish that Probation denied Student a FAPE by not assessing him during the one day in which it was the responsible public agency for academic services. Probation did not prevent County from assessing him, and it was at all times County's duty, not Probation's duty, to do so.

Issue 3a: During Student's Juvenile Hall incarceration, did Probation deny Student a FAPE by failing to have qualified personnel provide Student with special education services?

Issue 3c: During Student's Juvenile Hall incarceration, did Probation deny Student a FAPE by failing to provide Student with individualized academic instruction and special education services?

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

27. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.) For example, a brief gap in the delivery of services may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal. May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, p. 7.)

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

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

30. For the one day Probation refused County access to provide educational services, Probation attempted to shift the blame for the failure onto County. Probation argued that the County aides failed to schedule their visits with the probation staff on duty in the housing units so that Probation could have adequate staffing available for the visits. However, Probation should have known that, when County aides called and Probation

informed County that certain students would not attend Mt. McKinley, the County aides would attempt to see those students. Probation should have then ensured that it had the appropriate staffing to permit the aides' visits. Student's expert, Peter Leone, Ph.D.,⁷ was convincing in establishing the myriad of options available to Probation to ensure safety and security during a student's instruction, and that County personnel could safely have provided academic instruction.⁸ Additionally, state regulations⁹ require Probation to ensure that wards receive certain services, such as education, while on a security level. Further, based on information in the special incident reports in evidence, Probation failed to demonstrate that Student presented such a safety and security risk that the County aides could not safely serve Student.

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

⁷ Dr. Leone is a professor at the University of Maryland in its Department of Special Education, and has taught there since 1981. He was also the director of the National Center on Education, Disability and Juvenile Justice from 1999 through 2006, and published numerous scholarly articles on providing education to incarcerated juveniles, especially those needing special education services. Dr. Leone has also consulted with correctional facilities on providing educational services to incarcerated juveniles, and been an expert in these matters for court proceedings and consent decrees, for (among others) the Los Angeles County Office of Education and its juvenile court school at the Challenger Memorial Youth Center.

⁸ After the hearing, Probation filed a motion to augment the record to introduce Los Angeles County Probation Directive 1331, issued June 6, 2013, to impeach Student's expert's testimony. Student opposed Probation's motion. Probation's motion to augment the record is denied as Probation did not establish why it did not discover this document before the hearing, nor why this document was so important that the record should be re-opened for its introduction.

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

REMEDIES

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

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

34. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Puyallup, supra*, 31 F.3d at p. 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. District of Columbia, supra*, 401 F.3d at p. 524.)

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

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

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

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

37. However, Dr. Grandison's formulaic proposal of two hours of educational service for one hour of missed education service is not supported by any research or other evidence. Additionally, Dr. Grandison did not separate how much of Student's lack of

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

¹³ Dr. Alice Parker, Student's expert in the jurisdictional hearing, opined that one hour a day from a credentialed special education teacher would be appropriate for a student not permitted by Probation to attend Mt. McKinley. Dr. Parker oversaw the California Department of Education's quality assurance process from 1997 through 2005, which oversees complaints made against public agencies regarding special education services. Student accepted in that hearing that one hour of tutoring would be appropriate for a missed school day, and Probation did not present any evidence to the contrary. To the extent that there is any conflict between Dr. Parker and Dr. Grandison, Dr. Parker is more credible based on her more extensive knowledge of special education instruction, as noted in the jurisdictional hearing, than Dr. Grandison.

educational progress was caused by County as opposed to Probation, or distinguish between educational loss caused by arguably unqualified teachers from hours of instruction missed.

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

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

ORDER

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

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

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

Dated: December 26, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings