

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TEMECULA VALLEY UNIFIED
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2011070360

DECISION

Susan Ruff, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on October 10, 11, and 12, 2011, in Temecula, California.

Peter Sansom, Esq., represented the Temecula Valley Unified School District (District). Kimberly Velez, Director of Special Education, and Melanie Hertig, Assistant Director of Special Education, also appeared at various times on behalf of the District.

Eric Freedus, Esq., represented Student and Student's mother. Student's mother was present for part of the first and third days of hearing. Student was not present.

The District's request for due process hearing was filed on July 12, 2011. Riverside County Department of Mental Health (CMH) was originally one of the petitioning parties, but withdrew from the case on August 3, 2011. On August 8, 2011, OAH granted the parties' request to continue the hearing dates. The parties requested and received permission to file written closing argument. The case was taken under submission upon receipt of the parties' written closing argument on October 31, 2011.¹

ISSUE

Did the District's proposed May 26, 2011 individualized educational program (IEP) offer Student a free appropriate public education (FAPE) in the least restrictive environment?

¹ To maintain a clear record, Student's written closing argument has been marked as Exhibit S-81. The District's written closing argument has been marked as Exhibit D-56.

CONTENTIONS

This case involves an IEP offer made by the District on May 26, 2011. The District contends that the offer was both procedurally and substantively appropriate. On the first day of hearing, the District's counsel confirmed that the District is only seeking a determination that the May 26, 2011 offer was appropriate as of the date it was made. The District is not seeking an order permitting the District to enforce that offer as of the present date, so any events which occurred after the date of that IEP offer are not relevant to the present case.

Student contends that the District's offer denied Student a FAPE both procedurally and substantively. Student raises several procedural challenges to the District's offer based on the conduct of CMH. Student argues that CMH failed to conduct a reassessment and failed to draft an assessment report or provide a prior written notice. Student also argues that the IEP failed to delineate CMH services with sufficient specificity and failed to include mental health goals related to the CMH services. Student contends that the District's offer substantively denied Student a FAPE because it called for an inappropriate placement for Student in a day program instead of a residential placement.

This Decision finds that the District's May 26, 2011 IEP offer was appropriate, both procedurally and substantively, as of the time it was made.

FACTUAL FINDINGS

1. Student is a 16-year-old who is currently eligible for special education and related services under the eligibility category of emotional disturbance (ED). The parties do not dispute that Student's family resides within the jurisdiction of the District.

2. Student has a history of emotional difficulties. She witnessed serious domestic violence in her home in the past and was also a victim of domestic violence. Her diagnoses include, but are not limited to, posttraumatic stress disorder, depression, and generalized anxiety disorder.

3. Student also has a history of behavioral difficulties in her home. She has been verbally abusive and disrespectful to her mother and brother, and occasionally had physical altercations with her brother. Student's mother has had a very difficult time controlling Student at home. For example, prior to Student's placement in a residential facility, Student would sneak away from home at night to go to parties where people were drinking.

4. This case involves an IEP offer made by the District on May 26, 2011. In that proposed IEP, Student was eligible for special education and related services under the category of ED. The IEP contained detailed present levels of performance and goals in the areas of: a) behavior (school attendance); b) behavior (compliance with instructions without negative attitude or conduct); c) social/emotional (conduct with peers); d) independent

living/transition; e) social/emotional (depression/negative feelings); and f) completion of school work. It also contained an individual transition plan for Student.²

5. The educational program offered in the IEP included: 1) placement at the Jack Weaver School at the Oak Grove Center (Oak Grove), a nonpublic school (NPS); 2) family counseling one time a week for 45 minutes per session; 3) individual therapy one time a week for 45 minutes per session; 4) 90 minutes per day, five days a week, at Oak Grove's afterschool group (which is described in Factual Finding 9 below); 5) monthly programs at Oak Grove such as career and college awareness; 6) extended school year (ESY) educational services; and 7) transportation to and from Oak Grove. During the IEP meeting, CMH offered Student and her family the following mental health services, separate from the District's IEP offer: behavioral support in her home, medication monitoring one time per month, and trauma-focused cognitive behavior therapy.

6. As discussed in Legal Conclusions 2-5 below, a school district's IEP offer is evaluated in light of what was objectively reasonable at the time the offer was made. To determine what was objectively reasonable in the instant case, it is necessary to look at the information possessed by the District at the time of the May 26, 2011 IEP offer. In order to do that, this Decision will start with events which occurred approximately a year before the IEP in question.

Student's Placement at Oak Grove in March and April 2010

7. During the 2009-2010 school year, Student's ninth grade year, Student's IEP team determined that Student's educational needs were too great to be met in a general education public school classroom. Student was intelligent and had the capability of doing grade level work, but she was habitually tardy and absent from class. She was frequently off task in class and had problems with completing work. Her grades during the first part of the 2009-2010 school year at Temecula Valley High School were mostly F's. The parties agreed to place Student at Oak Grove, a state certified NPS located in Murrieta, California.

8. In addition to the NPS, Oak Grove operates a residential facility. For the NPS students, Oak Grove runs on a traditional school year calendar, which starts in September and ends in June. Oak Grove had an ESY program consisting of five weeks of education during the summer. The ESY program runs from approximately the week after the Fourth of July through the first week of August.

9. Although not all pupils who attend Oak Grove are required to have ED as their special education eligibility category, Oak Grove specializes in educating pupils with ED.

² The District introduced evidence to show that the IEP meeting and IEP document complied with the various procedural requirements of federal and state law. Because Student has only raised objections to certain aspects of the IEP, this Decision will focus on those objections. With respect to the remaining procedural requirements, the District met its burden of proving that its IEP complied with the law.

The Oak Grove facility has therapists on staff and can provide mental health services and treatment to pupils as part of an afterschool program. The afterschool program runs five days a week for 90 minutes per day. On three days of the week, the program is conducted by a licensed therapist and consists of a group therapy session. On the other two days, the program is conducted by a behavior specialist and the pupils work on things such as life skills and homework assistance.

10. During the hearing, Student's expert Sara Frampton, Ph.D., explained that, in her opinion, Oak Grove differed from a traditional day treatment program for ED students. For example, according to Dr. Frampton, a traditional day treatment program includes a therapy component during the school day, while Oak Grove provides its mental health services as part of the afterschool program.

11. Student attended Oak Grove for approximately two months, from March 1, 2010, to April 28, 2010. A bus picked her up each morning to make sure that she arrived at school on time. The pupils switched classrooms and teachers during the school day. There were about 12 pupils in Student's English and history classes, one teacher, and two aides (a behavioral specialist and an educational assistant). Student was able to see a therapist on campus if she wished to do so.

12. Student's grades increased significantly during the time she was at Oak Grove. At the end of the two months at Oak Grove, Student was getting B's in English and Nutrition, and C's in Life Skills and Physical Education. Her other three grades (World Geography, Algebra and Physical Science) were listed as incomplete due to her failure to turn in missing assignments. She was making progress on many of her IEP goals.

13. During her classes at Oak Grove, Student needed prompting to stay focused and to complete her work. She seemed distracted and was out of her seat a lot. Student dressed provocatively while at Oak Grove and engaged in actions such as passing notes to attract the attention of boys. Upon occasion, she also engaged in inappropriate activities with male students during the school day, such as inappropriate massaging and touching. The Oak Grove staff worked with Student on maintaining appropriate boundaries with her peers, and Student earned points for appropriate behavior.

14. During her first month at Oak Grove, Student's attendance record was perfect. After she returned from spring break in April, she had occasions when she left class without permission. At the IEP meeting on May 26, 2011, Michelle Sebastian, one of Student's teachers, explained that the Oak Grove staff had realized Student had been asking to leave class to get a drink or use the restroom as an excuse to socialize with male peers. When the staff began denying her permission to leave, she started leaving class without permission.

15. There were nine times during the month of April after Student returned from spring break that Student left class without permission. Some of these instances were very short – even if a pupil walks outside the door of the classroom without permission Oak Grove reports it as an absence from class. On other occasions Student left the classroom for

a longer period of time. The Oak Grove staff would follow her and remind her about the points system and her failure to earn privileges if she continued to disobey.

16. There was one occasion in April 2010 when Student left class for approximately one to two hours. For about the first 10 to 15 minutes of that time, the Oak Grove staff did not know where she was. Student did not actually leave the Oak Grove campus on that occasion (or on any other occasion when she left class without permission). The Oak Grove staff members found her and were able to monitor her. Student did not engage in any harmful conduct on that occasion. Oak Grove did not physically restrain Student on that occasion because they do not use physical restraint unless the pupil is harming herself or others. Aside from these incidents of leaving class, Student had a very good attendance record during her two months at Oak Grove, until she was pulled from Oak Grove to begin residential placement elsewhere. There was also one occasion in which Student almost got into a fight at Oak Grove, but was stopped by the staff.

17. The parties dispute whether Student was academically and behaviorally successful during her time at Oak Grove. This case involves only the District's May 26, 2011 IEP offer, so the appropriateness of the 2010 placement at Oak Grove is not directly at issue. However, because the District's May 26, 2011 offer proposed to place Student back at Oak Grove, the appropriateness of Oak Grove in March and April 2010 is relevant to what was objectively reasonable for the District to offer later. Therefore, Factual Findings will be made regarding the appropriateness of that Oak Grove placement.

18. Both parties produced evidence regarding the 2010 Oak Grove placement. Student relied upon the testimony of Student's mother and the opinion of Student's expert Dr. Frampton as evidence that the Oak Grove placement was not appropriate as of April 2010. The District relied upon the testimony of Sebastian and the opinions of the therapists from CMH to show that the placement was appropriate.

19. During her testimony, Student's mother raised concerns about Student's conduct at school and at home during her placement at Oak Grove. Student's mother testified that Student was offered illegal drugs by a friend at Oak Grove.³ That same friend would visit Student in her home at night, until Student's mother learned about the drugs and refused to let the friend stay at the house. Student's mother testified that she was informed that Student would leave class at Oak Grove and disappear. Oak Grove would call Student's mother to say that Student had been missing for a few hours. Student's mother said the Oak Grove staff told her that no one knew if Student was on or off campus. She also testified that she was informed that Student engaged in sexually inappropriate behavior while at Oak Grove.

20. Dr. Frampton agreed that Oak Grove was not appropriate for Student. Dr. Frampton is a marriage and family therapist and licensed educational psychologist who

³ There was no evidence that Student actually took drugs as a result of the friend's offer.

operates a private practice in Del Mar. She has a master's degree in special education and a second master's degree in counseling. She also holds a Ph.D. in psychology as well as numerous credentials related to special education. She has worked as a classroom teacher and resource specialist in the past and now provides advocacy services to parents of special needs children through her business Advocacy Associates, Inc. Dr. Frampton worked as an advocate for Student and Student's family during the times relevant to this case.

21. Dr. Frampton is familiar with Oak Grove. She has represented children who attended Oak Grove in the past and knows the current director of Oak Grove (Mike Brown). She was part of the decision making process to send Student to Oak Grove in March 2010. She explained that Student had been accepted at Provo Canyon School (Provo Canyon), a locked residential facility located in Utah in January 2010, but Dr. Frampton had been willing to try Oak Grove as a placement for Student. She became concerned about the placement during April 2010, when Student's mother reported to her that Student was exposed to other pupils using illegal drugs and that pupils showed up at Student's home at odd hours who seemed to be inebriated.

22. Dr. Frampton was also told that Student did not cooperate with therapy, particularly family therapy, and there were reports that Student would run away. Dr. Frampton heard that Student was going "awol" with boys. She was concerned that the Oak Grove placement was leading Student down a bad path.

23. Dr. Frampton attended the 30-day placement IEP team meeting for Student in April 2010. Dr. Frampton testified that by the end of that meeting, she did not think Student's needs could be met at Oak Grove. Instead, she proposed a placement in the locked residential facility at Provo Canyon.

24. Sebastian testified on behalf of the District. She has been a special education teacher at Oak Grove since 2004. She was Student's case manager and one of her teachers during the time Student attended Oak Grove in March and April 2010. She believed that Oak Grove was an appropriate placement for Student and was meeting Student's needs at that time. Student attended school almost every day during her placement at Oak Grove, in direct contrast to her prior placement in a general education high school where her attendance had been a problem. Sebastian explained that Student never left the Oak Grove campus and that, aside from one incident, Oak Grove staff always knew where Student was when she left class.

25. In Sebastian's opinion, Student did not exhibit the kinds of behaviors that would prevent her from being educated at Oak Grove. Pupils who could not be educated at Oak Grove included those who were very aggressive, for example pupils who would throw desks, who could remain seated for no more than five seconds at a time, or who would use objects to harm staff. Student, by contrast, never engaged in fights or aggressive conduct at Oak Grove. Oak Grove was not a locked campus so Student could have left campus when she left class, but she did not do so. However, Sebastian admitted during cross examination

that two months was a short time to get a complete picture of how a child would react to a placement.

26. CMH also believed strongly that Oak Grove was an appropriate placement for Student as of April 2010. Eva Galvan, a clinical therapist with CMH, conducted an assessment of Student in April 2010 and prepared a report dated May 18, 2010. Galvan did not testify at the hearing, but Claire Priester, a clinical therapist with CMH who conducted a follow-up assessment of Student in December 2010 and January 2011, testified that Student gained significant benefit while at Oak Grove. Priester reviewed Galvan's report and Student's records from Oak Grove. She explained that prior to the Oak Grove placement Student was frequently truant from or tardy to her classes at high school and was failing those classes. At Oak Grove, Student began attending classes regularly and her grades improved significantly. Priester also believed that the therapy notes from Oak Grove showed that Student was beginning to open up to therapy. When Priester spoke with Student as part of Priester's later assessment, Student told Priester that she wished she could return to Oak Grove to continue therapy with her Oak Grove therapist.

27. During the hearing, Student challenged Priester's conclusion that Student had begun to open up to her therapist. The discussions with the therapist which Priester found significant occurred during the two days before Student ceased attending Oak Grove, so it is not possible to determine whether Student was benefitting therapeutically at Oak Grove. However, the evidence does show that she benefitted academically at Oak Grove.

28. The parties also disputed whether Mike Brown, the Director of Oak Grove, stated during the April 2010 IEP meeting that Oak Grove could not meet Student's needs. Brown is not a mental health professional, and he did not testify at the hearing. Dr. Frampton testified that when she proposed the placement in the locked facility at Provo Canyon to the IEP team, Brown said, "Good." According to Dr. Frampton, Brown told the team that some students have to go out of state to get sufficient treatment and he thought she was one of them.

29. Sebastian did not remember Brown stating that Oak Grove was not appropriate. According to her recollection, Brown stated that Student had not been at Oak Grove long enough to see whether it would ultimately be an appropriate placement. When the team discussed a possible residential placement, Brown said the Oak Grove residential facility would not be appropriate for Student if she required a residential placement, because it was not a locked-down facility. Jeffery Janis, who also attended the April 2010 meeting, testified that he did not remember Brown making a statement that Oak Grove could not meet Student's needs or that she needed residential placement.

30. The evidence supports a finding that Oak Grove was an appropriate placement for Student as of March and April 2010. Student's grades improved dramatically during her two months at Oak Grove. Although she had a problem with leaving class occasionally during her last two weeks at Oak Grove, the Oak Grove staff was addressing that issue and there was no indication that Student was in any danger from her episodes of leaving class.

Even on the one occasion where Oak Grove did not know her whereabouts at first, she did not leave the campus. Any activities that occurred at Student's home regarding her peers at Oak Grove were not interfering with her education there and did not indicate an educational necessity for residential placement. Likewise, any difficulties that Student's mother had controlling Student's behavior in the home were not sufficient under these circumstances to necessitate a residential placement. The testimony of Sebastian is persuasive on this issue -- she was one of Student's teachers at Oak Grove and had personal knowledge of the academic progress Student was making there. The evidence did not show that Brown stated Oak Grove could not meet her needs; instead, as Sebastian testified, he stated that the residential facility at Oak Grove would not be sufficient if she required a residential placement.

Student's Residential Placement at Provo Canyon, Utah

31. April 28, 2010, was Student's last day at Oak Grove. On April 30, 2010, Student's mother placed Student in the locked residential facility at Provo Canyon. Student remained at Provo Canyon up to and including the time of the May 26, 2011 IEP meeting.⁴

32. Student's problem behaviors escalated dramatically while she was at Provo Canyon. She began to engage in self-harm, such as scratching her skin. For example, Student's mother brought to the hearing a photograph of Student taken in August 2010, which showed a long cut or scab on Student's left arm. Student had not exhibited that type of behavior prior to her placement at Provo Canyon.

33. Student also engaged in suicidal ideation and suicidal gestures while at Provo Canyon. Suicidal ideation means thoughts of suicide. Suicidal gestures are actions that are self-harmful and may be suicidal. Sometimes these gestures are intended for other purposes than a suicide attempt, such as an attempt to gain attention or a cry for help. To determine the difference, a therapist must look at factors such as the child's history and the level of lethality of the gestures. Student had not engaged in suicidal gestures prior to her stay at Provo Canyon.

34. While Student resided at Provo Canyon, she was prescribed medications, including a medication known as Celexa. According to Dr. Lane Smith, a psychiatrist at Provo Canyon, Celexa is an antidepressant that is also used to treat conditions such as anxiety. It was given to Student at Provo Canyon to address her depression and anxiety. One of the potential side effects of Celexa in children and adolescents is an increase in suicidal thoughts and suicidal behaviors. Celexa has a "black box warning" from the Food and Drug Administration regarding this possible side effect. Dr. Smith admitted during cross examination that it was possible Student's use of Celexa may have resulted in her engaging in suicidal ideation and gestures while at Provo Canyon.

⁴ At some point after the May 26, 2011 meeting, Student's mother moved Student from Provo Canyon to another residential facility. Because that move occurred after the IEP meeting in question in this case, it is not relevant to the District's May 2011 IEP offer.

35. Student engaged in serious incidents of self harm (scratching), suicidal ideation and gestures, and aggressive behavior at Provo Canyon in August 2010 and in February 2011. In addition, she had incidents involving frustration, non-compliance and/or aggression toward staff or peers outside the classroom at the Provo Canyon facility at various times, including but not limited to August 27, 2010, September 4, 2010, October 8, 2010, December 17, 2010, and April 25, 2011. In February 2011, she was given a diagnosis of Bulimia Nervosa based on vomiting her food. According to the admitting psychiatric evaluation of Student at the time she entered Provo Canyon, she had no history of an eating disorder. She also engaged in inappropriate sexual activities with her female peers in October 2010 and March 2011. In December 2010, her therapist noted that she had written a love note to a staff member and a peer. In February and April 2011, Student engaged in “cheeking” her medications so she could give them to a peer.

36. In contrast to her behavioral problems in the milieu (residential) portion of her Provo Canyon placement, Student’s classroom behavior as reported by her teachers was much less of a problem. She continued to be off task at times and require prompting to complete some of her assignments, but there were no reports of her inflicting self-harm during class or engaging in suicidal gestures during class. Upon occasion the Provo Canyon staff kept Student out of class when they believed she might be disruptive based on her behavior in the morning. The monthly teacher reports occasionally noted problems with peers or conduct such as talking in class without raising her hand, but nothing comparable to the severe behaviors she exhibited in the residential portion of the placement. For the most part her grades were fairly good while she attended Provo Canyon, though she had the same problems with turning in assignments that she exhibited at Oak Grove.

37. Student’s mother received copies of monthly treatment reports and verbal reports of certain incidents from Provo Canyon, but Student’s mother and Dr. Frampton were not aware of everything that occurred at Provo Canyon during Student’s stay there.

38. In September 2010, the parties held an IEP team meeting. During that meeting, in light of Student’s serious behaviors at Provo Canyon in August 2010, Student’s mother requested that CMH determine if Student’s needs had changed and if she now required a residential placement. The District supported the request and also offered to conduct a new District assessment.

39. Mike Brown attended that meeting. Once again, the parties dispute what Brown said during the meeting. According to Dr. Frampton, Brown told the IEP team that he did not think Oak Grove had something that would meet Student’s needs at that time. Janis testified that he spoke with Brown within a few weeks after the September 2010 IEP meeting. The meeting took place in Brown’s office at Oak Grove, and Oak Grove staff members were present at the meeting. Brown and the Oak Grove staff assured Janis that Oak Grove was an appropriate placement for Student. When Janis asked Brown why he made a comment to the contrary during the IEP meeting, Brown declined to discuss it.

40. In October and November 2010, District School Psychologist Coral French conducted an assessment of Student and prepared a report. With respect to her assessment, the parties stipulated to the following: "... that Coral French's assessment and related report was appropriate and that Ms. French's report was not conducted on behalf of Riverside County Mental Health ("RCMH") or to satisfy any legal obligation RCMH had in regard to its obligation to reevaluate [Student's] mental health needs."

41. As part of French's assessment, she went to Provo Canyon and observed Student in class. She also reviewed records, including past assessments, and tested Student with the Conners 3 Self-Report, the Piers-Harris Children's Self-Concept Scale, and the Reynolds Adolescent Depression Scale, Second Edition. French asked Student's mother to complete a Parent Survey and Information Update form. She also provided several rating scales to Student's mother to complete, including the Conners 3, the Behavior Assessment System for Children, Second Edition (BASC-2), and the Scale for Assessing Emotional Disturbance (SAED). French solicited written input from Student's teachers at Oak Grove and Provo Canyon and provided them with rating scales to complete, including the Conners 3, the SAED, and the BASC-2.

42. French's report concluded, in part:

[Student] may benefit from an educational placement (day school) that is highly structured academically and behaviorally. A recommended program would include a counseling component that may include other family members to address the unique family dynamics that are involved in [Student's] educational and personal progress. Further, [Student] should be able to make progress on her educational/behavioral goals on her current IEP . . . by regularly attending a day treatment program.

However, if the incidences of "suicide ideations and gestures", "self harm" and aggression toward others reported by Provo Canyon School in September 2010 (Riverside County AB2726 referral form) can be confirmed, then the IEP team may need to recommend a more restrictive educational environment.

43. In November 2010, Dr. Frampton visited Student at Provo Canyon and spoke with Student. Student tried very hard to convince Dr. Frampton to allow Student to leave Provo Canyon and return home. Once she realized that Dr. Frampton would not order her release, Student became extremely upset and had to be removed from the room.

44. In December 2010 and January 2011, Priester conducted a reassessment of Student on behalf of CMH. Priester is a clinical therapist with the Children's Case Management Unit of CMH. Her duties include evaluation of children to see if they require residential placement. She has evaluated between 100 and 200 children in the past to determine if they need such a placement. She has worked for CMH for approximately 14 years, and has provided counseling to children who witnessed domestic violence, who were victims of domestic violence, and who have reported that they were raped. Priester has also

provided therapy to children who have expressed suicidal ideation and engaged in suicidal gestures. She explained that a large number of children treated by CMH have expressed suicidal ideation, and Priester has experience in examining what underlies the actions by children which appear suicidal.

45. In conducting the reassessment, Priester requested records from Provo Canyon, reviewed prior assessments, including the recent assessment by Coral French, arranged for an interview with Student, and attempted to schedule telephone interviews with the staff at Provo Canyon.

46. Priester was never able to interview the Provo Canyon teachers, because they were not cooperative. During the hearing, she explained that her supervisor Dianne Radican and other CMH staff had attempted to schedule interviews, but there was difficulty with scheduling because Dr. Frampton insisted on being a participant during the interviews. Radican testified that the teachers at Provo Canyon never specifically refused to be interviewed, but on each occasion in which she tried to set up interviews with them, her attempts were deflected by other Provo staff.

47. Priester did not interview Student's mother as part of the reassessment. Radican explained that CMH made appointments to interview Student's mother, but they were canceled. In Priester's opinion, the lack of an interview with Student's mother did not invalidate her assessment, because Student had not lived with her mother since the prior April. CMH had interviewed Student's mother at that time and Coral French had interviewed Student's mother in connection with her assessment in October 2010.

48. As part of the reassessment, Priester spoke with Student by video conference. Priester described Student's demeanor during the interview as calm and forthcoming. Although Student was taking medication at the time, her speech was clear and she did not appear overly medicated. Student identified issues she was working on during her therapy sessions at Provo Canyon, including her need to respect her mother as a parent and to make her school life more important. Student acknowledged that she had made statements about wanting to kill herself in the past, but denied she would ever commit suicide or felt suicidal. She said she made the statements when she was angry or wanted to get their attention. She also admitted that she had engaged in self harm behaviors at Provo Canyon, such as scratching herself or trying to choke herself. She told Priester that she had learned the behavior from others at Provo Canyon and used it to relieve stress or distract herself. Student described the Provo Canyon staff as rigid and punitive and claimed that when she refused to do her chores the staff described her conduct as harmful to herself.

49. Priester examined Student's arms and neck during the video interview, but did not see evidence of self harm.⁵ Priester asked Student about the coping skills she was using.

⁵ Near the end of the hearing, Student's counsel sought to enter into evidence two photos of Student, the first taken in August 2010 and the second taken in August 2011. As discussed in Factual Finding 32 above, the picture taken in August 2010 showed a long cut

Student told her that she had learned to use coping skills such as taking timeouts, counting to 10, and similar activities rather than blowing up. Student reported that she was working on talking more respectfully to others in the classroom.

50. Priester concluded that the types of behaviors Student exhibited at Provo Canyon could be treated in an outpatient setting and did not require residential treatment. She believed that the Oak Grove day program would be appropriate to meet Student's needs.

51. In connection with Priester's reassessment, CMH requested records from Provo Canyon including "all educational, psychiatric, medication and therapeutic records, behavior reports, any assessments and grades." Priester testified that she received Student's records from Provo Canyon at some point after her interview of Student and reviewed those records prior to finalizing her report. The records she reviewed included monthly reports, progress reports and grade reports with teacher comments. Priester's report made no specific mention of the receipt or review of those records. Priester said that she did not include a discussion of the incident reports from Provo Canyon, because they were not sufficient to change her opinion. She explained that, although she saw evidence of self-harm in the Provo Canyon records, she saw no evidence of lethal intent.

52. Priester's report concluded that Student did not require residential placement to gain educational benefit. The report concluded:

[Student] does not qualify for...residential placement because: 1) less restrictive and appropriate mental health interventions were not tried or given

or scab on Student's arm, which Student's mother reported came from Student's self-injurious scratching. The picture taken in August 2011 showed darkened patches on Student's skin which Student contended were keloid scars caused by Student's self-harm. Keloid scarring is a darkening of the skin that occurs in some skin types after the skin is cut. Student's counsel had not produced copies of those pictures to the District's counsel prior to the hearing, despite the requirement of Education Code section 56505, subdivision (e)(7), that all documentary evidence be produced to the opposing side at least five business days prior to the hearing. Student's counsel contended that the photographs were rebuttal evidence to prove that Priester was not accurate when she stated that she did not see any marks on Student's arms or neck at the time of her interview of Student. The pictures were accepted into evidence solely for the purpose of rebutting Priester's testimony.

Because Student chose to wait until almost the end of the hearing to produce these pictures, Priester was not able to review the pictures or discuss them as part of her testimony. Student presented no expert testimony regarding the pictures to discuss whether the dark marks on Student's skin were keloid scarring caused by scratching which would have been visible to Priester during her video interview of Student. Although the pictures were accepted into evidence, they have very little persuasive value to rebut Priester's testimony about what she saw. The pictures also do not shed any light on how Priester, as a trained professional, would have interpreted any marks that she saw.

a reasonable time to work before placement at Provo Canyon; 2) [Student] was demonstrating ability to benefit at Oak Grove NPS day program, both educationally and therapeutically; 3) more recent records, since her last AB2726 assessment, do not justify higher level of care; 4) she is entitled to the least restrictive environment in which to benefit from her education under the law.

53. During the hearing, Student challenged the appropriateness of Priester's report. Dr. Frampton expressed concerns about Priester's assessment because there was no indication in the report that Priester obtained all of Student's records from Provo Canyon. She was also concerned because she is aware that CMH typically recommends the lowest level of services first, before moving on to residential placement. She took issue with the conclusion that Student was benefiting at Oak Grove both educationally and therapeutically.

54. Student is correct that Priester's report could have been much more complete. Priester did not discuss the serious behavioral incidents that had occurred at Provo Canyon in August 2010. Her report was also weakened by the emphasis she placed on the past failure of Student's family to participate fully in therapeutic interventions. For example, the pertinent history section of her report contains a full paragraph discussing missed appointments and problems with therapy in and before 2008. Priester's conclusions in her report seem to be based more on her belief that Student should never have been removed from Oak Grove to begin with, rather than a full evaluation of Student's behavioral circumstances as of January 2011. While she may have been correct in her belief that Oak Grove was an appropriate placement for Student in April 2010, the purpose of January 2011 assessment was to look at Student's behavior subsequent to her placement at Provo Canyon to see if that changed anything.

55. Although Priester completed her report in January 2011, the report was not sent to Student's mother until shortly before the May 16, 2011 IEP team meeting. Priester testified that they tried to schedule an IEP team meeting from December forward, but were unable to schedule it.

56. As mentioned above in Factual Finding 35, in February 2011, Student engaged in serious incidents of self-harm, suicidal gestures and oppositional behavior at Provo Canyon. According to reports, her behavior included, among other things, trying to strangle herself with a sweatshirt, a hospital gown, and her hair. She made verbal threats of self-harm and claimed to have ingested pills that she found on the floor and non-toxic cleaning solution. She engaged in aggressive conduct toward staff. Daniel Woodbury, one of Student's therapists at Provo Canyon, sent an email message to Dr. Frampton on February 9, 2011, in which he described Student's conduct and said the "gestures were not life threatening and seemed more about getting people's attention. She wrapped her shirt around her neck, but it was in front of staff...." Woodbury also noted that Student knew the cleaning solution was non-toxic. Student remained on "investment" (the most restrictive level of care) for much of the time she was at Provo Canyon.

57. Beginning in March 2011, the District staff began attempting to obtain Student's records from Provo Canyon in preparation for an upcoming IEP meeting. The District made multiple records requests on and after March 25, 2011. District Program Specialist Breck Smith also made a written request for Provo Canyon personnel to fill out forms related to Student's prior goals, present levels of performance and draft goals. In answer to Smith's question about whether there had been any disciplinary incidents or serious behaviors, Woodbury provided the following information:

Starting in January -- 2/6/11 and 2/7/11 [Student] made several attempts each day to kill herself either by wrapping her shirt sleeve around her neck or choking [sic] herself with her hands. 2/13/11 She threatened to harm herself and was secluded. Since then she has not made any suicide attempts. However, she has several incidents of cheeking her medications and giving them to peers, two incidents of sexually acting out with peers, and regularly antagonizing her peers to the point where they attack her.

58. In response to Smith's question about whether Student needed to stay at Provo Canyon, Woodbury stated the following:

[Student] seems to be making slow progress and is more engaged in therapy. This may be a good time to move her to a less restrictive setting based on her efforts. Her issues are long-term and she would benefit from a residential program in California such as Family Life Center if they will accept her. It has been over two months since the last time she was suicidal or combative with staff.

59. On May 16, 2011, the parties held an IEP team meeting for Student. Student's mother attended the meeting along with her advocate Dr. Frampton. The District team members in attendance included Breck Smith and Coral French, among others.

60. Priester and Radican attended the meeting on behalf of CMH. They had mailed Priester's January 2011 report to Student's mother prior to the meeting and also brought the report with them to the meeting.

61. Woodbury and Marshall Christensen from Provo Canyon participated in the meeting by telephone. As stated above, Woodbury had been one of Student's therapists at Provo Canyon. Christensen was one of the administrators at Provo Canyon.

62. As the team began discussing Student's behavior at Provo Canyon during the meeting, the District IEP team members realized that they had not received the complete set of records from Provo Canyon, despite the District's records requests. Christensen admitted to them that Provo Canyon had not sent the District the full set of records. Counsel for the District insisted that Provo Canyon produce the full set of records. The IEP team arranged for a follow-up meeting to give the participants time to receive and review the full set of records from Provo Canyon.

63. Provo Canyon sent additional records shortly after the meeting. The District received those records on Friday, May 20, 2011. The records consisted of hundreds of pages. Breck Smith reviewed the documents over the weekend so that she would be prepared to discuss them at the IEP team meeting. She took notes during her review and prepared a timeline of behaviors and incidents that stood out to her as she conducted her review. She provided her outline to Coral French, who typed it up and included it as an addendum to French's 2010 assessment report for the IEP team at the May 26, 2011 meeting.

64. Student contends that Smith's summary omitted behavioral incidents at Provo Canyon. While it is true that the summary did not list every incident of problem behavior for Student during her time at Provo Canyon, a comparison of the summary with the Provo Canyon records shows that the summary did a good job of highlighting the types of problem behaviors in which Student engaged while at Provo Canyon. It listed most, if not all, of the most serious behavioral incidents that occurred after Coral French's 2010 assessment.

65. Priester and Radican also received and reviewed the new records from Provo Canyon prior to the May 26, 2011 IEP meeting. Radican received the records on the day before the May 26 IEP team meeting, and she spent hours during the evening before the meeting and on the morning of the meeting reviewing those records to prepare for the meeting. CMH did not prepare a new written report or summary of the documentation received from Provo Canyon prior to the May 26, 2011 IEP team meeting.

66. Student's mother and/or Dr. Frampton also received a copy of the Provo Canyon records prior to the May 26 IEP meeting, but Dr. Frampton did not have an opportunity to review the records prior to the meeting.

67. On May 26, 2011, Student's IEP team met again.⁶ The people in attendance at the meeting included, among others, Breck Smith, French, Sebastian, Radican, Priester, Student's mother and Dr. Frampton. Christensen and Woodbury participated in the meeting by telephone. Near the beginning of the meeting, Radican told the IEP team rather firmly that a residential level of care was not required for Student.

68. The team discussed Student's conduct in February 2011. Woodbury told the team that he believed Student's suicidal gestures were attention seeking and were not truly an attempt at suicide.

69. Priester agreed that Student was not at risk for committing suicide. She felt that Student did not exhibit a consistent pattern of suicidal behaviors that indicated a lethal plan. Student had told Priester during the video interview that she would engage in suicidal

⁶ During the hearing, Student stipulated that Student was not challenging the IEP based on failure to have the necessary team members at the meeting. Student also stipulated that Student had no problems regarding the goals included in the May 26, 2011 IEP, the IEP team discussion regarding those goals, or the transition plan included in that IEP. Student's concern regarding goals involved the lack of CMH goals related to mental health in that IEP.

behaviors to seek attention when she was angry or frustrated. Radican also agreed that Student was not suicidal, based on the nature of Student's conduct at Provo Canyon. For example, Radican pointed out that Student's suicidal gestures in choking herself were done in front of Provo Canyon staff.

70. According to Priester, the Provo Canyon representatives told the IEP team that Student had exhausted her ability to benefit from her placement at Provo Canyon. The team discussed how Student seemed to have stalemated at her current level at Provo Canyon and there was a discussion about whether some of her defiance might relate to her frustration at still being there and not progressing further. During her testimony, Radican explained that Provo Canyon uses a system of levels, and that pupils gain more privileges as their good behavior causes them to rise up through the levels. Student had been on the lowest level, the "investment" level for six months. Because of Student's behavior outside the classroom at Provo Canyon, she was occasionally kept out of class. When Radican asked what behaviors Student was exhibiting that warranted her being on investment for six months, the Provo Canyon representatives indicated that Student was verbally disrespectful, would roll her eyes, and did not always follow directions or finish her homework.

71. The parties dispute to what extent the IEP team relied upon Breck Smith's summary of the Provo Canyon records (described in Factual Findings 63 – 64 above), rather than discussing the records themselves. Because the records were voluminous, the IEP team did not have time to go through them in detail during the meeting. Priester testified that some of the items on Smith's summary were discussed during the meeting, and there were other things discussed that were not on the summary. Radican remembered that Woodbury discussed Student's behavioral incidents, including those involving suicidal gestures and sexual acting out behaviors.

72. After the meeting Dr. Frampton reviewed the records from Provo Canyon and determined that several serious behavioral incidents from Provo Canyon were not noted in Smith's summary. Dr. Frampton testified that Smith's summary omitted incidents involving serious matters such as sexual misconduct with roommates and repeated incidents of self harm. Dr. Frampton did not think it was a purposeful omission, but she felt that the incidents should have been raised to the IEP team.

73. Smith testified that when her summary was considered during the meeting, Student's mother made a comment about Student's weight, but no one else objected to the summary or stated that it contained omissions. Smith believed that IEP team had sufficient information at the May 26, 2011 meeting to make a determination as to Student's needs.

74. Radican testified that Smith's summary was never presented to the IEP team as a complete and accurate summary of what was in Provo Canyon records. If the summary had been presented as a complete record, Radican would have explained to the team that there were other things she noticed in the Provo Canyon records that were not included in the summary.

75. The IEP team updated Student's present levels of performance based on the new information received from Provo Canyon. The team also discussed changing one of the goals based on the information from Provo Canyon. Dr. Frampton testified that she did not agree with the present levels of performance stated on the IEP, but she did not comment on them during the meeting, because at that point she believed that the District was not listening to her and that nothing Student's family said would matter.

76. The IEP team considered whether Student required a residential placement. The team discussed her behaviors, and how those behaviors were affecting her in and out of the classroom portion of her Provo Canyon placement. The team also discussed what happened at Oak Grove and whether Student could be educated in a regular high school. The team determined that Student's needs were too great for a regular high school placement. As discussed above in Factual Finding 5, the District ultimately offered a placement in the day program at Oak Grove. Student's program at Oak Grove would have consisted of education in the NPS, individual and family counseling, and participation in the afterschool therapeutic program.

77. The parties dispute whether the offer of a day program at Oak Grove in the May 26, 2011 IEP was sufficient to meet Student's needs. Dr. Frampton opined that Oak Grove would not have been an appropriate placement for Student as of May 2011. She based her opinion on several things. First, she was concerned that Oak Grove's NPS would have been closed for part of the summer and explained that she "couldn't really bring [Student] home to that." Dr. Frampton also expressed her concerns about the lack of a written plan describing how Student's needs would be served if she came back from Provo Canyon to Oak Grove. In Dr. Frampton's opinion, the 60 minutes a week of cognitive behavioral therapy offered by CMH would not be sufficient to meet her needs because she was acting out so severely.

78. More importantly, Dr. Frampton believed that if Student did not have someone supervising her 24 hours a day, she would not have had the success in her academic program that she had at Provo Canyon. Dr. Frampton explained that they had tried a general educational classroom at Temecula Valley High School and Student had failed. During her testimony, Dr. Frampton described the problems at Oak Grove as follows:

. . . we put her at Oak Grove and she was running away from the teacher Michelle and the aide, the mental health aide Samantha, and they'd run...try to run after her and she'd run away and she was gone for an hour or two at a time. So I think that without her being in a residential placement we couldn't have delivered an education to her and that's where a FAPE comes in with residential placement.

79. Dr. Frampton also explained that, in her opinion, it was not really relevant if Student's serious behaviors at Provo Canyon occurred in the residential part of the facility or the classroom. She believes that if a teenage girl has an eating disorder or tries to cut or hang herself, it does not matter where that happens.

80. Dr. Frampton also opined that CMH should have prepared a treatment plan and mental health goals for Student. During the IEP meeting, Dr. Frampton asked if CMH was going to update Priester's January 2011 report. Radican told her that CMH would not update their assessment and that Student should never have been put in residential placement to begin with.

81. Lane Smith, M.D., the Medical Director of Provo Canyon and a psychiatrist for the girls' program there, also testified that, in his opinion, Student needed a residential placement as of May 2011. Dr. Smith received his medical degree in 1965 and is licensed to practice in many states, including California. He has been the medical director at Provo Canyon since 2007. Dr. Smith saw Student on a regular basis at least once a month while she resided at Provo Canyon. He also met with her therapists at team meetings and during informal consultations.

82. In Dr. Smith's opinion, suicidal gestures can be lethal, and it is difficult to make a true distinction between what is just a gesture and what has suicidal intent. He did not believe that Student was ready to step down to a lesser level of placement in May 2011, and that she was not ready for a day program. He explained that when you are trying to modify behavior, if you change placement too soon, the behavior may get worse.

83. Dr. Smith testified that when Student first arrived at Provo Canyon there was a "honeymoon period" at the beginning when she was trying to show that she was fine and did not need residential placement. Then Student began oppositional behavior that peaked in February 2011. Dr. Smith believed that Student's behavior was resolving as of May 2011, but she was not ready for a less restrictive placement. In his opinion, if she had been in placed in a less restrictive setting at that time, she would have reverted to the behaviors that she showed at Provo Canyon, including oppositional behavior, unwillingness to conform to society, dishonesty, and a strong sense of personal entitlement that caused problems. He also believed that it was important to take into account her family life and the type of support that she would or would not receive in the home. He explained that prior to Student's residence at Provo Canyon there had been problems with getting her to and from her day program.

84. Dr. Smith also testified that, based on the records from Oak Grove that he reviewed, he believed that Student's behavior had been escalating during the second month she attended Oak Grove in April 2010. He said that when she first attended Oak Grove, her attendance was good, but after a while she reverted to the types of behaviors she exhibited before she came there, including noncompliance, constant lying, and failing three of her classes. Dr. Smith had never visited Oak Grove, and his knowledge of Oak Grove came solely from the documentation sent to him.

85. The District witnesses, on the other hand, believed that the offer of Oak Grove was appropriate. Breck Smith acknowledged that the Provo Canyon behavioral incidents and reports of self harm were significant, but she explained that she was concerned about conduct that might affect Student's progress at school when she prepared her summary of the Provo

Canyon records. When she went through those records, she found that the majority of behavioral incidents occurred in the residential component of Student's program, not in the classroom setting at Provo Canyon. On cross-examination, she admitted that if Student harmed herself that might affect her ability to attend school. She also admitted that it would be significant to her opinion if Student harmed staff, engaged in physical altercations with staff, or engaged in sexually inappropriate conduct with peers.

86. Priester opined that Oak Grove was an appropriate placement as of May 2011. She believed that Student was benefitting from the Oak Grove placement before she went to Provo Canyon and that Student had not manifested any behaviors at Provo Canyon that Oak Grove could not handle. All of her behaviors could be treated on an outpatient basis.

87. Priester pointed out that Student's self-harm and suicidal gestures did not occur prior to Student's residence at Provo Canyon, and Priester did not believe that they would recur if she returned to Oak Grove from Provo Canyon. If they did recur, Priester believed that Oak Grove was sufficiently structured to support Student's needs. The staff at Oak Grove appropriately addresses self-harm by pupils on a regular basis. In Priester's opinion, none of Student's suicidal gestures were truly a danger to her, but even if they had been, Oak Grove staff and therapists know what to do in such cases.

88. She also believed the IEP offer of individual and family counseling for Student was appropriate. She explained that 45 minutes a week of family counseling was a good starting place, but that the therapists would want to determine if that amount of time was adequate as therapy progressed. In her opinion, 45 minutes per week of individual therapy would have been sufficient for the first six months of Student's placement at Oak Grove.

89. Radican testified that the types of behaviors which lead a pupil to require a lockdown placement such as Provo Canyon include things such as running away for days at a time and self injurious behavior that puts the child at risk, such as running in front of cars or cutting skin to the level of tendon and bone. She said that scratching and similar self injurious behaviors do not necessarily rise to the level of residential care, even if the scratching leaves a scar.

90. Sebastian also agreed that Oak Grove would have been an appropriate placement for Student as of May 2011. She believed that the IEP team had sufficient information as of May 26, 2011, to determine that Oak Grove would be appropriate. She explained that the Oak Grove staff is trained to deal with children who engage in self-harm or suicidal conduct in school. Sebastian has educated students at Oak Grove who have engaged in self-harm or suicidal behavior.

91. Sebastian reported that her current class at Oak Grove contains nine students, a behavior specialist, an educational assistant, and the teacher. There are eight girls in her class and one boy. Sebastian also believed that the Oak Grove ESY program would be appropriate because Student needed to stay within the routine and structure of the NPS during the summer.

92. The parties also dispute whether the May 26, 2011 IEP contained sufficient goals to address Student's mental health needs. Claire Priester testified that the IEP contained mental health goals related to class attendance, noncompliance/respectful conduct, depression and conduct toward peers. She explained that those goals were appropriate to address Student's mental health needs as they relate to education. For example, the goal requiring Student to attend class addressed her mental health needs because her class attendance declined when she was feeling overwhelmed or stressed. The goal addressing her oppositional behaviors was also appropriate because those behaviors could affect her education. Priester believed that these goals could be addressed in the individual and group counseling sessions at Oak Grove. In her opinion, Student's May 26, 2011 IEP did not need any additional mental health goals.

93. Priester also felt that there was nothing in the Provo Canyon records to suggest that a new assessment by CMH was necessary -- the IEP team had voluminous records from Provo Canyon and input from Student's therapist at Provo Canyon. Priester felt confident that the IEP team understood Student's needs well.

94. Radican also agreed that a reassessment was not necessary. Radican is a Mental Health Services Supervisor for CMH. She has held that position for 17 years. As part of her duties she supervises the Children's Case Management Division. She works with families who have children in residential placement and she helps provide resources to families so that residential placement will not be necessary. Prior to her current position, she spent many years as a senior mental health social worker for San Diego County and then CMH. She has a master's degree in social work and licensure as a licensed clinical social worker. She is qualified through special training with the county to make a determination if a child requires a 72-hour involuntary hold under Welfare and Institutions Code section 5150. She has made presentations to school districts in Riverside County about when children can be placed in residential facilities and has experience working with children who have attempted to commit suicide. She also has over 20 years of experience working with children who have witnessed domestic violence and have been victims of domestic violence in the home. She is familiar with the facilities at Provo Canyon and Oak Grove and has visited both facilities multiple times in the past.

95. Radican reviewed all the records from Provo Canyon and found nothing of significance to require a new assessment. Radican explained that CMH reevaluates whenever there is new information of significance that would cause them concern about the child being in the community or the home. She stated that the behaviors exhibited by Student are commonly exhibited by girls in residential facilities. For example, she said that girls in residential placement often act out sexually with same-sex peers because they are only around same-sex peers. In her review of the Provo Canyon records, it appeared that Student's sexual conduct was done on a dare from the other girls. In Radican's opinion, there was nothing in any of Student's conduct at Provo Canyon to suggest a change in Student's mental health needs that warranted a reevaluation.

LEGAL CONCLUSIONS

1. The party filing a due process case has the burden of proof in the proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) In this case, the District, as the petitioning party, has the burden of proof.

2. Under the Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 - 207.)

4. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

5. In *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, supra*, 458 U.S. at p. 201.) *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 "sufficient to confer some educational benefit" upon the child. (*Ibid.*) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not

required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that an IEP “is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

6. Because this is a district-filed case, the District has the burden of proof to show that the May 26, 2011 IEP met the requirements of law both procedurally and substantively. As stated above, Student has narrowed the issues of this case to certain procedural and substantive aspects of the IEP. Therefore, this Decision will focus on the issues Student raised in her written closing argument. Although the issues were raised by Student, the District still has the burden of proof on those issues.

Did the District Deny Student a FAPE Because CMH Failed to Reassess after a Reassessment Was Requested?

7. Student first contends that the District committed a procedural violation of special education law, because CMH failed to reassess Student. Under California law, a district is required to reassess a special education student under the following circumstances:

A reassessment of the pupil . . . shall be conducted if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment.

(Ed. Code, § 56381, subd. (a)(1).)

8. However, the code goes on to restrict when a reassessment may be conducted:

A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary.

(Ed. Code, § 56381, subd. (a)(2).)

9. Student contends that Student’s advocate made a specific request for reassessment at May 26, 2011 IEP team meeting. Student further contends that CMH failed to conduct a reassessment as requested. Even if Student’s contention is correct, any failure to reassess based on that request is not at issue in this case. The only issue in this case is whether the District made an appropriate IEP offer based on what was objectively reasonable as of the date the offer was made. Any request for reassessment made on that date would not

have triggered an obligation to reassess until *after* that date. The law sets up a series of timelines for an assessment after a request is made. (See, e.g., Ed. Code, § 56321.) Even if there was a denial of FAPE in this regard (and nothing in this Decision is intended to imply there was such a denial) that denial would be the subject of another case, not this case.

10. Student next contends that CMH should have reassessed based on events that had occurred at Provo Canyon between January 2011 and May 2011. However, there was insufficient evidence or legal authority to show that such a reassessment was required. As discussed in Factual Findings 26 – 54 above, the District had conducted a comprehensive assessment of Student in the fall of 2010, less than a year before the May 2011 IEP meeting. CMH had conducted a reassessment in December 2010/January 2011. The law presumes that reassessments are not necessary more than once a year. (Ed. Code, § 56381, subd. (a)(2).) Given the two assessments less than a year before the May IEP team meetings, there was no obvious need to reassess. As stated in Factual Finding 63, the new documentation from Provo Canyon was not received until May 20, 2011, so any obligation to reassess could not have arisen prior to that time.

11. More importantly, the issue in this case is not whether anyone should have reassessed Student. This is not a Student-filed case in which Student is seeking a reassessment or an independent educational evaluation. This is also not a case involving a district's request to reassess. The issue in the instant case is whether the District had sufficient information as of May 26, 2011, to make an appropriate IEP offer for Student. Any issue regarding a need for reassessment is relevant only in so far as it relates to the amount of information the District did or did not possess at the time of the IEP meeting in May 2011.

12. As set forth in Factual Findings 1 – 95 above, the District had sufficient information to make an IEP offer as of May 26, 2011. The District had the initial assessment reports conducted prior to Student's placement at Provo Canyon and knowledge of what happened to Student during the time she attended Oak Grove. The District also had French's 2010 assessment, Priester's assessment report, input at the IEP team meeting from staff from Oak Grove and Provo Canyon, and voluminous records detailing Student's time at Provo Canyon. As discussed in Factual Findings 62 – 66 above, the District's program representative and both representatives from CMH who attended the IEP team meeting had reviewed the Provo Canyon records in detail prior to the May 26 IEP meeting. The information possessed by the District was sufficient for the IEP team to determine Student's needs, present levels of performance, goals, and IEP placement and services. There was no need to reassess as of May 26, 2011, in order to make an appropriate offer. There was no procedural violation in this regard and no denial of FAPE.

Did the District Deny Student a FAPE Because CMH Failed to Prepare a Written Assessment Report?

13. Student next contends that CMH had a statutory duty to draft a written assessment report after reviewing the Provo Canyon records pursuant to California Code of

Regulations, title 2, section 60045, and to provide that report to Student's mother two days before the IEP team meeting. Alternatively, Student contends that CMH was required to provide Student's mother with prior written notice pursuant to Education Code section 56500.4, explaining the reasons for the refusal to recommend a residential level of care. Student argues that CMH's failure to do either of these two things prevented Student's mother from participating in the IEP process and constituted a procedural violation of special education law.

14. California Code of Regulations, title 2, section 60045, is part of the section of the regulations dealing with a referral by a school district to a county mental health agency when an IEP team believes that a pupil may require mental health services from that county agency. The section cited by Student sets forth particular timelines for the county mental health agency to respond to such a request. If a mental health assessment is conducted by the county agency, the law requires the agency to provide a parent with a copy of a report at least two days prior to the IEP team meeting. (Cal. Code Regs., tit. 2, § 60045, subd. (f).)

15. Education Code section 56500.4 provides, in part, that "prior written notice shall be given by the public agency to the parents or guardians of an individual with exceptional needs, or to the parents or guardians of a child upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child." The section goes on to state what the prior written notice is required to contain.

16. An educational agency must permit a child's parent "meaningful" participation in the IEP process. (*Ms. S. v Vashon Island School District* (9th. Cir. 2003) 337 F.3d 1115, 1131-1132.) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (*Id.* at. p. 1133.) A parent has an adequate opportunity to participate in the IEP process when he or she is present at the IEP meeting. (34 C.F.R. § 300.322(a)(2006); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate occurs when a parent has the opportunity to discuss the proposed IEP and the team considers the concerns of the parent. (*Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.) An adequate opportunity to participate occurs when a parent engages in a discussion of the goals contained in the proposed IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.)

17. The evidence did not support a finding that there was a need for CMH to prepare an assessment report at the time of the May 26, 2011 IEP team meeting. As stated in Legal Conclusions 7 – 12 above, any requirement to reassess would have arisen after the May 26, 2011 IEP team meeting, so it follows that there was no requirement to prepare an assessment report.

18. Further, the weight of the evidence showed that Student's mother was able to participate meaningfully in the IEP meeting despite any failure by CMH to prepare a report of the Provo Canyon records or provide a prior written notice. As discussed in Factual

Findings 59 – 95 above, Student’s mother attended both of the May 2011 IEP meetings with her advocate/expert Dr. Frampton. Student’s mother and her expert had the same opportunity to review the Provo Canyon records prior to the May 26, 2011 IEP team meeting as the District and CMH experts. Breck Smith’s summary, although it did not include every behavioral incident, was sufficient to allow the IEP team to understand the types of serious behaviors Student was exhibiting at Provo Canyon. The Provo Canyon representatives attended the May 26, 2011 IEP meeting by telephone and provided input regarding Student’s needs. If anything, as set forth in Factual Finding 37 above, Student’s mother had more notice regarding the events at Provo Canyon than the District and CMH because she had received notification from Provo Canyon at the time that at least some of the behavioral incidents occurred.

19. Student also argues that Priester’s December 2010/January 2011 assessment was not sufficient to fulfill CMH’s obligation to provide a new assessment report. As stated above in Factual Findings 44 – 54 above, Priester’s report could have been more thoroughly written. However, it was still a proper assessment report and did not give rise to a new duty to assess by CMH or the District. It was just one of many sources of information that the IEP team had when it considered Student’s needs on May 26, 2011.

20. Student’s mother and her expert understood very well the disagreement between the parties regarding residential placement at the time of the May 26, 2011 IEP team meeting. They did not need a prior written notice to understand those reasons for that disagreement. They knew the position of the CMH representatives on that issue. Student’s mother and her expert/advocate, along with the other IEP team members, received input from Oak Grove and Provo Canyon staff on this issue. The District met its burden of showing that there was no procedural violation.

21. However, even if there had been a procedural violation, that violation did not give rise to a substantive denial of FAPE. There was no evidence whatsoever that any failure by CMH to draft a written report regarding the Provo Canyon records or provide a prior written notice impeded Student’s right to a FAPE or caused her to have a deprivation of educational benefits. Student’s mother had a full opportunity to participate in the IEP team meeting along with her chosen advocate/expert.

22. Student also contends that the District failed to discuss or document a discussion of all of the Provo Canyon records during the IEP team meeting. It is not clear whether Student raises this contention as a separate violation of special education law or whether it was part of Student’s contention regarding the need for a CMH assessment report. Either way, the contention does not show a denial of FAPE.

23. Student’s main argument in this regard involves the summary written by Breck Smith described in Factual Findings 63 – 64 above. Student contends that it did not contain all the relevant incidents of Student’s problem behaviors at Provo Canyon. However, as set forth in Factual Findings 63 – 95 above, the District did not rely solely on Smith’s summary during the IEP team meeting. In addition, the IEP team had input from two representatives

from Provo Canyon, including one of Student’s therapists. Three members of the IEP team had read the Provo Canyon documents in detail. Student’s mother and Student’s advocate had the same opportunity to read those documents prior to the meeting that the District and CMH did. As discussed in Factual Finding 37 above, Student’s mother received notice from Provo Canyon about at least some of these behavioral incidents at the time they occurred.

24. Even if Smith’s summary did not provide detail on every incident which occurred, it described sufficient information for the IEP team to discuss the types of behaviors Student was exhibiting and to make a determination regarding her present levels of performance and educational needs, particularly when two individuals from Provo Canyon were present telephonically to provide input. The point is not whether Breck Smith’s summary was complete – the point is whether the IEP team had sufficient information to make a determination. The IEP team had plenty of information and properly considered that information. Student’s mother and her expert had a full opportunity to participate in that process. There was no procedural denial of FAPE in this regard.

Did the District Deny Student a FAPE Because of Lack of Specificity of the Proposed IEP Services?

25. Student also contends that the District denied Student a FAPE, because the IEP failed to include sufficient specificity for the designated instruction services (DIS) that Student was supposed to receive. An IEP must include a projected start date for services, as well as the anticipated frequency, location and duration of the services. (20 U.S.C. § 1414(d)(1)(A)(VII); 34 C.F.R. § 300.320(a)(7) (2006); Ed. Code, § 56345, subd. (a)(7).)

26. Student contends that the IEP failed to list the proposed CMH cognitive behavior therapy services with sufficient specificity. However, as stated in Factual Finding 5 above, the IEP indicated that the cognitive behavior therapy was not a service being offered by the District as part of the IEP, but was instead offered by CMH separate from the District’s offer of FAPE. Under those circumstances, any failure to include specificity would not have affected the District’s offer. There was no procedural violation in this regard. The DIS services offered in the IEP are described with the required specificity. The District provided sufficient evidence to show that its IEP offer was appropriate without consideration of the extra CMH services. There was no denial of FAPE.

Did the District Deny Student a FAPE Because of Lack of Mental Health Goals in the IEP?

27. Student contends that CMH was required to prepare IEP goals related to mental health in connection with the May 26, 2011 IEP. Student relies upon California Code of Regulations, title 2, section 60050, subdivision (a)(2), which states, in part that when it is determined “that a mental health service is necessary for a pupil with a disability to benefit from special education” the mental health portion of the IEP shall include “goals and objectives of the mental health services with objective criteria and evaluation procedures to determine whether they are being achieved”

28. The District contends that when the California Governor suspended CMH's mandate to provide mental health services to IEP students, CMH was no longer required to comply with California Code of Regulations, title 2, section 60050, subdivision (a)(2). Alternatively, the District contends that the May 26, 2011 IEP contained sufficient goals to address Student's mental health needs.

29. It is not necessary to address the legal issue regarding the effect of the Governor's suspension of the mental health agency responsibilities, because the evidence shows that the IEP contained sufficient goals to address Student's mental health needs as they related to Student's education. As stated in Factual Findings 4 and 92 above, the IEP contained behavioral and social/emotional goals relating to Student's school attendance, compliance with instructions, conduct with peers, and depression/negative feelings. Priester's testimony that these goals were sufficient to address Student's mental health needs is persuasive on this issue. There was no procedural violation and no denial of FAPE.

Did the District's May 26, 2011 IEP Offer Student a FAPE Substantively?

30. The key question in this case is not the list of procedural violations discussed above. The real issue is whether the District's offer of a day program at Oak Grove was reasonably calculated to provide Student with educational benefit at the time it was made on May 26, 2011.

31. Both federal and state law require a special education child to be educated in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) A residential treatment facility, which takes a child out of the child's home, is a much more restrictive placement than a day treatment or public school. However, a less restrictive environment must be appropriate to meet the child's needs in order to be a proper placement. In the instant case, Student contends that Oak Grove was not appropriate to meet Student's needs and that she required a more restrictive environment.

32. As discussed in Factual Findings 7 – 30 above, Oak Grove was an appropriate placement for Student as of April 2010. The placement was reasonably calculated to provide Student with educational benefit and did, in fact, provide such benefit. Student attended school regularly and her grades improved dramatically. Any behavioral issues in her home life were not affecting her school life at that time.

33. The real question is whether the events that occurred at Provo Canyon subsequent to April 2010 changed Student's situation so that it was no longer objectively reasonable for the District to offer a day program at Oak Grove in May 2011.

34. As set forth in Factual Findings 31 – 58 and 68 – 70 above, Student's problem behavior escalated dramatically during her residence at Provo Canyon. Whether it was due to her rebellion at being placed in a locked facility, the side effects of medication, conduct she learned from other residents, or the process of adjusting to the rules at Provo Canyon,

Student engaged in episodes of suicidal ideation and suicidal gestures in August 2010 and February 2011 while at Provo Canyon. During her time at Provo Canyon, she also engaged in episodes of self-harm, aggression toward staff, sexually inappropriate conduct with her roommates, and an eating disorder. She never succeeded in climbing out of the “investment” level of restrictions at Provo Canyon for any meaningful length of time, and Provo Canyon ultimately determined that she had stalemated there.

35. As set forth in Factual Findings 77 – 84 above, Dr. Frampton and Dr. Smith testified that Student required residential placement as of May 26, 2011. Both were credible witnesses with personal knowledge of Student. Whether or not Student required a residential placement as of April 2010, Dr. Frampton’s and Smith’s testimony raises the possibility that Student’s experiences at Provo Canyon may have altered her needs enough to require such a placement as of May 2011.

36. However, as set forth in Factual Findings 85 – 95, the weight of the evidence supports the District’s position that Oak Grove would have been appropriate to meet Student’s needs in May 2011. Sebastian and Priester were persuasive in their testimony that Oak Grove staff could handle the types of behaviors Student exhibited at Provo, even her worst behaviors. All the mental health professionals, including Student’s therapist at Provo Canyon, agreed that Student’s suicidal and self-harm behaviors were intended to gain attention and were not a true attempt at suicide. However, even if they were, Oak Grove therapists could address those behaviors effectively.

37. Further, it is unlikely that Student’s extreme behaviors would occur in the classroom at Oak Grove. Even at Student’s worst at Provo Canyon, she did not engage in suicidal gestures or self-harm in the classroom. Her classroom behaviors were similar to those she exhibited at Oak Grove – failure to turn in assignments, inattention and need for prompting. She successfully passed her classes at Provo Canyon, just as she had been doing with the majority of her classes at Oak Grove.

38. In Student’s written closing argument, Student contends that an IEP must also take into account Student’s behaviors outside the classroom. As set forth in Factual Findings 1 – 6 above, Student engaged in disruptive and aggressive behaviors in her home prior to her time at Provo Canyon and her mother had a very difficult time controlling her. As set forth in Factual Findings 31 – 95, during her residential stay at Provo Canyon she engaged in serious behaviors outside of her time in the classroom.

39. In analyzing the question of whether a child’s behaviors outside of the classroom warrant a residential placement, the Ninth Circuit has looked at the effect those behaviors have had on the child’s schooling. In *Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635 (*Clovis*), the court distinguished a residential placement that was for medical purposes from one that was for educational purposes. In *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, the court analyzed the *Clovis* case and articulated “three possible tests for determining when to impose responsibility for residential placements on the

special education system: (1) where the placement is ‘supportive’ of the pupil’s education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education.” (*Id.* at p. 1468.)

40. None of these three tests required Student to be placed residentially at District expense in May 2011. There was no evidence that a residential placement was primarily to aid Student to benefit from special education. Student was accessing her education at Oak Grove without residential placement. The similarity of her conduct in her classes at Provo Canyon when compared to Oak Grove is strong evidence that she would continue to benefit from her special education if placed back in Oak Grove. If her out-of-class behaviors spilled over into her classroom program, Oak Grove staff was trained to deal with those behaviors. Likewise, residential placement was not “supportive” of Student’s education in May 2011. It was objectively reasonable that a day program would provide sufficient structure for Student to gain educational benefit. Student’s conduct in the classroom was similar whether she was at Provo Canyon or Oak Grove.

41. This was also not a case where Student’s home behavior and school behavior were intertwined to a point which required residential placement. Student’s problem behaviors at Provo Canyon may have been caused by several different factors or a combination of those factors, as discussed in Legal Conclusion 34 above. However, the one thing that did not cause those behaviors was her school work. There was also no evidence that Student’s home problems caused her to miss school enough times to affect her education. Despite her home problems prior to Provo Canyon, she attended school almost every day at Oak Grove. She managed to gain educational benefit at Provo Canyon, despite the times the Provo Canyon staff did not allow her to attend class because of behavior issues.

42. A nice summary of the rules regarding residential placement was set forth in *Student v. Riverside County Department of Mental Health* (2009) OAH case number 2008100383. After a review of the various cases involving residential placement, the ALJ concluded:

The common thread of all cases cited above is that to warrant a residential placement, a student must demonstrate that he is unable to benefit from his educational placement and unable to progress toward meeting his IEP goals, even if his behaviors at home result in psychiatric hospitalizations. Only where the student’s home behavior has impacted his or her ability to function in the school environment has a court found that an IEP-based residential placement was warranted.

43. As of May 26, 2011, it was objectively reasonable for the District to conclude that Student could gain meaningful educational benefit at the Oak Grove day program. The District met its burden of proving that the May 26, 2011 offer of a day program at Oak Grove, with the afterschool program, and individual and group therapy, was reasonably

calculated to provide Student with meaningful educational benefit at the time the offer was made on May 26, 2011. There was no denial of FAPE.

ORDER

1. The District's IEP dated May 26, 2011, offered Student a FAPE in the least restrictive environment as of May 26, 2011.

PREVAILING PARTY

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

RIGHT TO APPEAL 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. (Ed Code, § 56505, subd. (k).)

Dated: November 15, 2011

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings