

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

HUMBOLDT COUNTY OFFICE OF  
EDUCATION AND NORTHERN  
HUMBOLDT UNION HIGH SCHOOL  
DISTRICT.

OAH CASE NO. 2013080004

DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, from the Office of Administrative Hearings (OAH), State of California, heard this matter in Eureka, California, on October 28 through 31, and November 5 through 6, 2013.

Attorney Daniel R. Shaw represented Student. Student's grandfather and legal guardian (Guardian) was present each day of hearing. Student's grandmother and another family member attended the second day of hearing. Student was not present and did not testify.

Attorney Carl D. Corbin represented the Humboldt County Office of Education (County) and the Northern Humboldt Union High School District (District).<sup>1</sup> Dr. Chris Hartley, Superintendent of the District, attended most of the hearing. David Lonn, the District's Executive Director, attended one day in his place. Jennifer Fairbanks, Principal of Humboldt County Court and Community Schools, attended each day of hearing as the County's representative.

The County filed a Request for Due Process Hearing (complaint) on May 28, 2013, naming Student. Student filed his original complaint on July 30, 2013, naming the County and the McKinleyville Union School District (McKinleyville).<sup>2</sup> OAH granted Student's

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<sup>1</sup> The Respondents are at times jointly referred to as the local educational agencies (LEA's) and their joint exhibits have been identified for the record as LEA exhibits.

motion to consolidate on August 12, 2013. On August 20, 2013, OAH granted the parties' joint request to continue the due process hearing. On August 29, 2013, OAH granted Student's motion to amend his complaint which added the District as a party, and the timelines restarted.

At hearing, oral and documentary evidence was received. The case was continued to November 18, 2013, at the parties' request for the submission of written closing briefs. Student timely filed his closing brief. Due to an oversight, the local education agencies (LEA's) filed their brief late on November 19, 2013. OAH accepted the late filing and the record was closed on November 19, 2013.<sup>3</sup>

### PRELIMINARY MATTERS

At the commencement of the due process hearing, Student indicated that he was no longer challenging the County's social-emotional assessment and requesting an independent educational evaluation (IEE), and moved to dismiss the County's case. The sole issue to be determined in the County's case was whether it appropriately conducted its 2013 social-emotional assessment of Student such that he is not entitled to an IEE at public expense. The County opposed Student's motion on the grounds that, because Guardian could renew his request for an IEE, it had a right to a ruling on the appropriateness of its evaluation and would be prejudiced if denied its right to present a case at this time. The ALJ placed Guardian under oath and he testified that he was no longer requesting an IEE.

The Individuals with Disabilities Education Act (IDEA) provides that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)<sup>4</sup>; Ed. Code, §§56329, subd. (b), 56506, subd. (c).) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) & (2).) When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

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<sup>2</sup> Subsequent to the filing of the action, Student reached a settlement with McKinleyville and it was dismissed from this action and did not appear at hearing.

<sup>3</sup> To maintain a clear record, Student's Closing Brief was marked for identification as Exhibit S-51. The LEA's Closing Brief was marked as Exhibit LEA-55.

<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

Under the doctrine of mootness, a court may refuse to hear a case because it does not present an existing controversy by the time of decision. (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) In order to except a case from the mootness doctrine, the presenting issue must be both “capable of repetition, yet evading review.” (*Weinstein v. Bradford* (1975) 423 U.S. 147, 149 [96 S.Ct. 347].)

Based upon Guardian’s sworn testimony, Student no longer had a disagreement with the County’s assessment and was no longer requesting an IEE. Accordingly, there being no controversy regarding County’s assessment, the County’s action was dismissed at the start of the hearing. Should Student renew his claim for an IEE in the future, the dismissal does not bar the County from filing for a due process hearing to defend its assessment.

### ISSUES<sup>5</sup>

*Issue One:* Did the County and the District fail to adequately assess Student during the 2012-2013 school year in the following areas: (a) mental health and social-emotional functioning; (b) speech and language services including American Sign Language (ASL), expressive-receptive communication, and pragmatics; (c) assistive technology; (d) intellectual functioning; (e) academics; and (f) attention?

*Issue Two:* Did the County procedurally deny Student a free appropriate public education (FAPE) during the 2012-2013 school year by:

- a. failing to hold an individualized education program (IEP) team meeting within 30 days of transfer to a new educational placement;
- b. predetermining his placement and refusing to consider a continuum of placement options;
- c. failing to provide prior written notice or an assessment plan within 15 days of Guardian’s June 4, 2013 request for an assistive technology assessment; and
- d. failing to maintain Student’s educational records?

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<sup>5</sup> The issues have been reordered and reworded for clarity and to reflect that McKinleyville is no longer a party to this matter. To the extent that any issue which previously applied to McKinleyville was amended to apply to the District and County, the LEA’s did not oppose such amendments. No substantive changes were made. (See *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443 (*Fresno*).)

*Issue Three:* Did the County and the District deny Student a FAPE during the 2012-2013 and the 2013-2014 school year and extended school years (ESY) by failing to:

- a. develop and offer measureable goals in all areas of need;
- b. offer sufficient related services as follows:
  - (i) adequate behavioral services, including a behavior intervention plan,
  - (ii) educationally related mental health services,
  - (iii) appropriate speech and language services, including social skill services, and/or
  - (iv) adequate deaf and hard of hearing services;
- c. provide Student with mental health services pursuant to his IEP;
- d. provide Student with deaf and hard of hearing services pursuant to his IEP;
- e. offer any ESY services; and
- f. offer placement in a residential treatment facility?

#### REQUESTED REMEDIES

Student seeks declaratory relief that he was denied a FAPE for the 2012-2013 and 2013-2014 school years and extended school years. Student requests that the County and District be required to: 1) provide him with compensatory education in the form of individual tutoring, behavior services, social skills training, speech and language services, and counseling; 2) provide independent functional behavioral, speech and language, assistive technology, and psycho-educational assessments by providers trained to assess deaf students; 3) fund the presence of the assessors at an IEP team meeting; 4) develop an IEP which offers placement in a residential placement and petition the juvenile court to join themselves in the juvenile court proceedings to explain the IEP and placement options; and 5) fund Student's placement in a residential placement such as the National Deaf Academy in Mount Dora, Florida (National Deaf Academy), as well as transportation, lodging and related travel expenses for grandparents to participate in family therapy.

#### CONTENTIONS OF THE PARTIES

At the heart of this case is whether Student requires a residential treatment center in order to receive meaningful benefit from his special educational program. Due to the various procedural and substantive violations alleged by Student above, he asserts that the County and District have denied him a FAPE. Student contends that he has communication, social, emotional, behavioral and mental health needs that prevent him from obtaining educational

benefit unless he is placed in a locked residential treatment center for the deaf, such as the National Deaf Academy.

The LEA's dispute Student's contentions that they have committed any procedural violations or denied him a FAPE. They contend that Student's maladaptive conduct is willful, manifests primarily at home and in the community, does not adversely impact his educational progress, stems from an inappropriate living environment, and is not disability-related. The LEA's assert McKinleyville High School (McKinleyville High) constitutes the least restrictive environment for Student. Finally, the LEA's contend that OAH lacks the authority to order placement at the National Deaf Academy as it is not certified by the State of California.

## FINDINGS OF FACT

### *Background and Jurisdiction*

1. Student is a 15-year-old male eligible for special education under the category of deaf and hard of hearing. He abruptly lost his hearing at four years of age due to meningitis and was deemed eligible for special education in January 2003. Student was exposed to drugs in utero and his parents were not able to appropriately care for him due to issues of substance abuse, mental health and incarceration. His grandparents raised him from the age of 11 months. They became his legal guardians and cared for him until February 2012, when he was first incarcerated at the Humboldt County Juvenile Hall (Juvenile Hall) for assaulting his grandfather. The grandparents remain his legal guardians, hold his educational rights, and are recognized as his "parents" under the IDEA. At all relevant times, Guardian has resided in McKinleyville within the District's educational boundaries.

### *Student's Perspective on His Needs and Disability*

2. Multiple witnesses, including Guardian, shared Student's perspective on his educational placement needs and disability, and this was an important factor considered by the ALJ. Student freely expresses his disregard for the deaf and rejects his own deafness and need for a visual communication system. He does not want to be educated in a deaf environment. Student was raised in a hearing home, although his Guardians immediately began to learn ASL when he lost his hearing. It was not until he enrolled at the California School for the Deaf in Fremont in 2006, that he began to learn ASL, which is his primary mode of communication.<sup>6</sup> Student likes to write and is able to communicate in writing at an approximate third grade level. His speech is virtually unintelligible. Student recently expressed a desire to practice using his voice but then changed his mind out of fear that he would be ridiculed.

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<sup>6</sup> In kindergarten, Student was first introduced to Signing Exact English (SEE), which follows typical English grammar as opposed to ASL which does not follow English sentence structure including use of pronouns.

### *Dependent Child Status and Juvenile Court Placements*

3. The Juvenile Court of Humboldt County (Juvenile Court) initially placed Student at Juvenile Hall on February 27, 2012, where he remained until May 31, 2012. The Juvenile Court adjudicated him a dependent child in July of 2012, pursuant to the Welfare and Institutions Code section 300. As of the time of hearing, Student remained a dependent child of the Juvenile Court, entrusted to the care and custody of the Humboldt County Department of Child Welfare Services (Child Welfare), for suitable placement.

4. On May 31, 2012, the Juvenile Court placed Student at Bridgman Group Home (Bridgman), within the San Diego Unified School District, where he was subsequently enrolled for the 2012-2013 school year. However, in September 2012, Bridgman discharged Student due to his destructive and runaway behaviors, and Student returned to Humboldt County.

5. On September 24, 2012, Child Welfare placed Student at the Children's Center, a shelter in Eureka, within the District's boundaries. Student was placed at the shelter for a period of 35 days, but physically stayed in placement for only five days due to his continual elopement. Student returned to Juvenile Hall on November 5, 2012, upon his arrest for being drunk in public. Student remained a dependent, under the care of Child Welfare Services, but was detained at a facility run by the Humboldt County Probation Department (Probation) until July 3, 2013. Upon his release from Juvenile Hall in July 2013, Student resided at various placements all within the District's boundaries, including with his Guardian, Youth Services Bureau, and Jaz Kids, Inc.

6. Student's last official placement was at Jaz Kids, a high security group home located in Humboldt County, although he had run away from this placement and was not physically residing there at the time of hearing. As of the last day of hearing, Student had been admitted to the adolescent psychiatric unit at St. Mary's Medical Center in San Francisco and had remained there for one week.

### *Respective Responsibility of the LEA's*

7. Under California law, the county office of education is responsible for the provision of a FAPE to qualified students detained in the juvenile hall within that county. Therefore, the County was the responsible LEA during the time Student was at Juvenile Hall. As such, it was responsible for conducting necessary assessments and making IEP offers, including the offer of a residential placement if needed by Student to make meaningful educational progress. The County operates the Von Humboldt Juvenile Court School (Von Humboldt) located within Juvenile Hall.

8. In general, for special education students who are not in Juvenile Hall, residency determines which LEA is responsible for providing them with a FAPE. Under the compulsory education law, a student between the ages of six and 18 must attend the school district where his parent or legal guardian resides. Residency in a particular LEA is also

established if a student is placed within the LEA's boundaries in a licensed children's institution, a foster home, or a relative home pursuant to a commitment or placement under the Welfare and Institutions Code. Here, the District was Student's district of residency upon his return to Humboldt County in September of 2012, because Child Welfare placed Student at a licensed facility within its boundaries. From July 3, 2013, upon his release from Juvenile Hall, through the time of hearing, the District was again the responsible LEA, aside from periods where Student was committed to a psychiatric hospital outside its boundaries,

9. The District claimed it was never informed of Student's return from San Diego Unified School District in September 2012. However, Humboldt County Social Worker Laura Maldonado credibly established that she spoke with Roger Golec, the foster care liaison for the LEA's, as well as with Amy Gordon, a District school psychologist, about Student's return in early October 2012.<sup>7</sup> Ms. Maldonado was persuasive in her detailed recollection that she and Ms. Gordon discussed "school of origin" issues in relation to Student's then current placement in Eureka while his Guardian resided in McKinleyville.<sup>8</sup> Thus, the District is charged with having notice of Student's return on or about the first week of October 2012.

10. In summary, for the 2012-2013 school year, the District was the responsible LEA from the first week of October 2012, until Student's re-incarceration on November 5, 2012. For the remainder of the 2012-2013 school year, beginning November 5, 2012, the County was responsible for offering and providing Student a FAPE due to his detention status. For the 2013-2014 school year, the District was responsible for offering and providing Student a FAPE.

#### *Need for Assessments, the 2012-2013 School Year*

11. An LEA must assess a student in all areas related to his suspected disability. A special education student must be reassessed at least every three years and not more often than annually, unless the parent and LEA agree to a different assessment schedule. An LEA also has an obligation to reassess a student if it has received new information about a student's functioning that impacts his education or otherwise has a reason to suspect that his educational or related service needs may have changed such that a reassessment is warranted.

12. Student contends that both the District and the County had an obligation to assess him in multiple areas related to his suspected disabilities during the 2012-2013 school

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<sup>7</sup> Ms. Maldonado has been a child welfare worker for six years. She has a master's degree in social work with a minor in deaf education. She taught as a special education teacher for 12 years and was certified by the National Registry of Interpreters for the Deaf as an interpreter for eight years.

<sup>8</sup> "School of origin" is defined as the school that the foster child attended when permanently housed or the school in which the child was last enrolled. (Ed. Code, § 48853.5, subd. (e).)

year. Although the District was Student's responsible LEA from the first week of October 2012 until November 5, 2012, it would not have had sufficient time to appropriately assess Student during this brief period, nor did Student establish that the District had any responsibility to assess him during the 2012-2013 school year. As discussed below, however, the District was required to immediately offer Student an interim IEP comparable to his prior IEP for those first 30 days. Student's assessment claim will be analyzed as to the County only, during Student's detention at Juvenile Hall from November 5, 2013, until July 3, 2013.

13. Student's last educational assessment was his April 2012 triennial psycho-educational evaluation. At that time, Student was attending Von Humboldt. The assessment consisted of a records review, review of progress, and observation, but no formal testing was administered.<sup>9</sup> At Von Humboldt, Student displayed low motivation, needed constant reminders to focus and complete work, and his art and journal entries highlighted his interest in drug use and gang affiliation. Upon his release from Juvenile Hall, Student exhibited mental health issues and acting out behaviors, new information which the County had a duty and the ability to obtain, and which supported a need for reassessment. From May 31 through September 24, 2012, Student resided at Bridgman, a group home in San Diego that provides treatment for deaf students with social and emotional needs. At Bridgman, Student displayed physically assaultive, destructive (including self-harm), atypical (urinating all over), chemically dependent and defiant behaviors, including chronic runaway behaviors. During this time, he attended Madison High School (Madison High) for only five of the 10 days he was enrolled. Bridgman terminated Student's placement as it was not able to keep him or others safe, and recommended a higher level of supervision at a locked residential treatment facility.

14. During his time at Bridgman, Student's therapist Susan Salinas diagnosed him with oppositional defiant disorder, post-trauma stress syndrome, communication disorder, and poly-substance dependence, and confirmed his prior diagnosis of attention-deficit hyperactivity disorder.<sup>10</sup> Ms. Salinas further identified several potential diagnoses warranting further evaluation including dysthymic disorder, mood disorder, impulse control disorder, conduct disorder, cognitive disorder and learning disability.<sup>11</sup> Bridgman psychiatrist Dr. Mark Knight proposed a trial of several psychotropic medications, but

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<sup>9</sup> Student limited his assessment claim to the 2012-2013 school year which began in September 2012. Whether the County failed to conduct comprehensive assessments as part of Student's April 2012 triennial assessment was not identified as an issue for hearing.

<sup>10</sup> Ms. Salinas did not testify. Her progress report constitutes hearsay and is not sufficient in itself to support a factual finding. (See Cal. Code of Regs., tit. 5, § 3082, subd. (b).) However, her report supported both prior and subsequent diagnostic impressions of Student to which several experts testified.

<sup>11</sup> Witnesses defined dysthymia as a chronic, low grade depression.

Student left prior to beginning any medication regimen. Bridgman staff also recommended that Student undergo a neuropsychological evaluation to rule out any organic impairment.

15. The Juvenile Court ordered a comprehensive evaluation of Student's needs, and Child Welfare arranged for Dr. Carren Stika, a private clinical psychologist, to conduct a neuropsychological evaluation. Due to Student's hospitalization for being a danger to himself and others and his subsequent discharge from Bridgman, she completed her evaluation of Student at Juvenile Hall in December 2012. The County learned of her findings and recommendations at a multidisciplinary meeting in February 2013. Dr. Stika found significant deficits in Student's mental health, social-emotional functioning and communication skills, which impacted his access to his education.

16. Despite Bridgman's conclusion that Student required a locked facility for his own safety, Child Welfare placed Student at a shelter in Eureka. His out-of-control behaviors and school refusal continued upon his return to Humboldt. He refused to remain in placement, eloped to a homeless encampment and continued using drugs and alcohol, at times in exchange for sexual favors. Student was returned to Juvenile Hall upon his arrest for being drunk in public on November 5, 2012.

*Knowledge of Student's Mental Health and Social-Emotional Functioning*

17. Although the evidence did not show when the County first learned of Student's decline in functioning after his release from Juvenile Hall on May 31, 2012, it is imputed with this knowledge as of November 5, 2012. The County had the duty to obtain current information on Student's needs and functioning, the ability to access Juvenile Court records regarding Student, and had direct access to Child Welfare, as the placing agency.<sup>12</sup> Further, had it convened an interim IEP team meeting to discuss what services to offer Student during his first 30 days at the Hall, or a subsequent 30-day IEP team meeting as required and discussed below, it could have invited all relevant professionals and obtained a full update.

18. Since his April 2012 triennial review, Student's circumstances had manifestly and dramatically changed, his behaviors escalated, and new information emerged about his mental health diagnoses, his social-emotional functioning, and his disregard for his own safety. In its defense, the County argued that Student demonstrated compliant behaviors at Juvenile Hall. However, Student's compliance while within the locked confines of Juvenile Hall did not absolve the County of its duty to assess. Good behavior while in lock-up hardly negated Student's past five months of seriously disturbed behaviors. LEA witnesses also tried to dismiss Student's behaviors at Bridgman as a demonstration of his intent to act out in order to get out. This testimony minimized the atypicality of Student's conduct and was not persuasive.

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<sup>12</sup> An LEA is authorized to inspect a student's juvenile court file. (Welf. & Inst. Code, § 827, subd. (a)(1)(G).)

19. Since the County was on notice of Student's recent destructive behaviors and significant changes in his mental health functioning which impacted his education, it was under an obligation to reassess him in the area of mental health and social-emotional functioning. Its failure to timely assess Student resulted in a procedural violation. The County's failure to timely assess Student in this critical area deprived Guardian of the ability to meaningfully participate in the decision making process with full assessment data, and delayed the provision of necessary mental health services. For these reasons, the County's failure to timely assess Student in the areas of social-emotional functioning and mental health resulted in a denial of a FAPE.

*The County's Social-Emotional and Mental Health Assessment*

20. Later, the County partially cured the above violation because, after it received Dr. Stika's report in February 2013, it arranged for an assessment by Dr. Peter Stoll, a school psychologist. The purpose of Dr. Stoll's assessment was to determine whether Student qualified as emotionally disturbed.<sup>13</sup> Dr. Stoll conducted his assessment in March and April 2013, and reported his results at IEP team meetings in April and May 2013, five to six months after Student's enrollment at Von Humboldt.

21. Dr. Stoll reviewed Student's available education records, administered various assessment tools, conducted interviews and observations, and determined that Student did not qualify for special education under the category of emotional disturbance. Dr. Stoll made recommendations for services, supports and placement that are analyzed later in this Decision. As noted in the Preliminary Matters section, Student and Parent withdrew their disagreement and request for an IEE based on the County's social-emotional assessment and its appropriateness is therefore not at issue. Based on the foregoing, the County denied Student a FAPE by failing to timely conduct the assessment from November 2012 through February 2013.

*Communication, Including Pragmatics and Assistive Technology Needs*

22. Bridgman therapist Ms. Salinas determined that Student showed a serious language dysfluency (meaning that he is not fluent in ASL) and diagnosed him with a communication disorder. Even so, Student did not prove by a preponderance of the evidence

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<sup>13</sup> In his 12 years as a school psychologist, Dr. Stoll has evaluated approximately 1,000 students, although only two of these involved deaf children. Since 2012, Dr. Stoll has served as the program director for educationally related mental health services with the County, and previously worked as a school psychologist and behavior specialist since 2005. He teaches graduate psychology courses in the area of assessments at Humboldt State University. He earned his undergraduate degree in social work in 1989, his master's degree in education, school and counseling psychology from the University of Massachusetts in 1997, as well as his doctorate in school psychology in 2003. He holds a pupil personnel services credential since 2005.

that the County had a sufficient basis of knowledge beginning in November 2012, to suspect that he may require reassessment in the areas of speech and language including ASL, receptive and expressive communication and pragmatics, or assistive technology.<sup>14</sup> Further, the County had continued Student's self-advocacy goal from April 2012, which targeted his unique needs in the areas of communication and social skills.

23. However, by April 2013, having received Dr. Stika's and Dr. Stoll's reports, the County was on notice that Student had suspected needs in the areas of communication, pragmatics and assistive technology based on the findings below. Given the County's rejection of Dr. Stika's findings, a new assessment of Student in the area of communication was warranted. Had the County timely conducted its social-emotional assessment, it would have discovered this additional area of needed assessment no later than February 2013.

24. In reviewing Student's past assessments, Dr. Stika noted in her report that numerous professionals highlighted his poorly developed communication skills and his need to improve his signing skills and increase his vocabulary if academic gains were to be made and social isolation was to decrease.<sup>15</sup> Dr. Stika's evaluation of Student's communication needs and her testimony were persuasive because, in addition to her qualifications, which establish that she has the knowledge and experience to appropriately assess Student, she herself has a hearing loss and is fluent in ASL. She established that Student lacked clear articulation in his signing which made it difficult to understand him.

25. As part of her assessment, Dr. Stika administered the Expressive and Receptive One Word Picture Vocabulary Tests, Fourth Edition, to evaluate Student's vocabulary skills. He earned a receptive standard score of 74, with an age equivalent of eight

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<sup>14</sup> Pragmatics is the social and relational aspect of language which includes interpersonal conversation and the ability to respond in a socially appropriate manner.

<sup>15</sup> Dr. Stika has been active in the field of special education and clinical psychology for more than 30 years and has evaluated several 1,000's of children with hearing loss. Since 1993, she has maintained a private practice focusing on serving deaf and hard of hearing individuals. She conducts evaluations of hearing-impaired children for school districts throughout the state and works part-time as a consultant at the House Research Institute's Children's Auditory Research and Evaluation Center in Los Angeles. Dr. Stika was an assistant professor at Gallaudet University, and currently teaches at San Diego State University, School of Speech, Language and Hearing Sciences. She is a contributor and trainer with the American Guidance Services, Inc. where she advises publishers on assessment instruments for the deaf. She has presented nationally and internationally on the topic of deafness and published numerous articles. She earned her undergraduate degree in psychology, speech and hearing sciences in 1977, a master's degree in deaf education from the University of Arizona in 1980, and her doctorate in clinical psychology from Syracuse University in 1989. She completed her internship and fellowship at Yale University Child Study Center. Prior to pursuing her doctorate, she taught deaf students in the public school system for four years and earned a superior teacher award.

years eight months, and an expressive standard score of 85, with an age equivalent of eleven years. Although his scores need to be interpreted with caution as the test is normed for hearing children, and the administration procedures could not be strictly followed, Dr. Stika confidently reported and established that Student's vocabulary skills were far below those of his hearing peers and that his significant gaps in receptive vocabulary may go unnoticed because he demonstrated better expressive skills. This highlighted the County's need to ensure that Student was assessed in the area of communication by a qualified professional skilled in working with the deaf, and preferably fluent in ASL.

26. Dr. Stoll reviewed Dr. Stika's assessment. As part of his assessment he administered the Conner's Rating Scale Revised to Cheryl Baer, Von Humboldt's general education teacher, Crystal Daman the instructional aide, and Student. Dr. Stoll testified that rating scales are the gold standard in social-emotional assessment practices. The Conner's assesses a broad range of problem behaviors. The results identified Student as having significant difficulties making friends and being socially detached. Ms. Gordon, a District school psychologist who has conducted approximately 500 student evaluations, established that based upon these rating scales, social skills was an area of concern to be further investigated through assessment, or addressed through an IEP team meeting for the development of goals or services.<sup>16</sup>

27. The LEA's own expert, Dr. Stoll, found that Student had a communication disorder that impeded his academic and social functioning. At hearing, Dr. Stoll identified social skills as an area of need for Student. His assertion that his recommendations for social skills instruction, including communication skills, were not necessary for Student to receive educational benefit, but rather were intended as additional benefits, was not persuasive or supported by any testing data. Dr. Stoll acknowledged that pragmatic communication was outside his area of expertise. He did not conduct further assessments in this area as he was not qualified to do so, nor did he recommend further assessment. Dr. Stoll determined that given Student's communication difficulties, his resistance to using his voice, his resistance to being deaf and his need to communicate through ASL, Student might benefit from an alternative augmentative communication evaluation and that an assistive technology device might help Student increase his social skills. His opinion that such an assessment was not required for Student to access his education, was equally unsupported by any evidence.

28. Dr. Stoll's testimony established that he was not qualified to and did not conduct a comprehensive assessment of Student's communication needs. His assessment focused on Student's social-emotional needs which necessarily implicated Student's communication needs for further assessment. While Dr. Stika's assessment did evaluate

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<sup>16</sup> Ms. Gordon is a licensed educational psychologist and has been employed with the District as a school psychologist since 2005, and served in the same capacity with the County from 2004-2005. She earned her undergraduate degree in psychology in 1988, and her master's degree in school psychology from Humboldt State University in 2003. She holds a pupil personnel services credential.

Student's communication needs, the County chose to reject her findings. In addition, her report did not provide Student's levels of performance in pragmatic communication, nor did she evaluate his assistive technology needs.

29. Additionally, Student's present levels of performance, discussed at the March 2013 annual IEP team meeting, noted that he appeared isolated at times, which was attributed to communication issues. In determining that Student met his IEP goal for self-advocacy, the team noted that he was in an environment (incarcerated) where he was able to advocate for his needs. The progress report for this goal did not address the reason for the goal as identified in his original baseline – Student's need for more socialization to develop skills to effectively communicate with the hearing world; something Von Humboldt did not facilitate.<sup>17</sup>

30. Student showed that by April 2013, the County had sufficient notice of his communication struggles to warrant a comprehensive communication assessment as to his needs related to ASL fluency, receptive and expressive vocabulary, pragmatic language and assistive technology. The County's failure to conduct this assessment impeded Guardian's ability to meaningfully participate in the decision making process without full assessment data and also impeded Student's right to a FAPE. Based upon Dr. Stika's evaluation, had the County conducted this assessment, it would have discovered areas of need for which goals and services were required. Therefore, the County's failure to assess in the areas of communication, pragmatics and assistive technology denied Student a FAPE.

#### *Attention*

31. Student had exhibited long-standing attention difficulties. In her interview with Dr. Stoll and in describing Student's present levels of academic performance for his March 2013 IEP, Ms. Baer noted that Student needed constant reminders throughout his stay at Von Humboldt to focus on his work, and that he frequently did not watch the interpreters. This data was consistent with past reports. In 2009, Student was diagnosed with attention deficit disorder, inattentive type, a diagnosis confirmed by both Ms. Salinas and Dr. Stika. Lisa Miller, a school psychologist for McKinleyville, reported in her 2012 triennial assessment report that Student's attention capabilities were compromised and inconsistent, which impeded his academic progress.<sup>18</sup>

32. Based upon his assessment, Dr. Stoll admitted it would be important to look further as to whether Student had unique educational needs in the area of attention. On the Conner's, both Ms. Baer and Ms. Daman rated Student as displaying clinically significant

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<sup>17</sup> Ms. Fairbanks established that socialization was not encouraged among the detainees and Student did not have access to an ASL interpreter outside of class instruction.

<sup>18</sup> Ms. Miller did not testify. Although her evaluation is a hearsay document, it supports other evidence of Student's educational functioning. (See Cal. Code of Regs., tit. 5, § 3082, subd. (b).)

problems with attention, concentration, organizational skills and completing tasks. Ms. Gordon also agreed that given this data, it would have been appropriate to further assess Student in the area of attention.

33. Student thus showed that the County did not fully assess him in the area of attention, and was required to do so. Its failure to assess Student in this area impeded Guardian's participatory rights, and resulted in a denial of a FAPE.

#### *Intellectual Functioning and Academics*

34. Cognitive testing from 2006 and 2009 revealed that Student had average intelligence. Dr. Stika's 2012 testing also indicated that Student's nonverbal intellectual ability remained solidly in the average range. Student did not prove that the County had reason to believe Student's intellectual functioning may have changed such that reassessment in this area was warranted.

35. Regarding academics, in November of 2012, the County administered the Test for Adult Basic Education (Basic Test) in the areas of English (including vocabulary and reading comprehension) and mathematics to determine Student's functioning level and needs. The Basic Test is approved by the California Department of Education as an assessment to measure academic performance at alternative education sites. The County provided Student with written test instructions and verbally reviewed these with the assistance of an interpreter. Additionally, Von Humboldt assessed Student's written language skills upon entrance by having him write a paragraph about himself.

36. In February 2012, Student scored a grade equivalent of 4.1 in English and 3.75 in math on the Basic Test. By November 2012, he tested at a grade equivalent of 5.9 in English and 4.8 in math. Student argued that these results were not realistic in that he demonstrated a gain in math of one grade year and in English of 1.8 years, over a period of only five months of instruction. Ms. Fairbanks persuasively explained that Student was not motivated when he first entered Juvenile Hall resulting in deflated scores, but he applied himself thereafter, and through summer school, and demonstrated academic progress.<sup>19</sup> Dr. Stika's standardized academic testing showed Student's functioning at the beginning to mid-third grade level. Although this was at odds with the curriculum scores from the Basic Test, this discrepancy did not indicate that further academic testing was warranted. Moreover, Dr. Stika's testimony established that academic scores cannot reliably be compared across different test instruments. By the time of his March 2013 annual IEP, Student had met his

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<sup>19</sup> Over her 23 years of experience with the County, Ms. Fairbanks has worked with 1,000's of students with behavioral issues. She began her career with the County as an instructional aide in 1990, then worked as counselor at Juvenile Hall, then as a general education teacher from 1993-2003, until she became the site supervisor and principal of Von Humboldt. She earned her undergraduate degree in psychology in 1990, and obtained her teaching credential in 1993, and administrative credential in 2004. She was recognized as alternative education administrator of the year in 2007-2008, and 2012-2013.

math and writing goals, although he was still struggling with his reading goal. Student did not show that the County was required to conduct further academic assessments.

37. In summary, the County appropriately assessed Student in the area of academics, and did not have reason to suspect that he required reassessment in the area of intellectual functioning. Student's delayed academic performance at grade levels well below his chronological age was not a suspected area of need related to a specific learning disability as Dr. Stika established his academic weaknesses were due to his deafness, significant language delays secondary to his hearing loss, and serious social-emotional problems. Dr. Stoll agreed that Student did not have a specific learning disability. However, due to Student's marked change in functioning, the County was required to reassess him in the area of mental health and social-emotional functioning in November 2012, and in the areas of communication and attention by April 2013. The County's failure to timely assess Student in these areas denied Student a FAPE.

#### *Procedural Violations During the 2012-2013 School Year*

38. There are two parts to the legal analysis regarding the validity of an IEP offer of FAPE: whether the LEA complied with the procedures set forth in the IDEA, as well as whether the IEP, developed in accordance with the required procedures, was reasonably calculated to enable the student to receive educational benefit. Not every procedural violation results in a denial of a FAPE. For a procedural inadequacy to constitute a denial of FAPE, it must have (a) impeded the student's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or (c) caused a deprivation of educational benefits.

#### *Not Holding an IEP Team Meeting Within 30 Days of Transfer<sup>20</sup>*

39. In general, when a student transfers between LEA's during the same school year, the receiving LEA is required to offer services comparable to those offered by the prior LEA, until it either adopts the student's prior IEP as its own or develops a new IEP, which must occur within 30 days of enrollment. The LEA is to consult with the student's parent in determining a comparable 30-day interim placement. The parent and LEA may agree not to convene an IEP team meeting and instead may develop a written document to amend or modify the student's current IEP to address the provision of comparable services.

40. During the 2012-2013 school year, Student transferred from Madison High under the jurisdiction of the San Diego Unified School District to the Children's Center within the educational boundaries of the District in September 2012, to Von Humboldt under the jurisdiction of the County on November 5, 2012. Upon his incarceration at Juvenile Hall

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<sup>20</sup> Student did not identify as an issue for hearing the District's failure to hold an IEP team meeting within 30 days of transfer. Therefore, the District's failure in this regard is analyzed below as a substantive failure to provide Student a FAPE during the 2012-2013 school year.

in November 2012, the County became responsible for his education while he remained in custody. San Diego Unified School District had developed an interim 30-day placement IEP dated September 18, 2012. However, that temporary IEP was not effective as the last operative IEP because Student left San Diego Unified School District prior to the expiration of the 30-day interim IEP. The District did not offer Student an interim IEP from September 2012 until his re-incarceration. Therefore, Student's operative IEP on re-entering the County's jurisdiction was his April 3, 2012 triennial IEP developed by the County at Von Humboldt.

41. On November 13, 2012, Guardian agreed to a telephone consultation with Laura Madjedi, the resource specialist teacher for Von Humboldt, to effectuate an administrative placement through an IEP amendment. Guardian and Ms. Madjedi agreed to continue Student's prior annual goals from his April 2012 IEP, and that he would again receive 120 minutes of specialized academic instruction per month, and interpreter services during the school day. This amendment specified that should Student stay in Juvenile Hall in excess of 30 days, the IEP team would meet to further review goals and placement.

42. The County never convened a 30-day IEP team meeting. Ms. Fairbanks testified that Ms. Madjedi and Guardian again spoke by telephone at the end of November 2012, that Ms. Madjedi reported that Student was doing fine, and that Guardian agreed that an IEP team meeting was not needed at that time. The County argues that if Guardian wanted an IEP team meeting, it would have convened one. However, the County cannot discharge its obligation to convene an IEP team meeting by placing the responsibility on the Guardian to request such a meeting.

43. The County also contends that any violation did not result in a substantive denial of a FAPE as it was the prior LEA and was informed of Student's needs based upon his prior incarceration and attendance at Von Humboldt from February through May 2012. The County argues that it convened Student's triennial IEP in April 2012, and reviewed his progress, determined his needs, developed new annual goals, and offered and provided placement and services. It further contends that pursuant to his April 2012 IEP, Student derived educational benefit as demonstrated by his progress towards his goals through May 2012. Therefore, the County maintains it was justified in continuing the same goals, services and placement upon his return five months later.

44. This is a unique situation in that the County was the receiving LEA as well as the LEA that developed Student's operative IEP. However, this fact does not excuse its duty to hold a 30-day IEP team meeting on Student's transfer. The County itself specified in writing on the November 13, 2012 amendment IEP, that if Student remained for more than one month it would convene an IEP team meeting. The County failed to hold this meeting so the IEP team did not officially adopt Student's prior IEP, nor determine if this remained appropriate. Since the County did not convene an IEP team meeting within 30 days of Student's transfer, Guardian was denied his participatory rights. Further, failure to convene this meeting resulted in a delay in reviewing and revising Student's IEP. In light of his

significantly changed circumstances, this delay impeded his right to a FAPE. Based on the foregoing, the County committed a procedural violation that denied Student a FAPE.

*Predetermination and Failure to Consider a Continuum of Placements*

45. Student alleges that the County predetermined that he would again be placed in its only classroom at Von Humboldt and receive the same level of instruction and supports as offered in April 2012, at his prior IEP team meeting, without considering the appropriateness of a residential placement. Predetermination occurs when the LEA has decided upon a student's educational placement outside of the IEP decision making process and presents its offer without considering Student input. Under the IDEA, parents of a child with a disability must have an opportunity to participate in meetings with respect to the educational placement and provision of a FAPE to their child. An LEA must consider the views of parents expressed in an IEP team meeting, including information from private assessors.

46. The law also requires that each special education local plan area (SELPA) have available a continuum of program options ranging from resource support to special day classes to a day or residential treatment program through which to effectively deliver a FAPE to each individual student with a disability. The law does not require that each IEP team consider all possible options, but rather that the team consider all appropriate options with an open mind. The fact that an eligible student is housed at a juvenile hall does not negate the need to consider all appropriate service and placement options.

47. The Juvenile Hall typically houses between 15-25 students, 30 percent of whom require special education. The population is transient with students generally staying from three days to two weeks. Von Humboldt is the only school at Juvenile Hall and has one classroom taught by a general education teacher, supported by a part time resource specialist, and staffed with a full-time instructional aide. County witnesses testified that they have been able to meet the special education needs of the detainees within the Von Humboldt general education classroom. Ms. Fairbank's testimony that she had never known a student at Juvenile Hall to require a residential placement to meet his educational needs was not persuasive and evinced her confusion as to the County's responsibility as an LEA to offer a residential placement when necessary to ensure the provision of a FAPE, with the duty of Probation to place wards residentially.

48. In February 2013, the County attended a multidisciplinary meeting regarding Student with representatives of Probation, Child Welfare, the District, their various legal representatives, and Mindy Fattig, the director of the Humboldt-Del Norte SELPA. At this meeting, the County learned the results of Dr. Stika's evaluation of Student and that she recommended Student be placed in a locked residential treatment center for the deaf in Florida. The LEA's responded that they were not responsible for offering a residential placement for Student as this was not the least restrictive environment in which he could receive educational benefit. Ms. Fattig represented that the County would assess Student for an emotional disturbance, and then convene an IEP team meeting to review the results and

determine the least restrictive environment.<sup>21</sup> Shortly after this meeting, county social worker, Ms. Maldonado, provided the County with a copy of Dr. Stika's evaluation. On February 15, 2013, Guardian signed an assessment plan authorizing the County to conduct a social-emotional assessment of Student.

49. The County convened an annual IEP team meeting for Student on March 28, 2013. Guardian attended and participated in this IEP team meeting as did all required team members. The District also attended. The team discussed Student's then-present levels of performance and progress on his annual goals and revised his three academic goals. The County continued to offer placement in the general education class at Von Humboldt with 30 minutes per week of specialized instruction, and 1400 minutes per week of interpreter services.

50. In support of his contention that the County predetermined that he did not require a locked residential treatment facility for the deaf, Student points to sentiments expressed at the February 2013 multidisciplinary meeting, as well as Ms. Fattig's March 18, 2013 letter to the Juvenile Court.<sup>22</sup> In this letter, Ms. Fattig stated her opinion that a locked residential facility was not the least restrictive environment for Student, and that the District would need to convene an IEP team meeting upon Student's release from the Juvenile Hall to determine his placement needs.

51. At the time of the March 2013 annual IEP team meeting, Dr. Stoll had not completed his assessment. The team did not discuss Dr. Stika's report or recommendation for residential treatment. According to the IEP documentation, the team considered the programming options of continued general education, resource specialist support and County deaf and hard of hearing services at Von Humboldt. The County's contention that it considered all appropriate placement options is not persuasive and does not relieve it of its duty to consider Dr. Stika's recommendation that Student required a locked residential treatment center for the deaf. The law requires the IEP team to consider private evaluations presented by the Student's family. Moreover, the County's position that it was not required to consider residential placement because Student was benefitting from his instruction at Von Humboldt, was incorrect because the LEA cannot legally make that determination unilaterally, outside the IEP team meeting process.

52. Although the County convened three additional IEP team meetings with the District in attendance, it did not consider Student's needs, and Guardian's request for a

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<sup>21</sup> Ms. Fattig was not available to testify. Reports of her statements are hearsay and cannot by themselves support a factual finding.

<sup>22</sup> This letter constitutes hearsay, however, it supports direct evidence of the LEA's position that Student did not require a residential placement.

residential placement.<sup>23</sup> The IEP team met in April 2013, to review the results of Dr. Stoll's evaluation. The IEP team notes clearly stated: "[Ms. Fattig] clarified that it is not the purpose of this meeting to discuss placement decisions. There is a current IEP in place with an offer of FAPE which Grandfather has agreed to." The team did not discuss residential placement. The team met again in May 2013, to review Dr. Stoll's revised report. Although he recommended placement for Student in a behaviorally-oriented classroom with hearing peers, the team did not discuss this placement option, which Dr. Stoll described as a special day class. Guardian asked about placement options for the upcoming school year, and the District informed him of three local community-based schools. In June 2013, the County convened one final IEP team meeting but again, did not discuss a special day class or residential placement.

53. The County focused exclusively on transitioning Student from Juvenile Hall to a traditional high school campus. It continued to approach Student's educational placement from the standpoint that since he was receiving academic benefit at Von Humboldt, within the confines of Juvenile Hall, then he did not require anything more than a community-based high school placement. At no time did the County convene an IEP team meeting to consider residential, day treatment, or special day class options. Such a discussion was appropriate given Student's incarceration, his educational placement history, his mental health needs, behavioral issues, and the assessment data and recommendations from both experts. The County entered the March 2013 IEP team meeting with the fixed mindset that Student did not require a residential placement in order to receive educational benefit. It was committed to a single course of action which constituted predetermination and a failure to consider a full continuum of appropriate placement options given the unique facts in this case. The failure to consider residential placement resulted in a predetermination that Student did not require that level of placement which significantly impeded the Guardian's participation in the decision making process and impeded Student's access to a FAPE. Therefore, this procedural violation denied Student a FAPE.

*Failure to Timely Respond to Guardian's Request for Assessment*

54. An LEA must deliver an assessment plan to a parent within 15 days of the parent's assessment request or explain through a prior written notice its refusal to do so.<sup>24</sup>

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<sup>23</sup> Guardian's testimony that he asked the County IEP team at one of the meetings to provide Student a residential placement was persuasive, consistent with Dr. Stika's recommendation, and in accord with the County's position that it would convene an IEP team meeting to discuss placement once it assessed Student.

<sup>24</sup> An LEA must provide prior written notice explaining a refusal to evaluate a student. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) Student did not litigate his prior written notice claim nor argue it in his closing brief. The evidence showed that the County did not deny Student's request for an assessment but rather did not follow timelines. Under these facts Student did not establish a need to provide prior written notice.

An IEP team meeting to review the assessment results must occur within 60 days of the receipt of parental consent for the assessment, not counting days between the student's school sessions and vacations in excess of five school days.

55. At the June 4, 2013 IEP team meeting, Guardian requested an assistive technology assessment of Student due to his communication and social needs. The County delegated this assessment to the District, and claims that the District, based upon its school calendar, timely presented Guardian with an assessment plan on August 12, 2013. However, Von Humboldt is a year-round school and therefore, was in session throughout June. The County was required to ensure that Guardian received an assessment plan within 15 days of his request, which ran on June 19, 2013. The County's failure to do so resulted in a procedural violation. However, even if Guardian signed and returned the assessment plan the day it was due, the County would have had until approximately August 19, 2013, to complete the assessment and convene an IEP team meeting. Student was released from Juvenile Hall on July 3, 2013, and the County was no longer the responsible LEA. The District became Student's LEA and was on summer break until August 26, 2013. Under these circumstances and time frames, Student did not show that this violation resulted in substantive harm. There was no denial of FAPE on this basis.

#### *Maintenance of Student's Educational Records*

56. Student alleges the County failed to safely maintain his educational records. The County contends that it maintained the educational records pertaining to Student that it did have, that it was prevented from obtaining Student's complete original records by the actions of Bridgman, Dr. Stika and Ms. Maldonado, and that once obtained, it appropriately maintained his records. In his closing brief, Student argues that this failure to maintain records prevented the IEP team from having full information on Student's educational history and needs. However, Student did not identify as an issue for hearing the failure of the County convened IEP teams to consider all relevant information, and therefore this issue is not determined herein. Rather, at issue is whether the County's failure to maintain Student's education records denied him his access rights by preventing him from timely receiving copies of his records upon his request in approximately July 2013.

57. Under the IDEA and related state law, the parent and student have the right of access to the student's educational records, including the right to inspect and review the records. Student argues that the County failed to comply with the legal requirement that it designate a foster care liaison for the purposes of ensuring the timely and effective transfer of educational records between LEA's and swift enrollment of a foster child in school.<sup>25</sup>

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<sup>25</sup> See Education Code section 48853.5. The foster care liaison in the receiving LEA is responsible for requesting the foster youth's educational records within two days of enrollment, while the liaison in the former LEA is responsible for ensuring that the records are transferred within two days of the request. Roger Golec was identified at hearing as a foster care liaison for the LEA's.

However, Student did not identify this as an issue in his complaint. Even if this were an issue, absent an allegation that the violation resulted in a denial of a FAPE, such a claim is not cognizable under the IDEA, is beyond the jurisdiction of OAH, and will not be determined in this Decision.

58. When a special education student is detained in Juvenile Hall, the County requests a copy of the student's most recent IEP, assessments, transcript, and immunization records. Due to the transient nature of the Von Humboldt student population, the County does not initially request the complete educational file, given the reality that students are often released prior to the receipt of their education records. In conformity with its protocol, the County originally requested and received Student's current documents only, at the time of his initial incarceration in February 2012. The County did not request nor receive Student's entire file at that time.

59. Upon Student's re-incarceration in November 2012, the County had the records it previously received from his elementary school district as well as the documents it generated in April 2012. According to Ms. Fairbanks, it was not until February 2013, that the County requested Student's entire educational file from the San Diego Unified School District. After multiple requests by the County, San Diego Unified School District responded on March 21, 2013, indicating that the only records it had were the interim placement agreement and discharge form.

60. The County traced Student's educational records to San Diego Unified School District through the Registrar of Community Schools. McKinleyville sent Student's education records to San Diego pursuant to a records request sometime after May 2012. It was unclear whether these were sent to San Diego Unified School District or to Bridgman. However, Student's original education records ended up at Bridgman and staff delivered them by early September 2012, to Dr. Stika as she prepared for her evaluation of Student. On December 20, 2012, upon completion of her evaluation, Dr. Stika gave Student's original education records to Ms. Maldonado, the county social worker. Ms. Maldonado was not aware they were his original education records and placed the documents in a corner of her work cubicle. Her testimony was persuasive that she never imagined she had taken possession of Student's original education records based upon her prior experience as a special education teacher that such records stay with the school district, and that copies are normally sent instead.

61. At the April 2013 IEP team meeting, it became clear to the County that Ms. Maldonado and other team members had reviewed information regarding Student's educational history that it did not have. At this IEP team meeting, Mr. Golec made a further plea for Student's education records but no member knew where they were. In May of 2013, Ms. Maldonado found Student's documents and determined that they were original education records. She asked her staff to copy them and return them to the County. However, in August 2013, Ms. Maldonado found Student's original education records still in her office.

62. Meanwhile, in June or July 2013, Student's attorney requested copies of Student's education records from the County. On July 9, 2013, Ms. Fairbanks provided Student's attorney with copies of all available records, renewed her attempts to locate Student's file, and learned that Dr. Stika had provided the records to Ms. Maldonado. The County left numerous messages with Child Welfare requesting Student's records. When Child Welfare did not respond, Ms. Fairbanks asked Mr. Golec to personally retrieve Student's records from Ms. Maldonado, which he did in early August 2013.

63. The actions of the Humboldt County Department of Child Welfare Services, and Ms. Maldonado, cannot be imputed to the County Office of Education, the party in this case. They are separate public agencies under the umbrella of the county with separate and distinct legal functions and obligations. Student did not prove that the County failed in its duty to maintain Student's education records. The County did not have possession of Student's records until at least August of 2013, and provided Student with copies of all the records it had when requested.

#### *Substantive Provision of FAPE, the 2012-2013 School Year*

64. During the 2012-2013 school year, from the beginning of October 2012, until November 5, 2012, the District was responsible for offering Student a FAPE. The District was obligated to immediately offer Student, after consultation with Guardian, comparable services to his operative IEP pursuant to the 30-day inter-district transfer provisions. The District failed to make this offer which constituted a procedural violation. This failure to offer Student an interim IEP denied Guardian his participatory rights and deprived Student of educational benefit. Therefore, Student proved that the District substantively denied him a FAPE during the 2012-2013 school year, for the month-long period it was responsible for his educational programming. Student's specific claims of a substantive denial of FAPE for the remainder of the 2012-2013 school year, are analyzed solely as to the County given Student's detention at the Juvenile Hall from November 5, 2012 through July 3, 2013.

#### *Development of Annual Goals*

65. The IEP must include a statement of measurable annual goals designed to meet the student's needs that result from his disability. Educational benefit is measured based upon progress towards goals. An LEA has no obligation to write goals more frequently than annually absent special circumstances such as when a student fails to make progress towards his goals, his needs change, or new information becomes available.

66. When Student returned to Juvenile Hall in November 2012, his operative IEP was the April 2012 triennial IEP developed by the County. At the triennial IEP meeting, the team identified academics and self-advocacy as Student's areas of need and developed three annual academic goals and one advocacy goal.<sup>26</sup> Student's academic goals were in pre-

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<sup>26</sup> Student did not identify as an issue for hearing the appropriateness of the April 2012 annual goals.

algebra, reading comprehension, and essay writing. His self-advocacy goal called for him to successfully communicate his needs and his thoughts on how to meet his needs when presented with real-life modeled situations. By way of an IEP amendment dated November 13, 2012, the County and Guardian agreed to continue these annual goals.

67. By the time of his March 28, 2013 annual IEP team meeting, Student had met his math, writing and self-advocacy goals and made progress on his reading goal. The IEP team discontinued his advocacy goal and revised his academic goals to include vocabulary development, algebra, and writing mechanics. Student did not contend that these goals failed to address his academic needs. However, as determined above, the evidence established that by April 2013, at the latest, the County was aware that Student had unique needs related to his disability in the areas of social-emotional functioning and mental health, communication including pragmatic language and assistive technology, and attention.

#### *Mental Health Goals*

68. Had the County timely conducted its social-emotional assessment upon Student's re-incarceration in November 2012, it would have identified Student's mental health needs by February 2013. Multiple professionals noted Student's depression. The evidence showed his symptoms, though constrained in the locked setting of Juvenile Hall, went beyond a general unhappiness about being locked up. Student knew that he was being treated differently than other detainees who were generally released within two weeks. No one could answer his question of why he was locked up for so long, and Student attributed it to his disability needs. Student hated his deafness and when outside the confines of Juvenile Hall, he attempted to find ways to alter his reality, as determined by Ms. Miller in early 2012. Student was in need of mental health goals to address his rejection of his disability, which impacted his self-concept.

69. Student's psychiatric history was also significant for incidents of self-harm including attempting to brand himself with a lighter, self-piercings and various attempts to tattoo himself. While in his cell he cut on his arm and carved the words, "High Life Humboldt." County witnesses discounted this behavior by portraying it as Student's attempt to fit in and have a tattoo like other detainees, thereby minimizing his needs. This was self-harming behavior evincing a mental health need related to his daily functioning.

70. By February 2013, the County was aware of Dr. Stika's diagnosis that Student suffered from dysthymia and her opinion that he needed cognitive behavioral therapy. Also, Dr. Stoll reported to the IEP team in both April and May 2013, that in order to benefit from his education, Student required educationally related mental health services to address anxiety, depression and disability awareness and advocacy. Without goals targeting these specific identified areas of need, the focus of counseling remained limited to self-advocacy and to supporting Student's transition into a comprehensive high school, rather than providing supports for his mental health needs. The County's failure to develop goals in the area of mental health therefore substantively denied Student a FAPE.

### *Communication Goals*

71. The evidence also established that Student's communication deficits constituted an additional area of need warranting further assessment for the development of communication-related goals. Although socialization among the detainees was not encouraged, there were reports that Student presented as socially isolated in Juvenile Hall. Student had an ASL interpreter only during class hours which impeded his ability to fully communicate with others outside of class. Ms. Salinas at Bridgman had diagnosed Student with a communication disorder, Dr. Stika extensively reported on Student's communication deficits, and even Dr. Stoll determined that Student had a communication disorder that impeded his academic and social functioning. Based on the Conner's Rating Scales administered by Dr. Stoll, Student had significant difficulties making friends and was socially detached. Ms. Gordon acknowledged at hearing that this data required further follow-up. Student established that by April 2013, the County was aware he required goals in the area of communication including pragmatic language. The County's failure to develop goals in the area of communication and pragmatics substantively denied Student a FAPE.

### *Behavior Goals in the Area of Attention*

72. Dr. Stoll's assessment also revealed that Student presented with significant problems in the area of attention, concentration and organization. Although he needed reminders to focus on his work, the County established that Student was amenable to redirection. He earned a higher than average number of credits and made up missing credits, though modified to his skill level. While Student proved that further assessment was warranted in the area of attention, he did not establish that this was an area of need requiring goals and services because there was no shown negative impact on his access to or receipt of educational benefit.

### *Related Services*

73. An annual IEP must contain a statement of related services to be provided to enable the student to benefit from his educational program. Related services (or "designated instruction and services" in California) may include behavior supports, counseling, speech and language services, and deaf and hard of hearing services including ASL instruction.

### *Behavior Services*

74. In the case of a student whose behavior impedes his learning or that of others, the IEP team must consider, when appropriate, the use of positive behavioral interventions and supports, and other strategies, to address that behavior. Student contends that he was dependent on the Juvenile Hall's behavior modification system to attend class and comply with class rules and that this should have been reflected as a related service or a behavior plan on his IEP. He also alleges he required additional behavior supports and services to address truancy and his inability to attend to instruction when present.

75. In order to encourage compliant behavior and discourage negative behaviors, Juvenile Hall and Von Humboldt utilize a behavior reinforcement program called the step-score system. A detainee can earn rewards such as lining up first in the dining hall or being allowed music or a deck of cards in his cell for maintaining a higher score. Student responded well to this system and, on average, maintained the highest score and infrequently lost point for non-compliant behavior. This behavior modification program was not a special education related service, but rather standard operating procedure. Student did not prove that he required an individualized behavior support plan or that the County was required to incorporate the step-score system into his IEP. Additionally, there was no evidence that Student refused to physically attend class at Von Humboldt or that he was ever suspended from class. Therefore, Student did not show that he required behavior services to target school attendance issues.

76. As to attention, Ms. Baer reported that Student needed constant reminders to focus on his work and relied on his interpreters to redirect his attention. For a period of several months, Student refused to look at one of his interpreters and, therefore, did not attend to instruction. However, he was amenable to re-direction, received credit for high-school work, and improved his scores on the Basic Test. On this record, despite the County's failure to assess Student in the area of attention, Student did not meet his burden of proof that he required a behavior plan or services to address inattention in order to receive a FAPE within the confines of the Hall.

#### *Educationally Related Mental Health Services*

77. Student's psychiatric history was remarkable for his anxiety, depression, aggression, obsessive compulsive behaviors, and intentional self-harm and risk-seeking behaviors. Student also presented as depressed at Juvenile Hall. By February 2013, the County had Dr. Stika's assessment which included the results of the Behavior Assessment System for Children, Second Edition, consisting of parent and teacher questionnaires which facilitate differential diagnosis of emotional and behavioral disorders. Both Guardian and Ms. Baer rated Student as "at risk" in the area of depression. At hearing, County witnesses unconvincingly minimized Student's depression as being "bummed out" about being locked up but offered no substantive challenges to the validity of Dr. Stika's assessment. Also, the County characterized his self-destructive, dangerous and assaultive behaviors while at Bridgman as willful attempts to return to Humboldt County, and his cutting on himself at Juvenile Hall as an attempt to fit in. These were misplaced efforts to normalize his seriously disturbed behaviors and were not persuasive.

78. Dr. Stika found no indication that a significant neurological issue caused Student's extreme behaviors prior to his incarceration. She diagnosed Student with conduct disorder, attention deficit hyperactivity disorder, predominantly inattentive type, dysthymic disorder, cannabis abuse, and communication difficulties related to deafness and education problems, and determined that additional testing would be needed to rule-out obsessive-compulsive disorder. Dr. Stika concluded that Student had serious emotional and behavioral problems that required intensive psychiatric intervention in order to effect behavioral change

and improve adaptive functioning to enable Student to benefit from his education. Dr. Stika recommended that Student receive cognitive behavioral therapy at least twice a week to address his numerous mental health issues, not the least of which was his rejection of his deafness. Dr. Stika's testimony on these matters was compelling and persuasive.

79. The County chose to dismiss Dr. Stika's recommendations based upon its characterization of her report as a medical report, unrelated to Student's school functioning. A medical report may well have important information for school professionals to consider. Dr. Stika is a renowned expert in assessing the needs of deaf students, and at hearing, established that she is recognized as an expert in educational programming for students with deafness. She reported Student's testing data from numerous standardized tools and rating scales, and summarized his educational and psychiatric history. The County summarily dismissed her report and conclusions, in part, due to her failure to observe Student at Von Humboldt or interview his teacher. This response highlights the County's failure to account for the impact of the specialized environment of the Juvenile Hall, a small, locked residential institution for serious offenders, with a daily regimen, rules, behavior modification program, camera surveillance, and correctional officers, on Student's functional and educational performance. As Dr. Stika concluded, without need to observe him there, Student was adjusting well to the highly structured environment of Juvenile Hall and, in such a setting, he was able to comply with expectations.

80. The County chose to await Dr. Stoll's report. He also determined that Student was in need of mental health intervention. He noted that many professionals including Ms. Baer, Mary Ann Gross, a teacher from Madison High, and Laura Hernandez, the SELPA's deaf and hard of hearing teacher, reported that Student appeared depressed. On the Childhood Depression Inventory, Second Edition, Student rated himself as at above average risk for depression. Student told Dr. Stoll that he felt depressed at the Juvenile Hall, sometimes wished he were dead, and admitted he thought about hurting himself so he could go to the hospital to escape. On an open-ended question task, Student responded, "Most of the time I feel ... *depressed when I'm locked up and deaf.*"

81. As found earlier, Dr. Stoll determined that Student required educationally related mental health services to address depression, anxiety, and disability issues, in order for him to receive educational benefit. Though deaf, Student identified as a hearing individual, and exhibited significant maladaptive behaviors. Dr. Stoll recommended that mental health counseling be provided through a non-public agency at the school setting for 30-45 minutes weekly, to assist Student in accessing his curriculum. At the May 17, 2013 IEP team meeting, the County offered six sessions of counseling for 30 minutes once a week, from May 28, 2013, through July 5, 2013. Dr. Stoll testified that this was a sufficient offer of mental health services as it was meant to cover Student's remaining time at Von Humboldt, and then the IEP team would review his continuing needs once he transitioned from Juvenile Hall. Student did not rebut Dr. Stoll's testimony and did not prove that the May 17, 2013 offer of counseling denied him a FAPE.

82. However, Student established that the County failed to make a timely offer of mental health services prior to May 17, 2013. Had the County timely assessed Student upon his re-incarceration, it would have determined much sooner, not later than February 2013, that mental health was an area of need for which Student required weekly counseling services. Having been denied the timely provision of intensive mental health services, Student once again returned to his physically aggressive, and risky runaway behaviors upon his release, as predicted by Dr. Stika in her December 2012 report. She warned that Student should not be reunified with his grandparents absent intensive intervention and evidence of therapeutic change, as this would inevitably lead to a reoccurrence of serious behavioral problems that would put Student and others in danger. Student established that the County's failure to offer mental health services from at least February 2013 through May 28, 2013, denied him a FAPE.

83. A failure to materially implement an IEP may constitute a denial of a FAPE. In May 2013, Guardian initially consented to the provision of the six sessions of mental health counseling, then withdrew his consent, and then agreed once more.<sup>27</sup> There was a dearth of evidence as to whether Student received any counseling from the County pursuant to his IEP. To the extent Student contended the County failed to implement this service, he did not meet his burden of proof.

#### *Speech and Language and Social Skills Services*

84. As determined above, the County's failure to assess Student and to develop goals in the area of communication including pragmatics, resulted in substantive denials of FAPE. Given his profound deafness, speech and language services for Student include more than just oral development of voice; they include all of communication such as the development of vocabulary, effective interchanges, and reading social cues. Dr. Stoll determined that Student's academic and social functioning was impeded by his communication deficits, but he did not administer any speech or language assessments to determine Student's service needs and acknowledged that pragmatic language is not his area of expertise. His conclusion, that while Student would benefit from direct instruction in social skills and communication skills, he did not require these services in order to receive a FAPE, was not supported by any data.

85. Dr. Stika's assessment showed that Student had significant deficits in his receptive and expressive language skills, and that professionals may overlook his receptive deficits given his greater, though still deficient, expressive abilities. Dr. Stika's testing data is unrefuted and she recommended that Student receive weekly speech and language services. Based upon Student's documented history of communication struggles, and Dr.

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<sup>27</sup> Guardian testified he objected to the counseling when it appeared the County planned to use the sessions to encouraging Student to advocate for himself at IEP team meetings, and thereby serve its own ends to keep Student from being placed residentially, as opposed to treating his grandson's significant mental health issues.

Stika's unrefuted testing data, Student established that he required the provision of related speech and language and social skills services. Therefore, the County's failure to offer these services by April 2013, denied Student a FAPE.

*Deaf and Hard of Hearing Services*

86. Student's April 2012 IEP offered three 30 minute sessions of direct deaf and hard of hearing services each month, along with staff consultation. These services were to target Student's signing needs including ASL conversation, structure and syntax, and increase his self-advocacy, as recommended by the School for the Deaf. The March 28, 2013 annual IEP did not offer any direct deaf or hard of hearing services, even though Student's then-present levels of performance showed that his ASL fluency and discourse needed improvement, and he often would not ask for clarification when he did not understand certain words or phrases. Student's present levels showed that he was successfully expressing his feelings, wants and needs, and was advocating for himself within the locked setting of Juvenile Hall. As a supplementary service, this IEP offered 15-30 minutes weekly consultation between the deaf and hard of hearing teacher and class teachers as well as 90 minutes each month of consult services to address concerns, and provide classroom and technology advice in person, by phone or through email correspondence.

87. Although the evidence established that Student had deficits in his signing and ability to communicate with others, Student did not prove that he required a specific frequency, duration, or type of deaf and hard of hearing services or ASL instruction such that the County's failure to offer direct services denied him a FAPE. Student continued to earn high school credits on work modified to his reading level. For the third quarter at Von Humboldt he earned 13 credits which is an average load.<sup>28</sup> During the fourth quarter he earned 19 credits as he was motivated to enter high school as a sophomore in the fall of 2013, and applied himself to make up missing ninth grade credits. Further, the June 4, 2013 progress reports on his goals indicated that Student was progressing on all his academic goals. He was reading more on his own, had improved his writing mechanics and spelling, and was progressing in the algebra curriculum. Student did not establish that the County denied him a FAPE by failing to offer adequate deaf and hard of hearing services.

88. Student appeared to additionally contend that the County failed to provide him with his IEP deaf and hard of hearing services, in that the assigned teacher was not properly credentialed. Ms. Hernandez was Student's deaf and hard of hearing teacher and has worked with Student on and off since August 2010.<sup>29</sup> She is not a credentialed deaf and hard of

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<sup>28</sup> Von Humboldt students are able to earn partial credit for each course. One credit equals one hour of direct instruction or 12 hours of independent study. Students are afforded a couple hours of independent credit recovery time each school day.

<sup>29</sup> Ms. Hernandez earned her undergraduate degree in elementary education with a minor in ASL from Humboldt State University in 2009 as well as her moderate to severe special education teaching credential in 2011. She is currently enrolled in a master's

hearing teacher although she has a moderate to severe teaching credential and is enrolled in a master's degree program to complete her specialty credentialing. However, she has an authorization through her program which allows her to teach deaf students. Student did not establish that the provision of deaf and hard of hearing services by Ms. Hernandez resulted in a denial of a FAPE. Nor did Student introduce any evidence that the County did not provide these services in accord with his April 2012 and March 2013 IEP's.

*Extended School Year, 2012-2013*

89. An LEA must provide extended school year services to a student in special education if required to prevent regression that may occur during the summer break, which when combined with the student's limited recoupment capacity renders it unlikely that the student would attain the level of functioning that would otherwise be expected.

90. None of Student's IEP's indicated a need for extended school year services. The offer of FAPE for the March 28, 2013 IEP checked the box indicating that extended school year was not required. The May 17, 2013 IEP team meeting notes documented that the team discussed extended school year and found that Student did not meet the criteria. Von Humboldt is a year round school. After Student left Juvenile Hall, he attended three weeks of summer school with the same level of specialized instruction at Von Humboldt. His IEP called for the provision of counseling services through July 5, 2013, and there was no evidence that he did not receive these services.

91. Dr. Stika testified that given Student's academic deficits, in light of his average intellectual functioning, he would benefit from extended school year services. However, she did not discuss whether Student would regress or otherwise have a limited ability to recoup ground lost over the summer months. Dr. Stoll testified that Student would benefit from counseling during the extended school year but he knew of no data to show that Student required extended school years services to prevent regression beyond what would be considered normal or that he lacked the ability to recoup. Student did not meet his burden of proof on this issue.

*Student's Need for Residential Placement During the 2012-2013 School Year*

92. The standard for residential placement is that a student requires this therapeutic level of care around the clock in order to access his educational program and derive meaningful benefit. The law requires that a student be placed in the least restrictive environment in which he is able to receive educational benefit.

93. Addressing the educational placement needs of a student with a low-incident disability such as deafness can be complicated. LEA's must ensure that educational programs recognize the unique nature of deafness and ensure that all deaf and hard-of-

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program in deaf and hard of hearing education through the University of Arizona and anticipates completing this program in spring 2016.

hearing students have fully accessible educational and communication opportunities. A review of Student's unique needs as a deaf student and unique circumstances as a dependent child housed at Juvenile Hall, as well as a review of his educational placements provides the context for understanding Student's mental health needs, their relation to his disability, and how they are inseparable from his educational needs. All of which is key to determining whether he required a residential placement during the 2012-2013 and 2013-2014 school years.

### *Student's Unique Needs*

94. Student had and continues to have unique needs in the areas of academics, including reading, writing and math; mental health including depression, anxiety, self-esteem, disability awareness, and self-advocacy; communication including ASL, receptive and expressive language and vocabulary, and pragmatics; and behavior, including self-harm and compulsive running away. His unique needs related to his disability are compounded by the fact that he was able to hear for his first three years of life; he has been raised in a hearing home; he has no functional verbal communication and requires yet rejects ASL; he was not immersed in ASL until he was approximately eight years of age; and he culturally identifies as a hearing person, and rejects his deafness. Student told Dr. Stika that ASL was "stupid" and most deaf people, "retarded." His responses on the Sentence Completion Task administered by Dr. Stika reflected his feelings regarding his deafness and his low self-esteem. For example, Student wrote, "My teachers think I ... *am just a deaf kid.*" Similarly, for Dr. Stoll's evaluation, Student filled in the blank as follows, "My teacher thinks I ... *am a disabled fool.*"

### *Unique Behaviors and Circumstances*

95. The Juvenile Court removed Student from Guardians' care because they were unable to protect Student or themselves from his extreme, disturbed behaviors. The LEA's claimed but did not prove Guardian's home was abusive such that Student required an alternate living arrangement which Child Welfare was trying to get the LEA's to fund. The evidence was clear and compelling that Guardian is a committed grandparent who loves his grandson, wants what is best for him, and has advocated for services to meet his educational, and mental health needs. Student's behaviors cannot fairly be attributed to Guardian's parenting skills or lack thereof as Student has exhibited self-injurious and destructive behaviors across settings. Student is a compulsive runner who runs from rules and restrictions and finds his way to various homeless encampments where he feels free and accepted. During both evaluations, Student perseverated on his affiliation with the homeless whom he calls his family, and did not understand why he could not live with them in the woods.

96. The Juvenile Court adjudicated Student a dependent child in need of protection yet housed him at Juvenile Hall, a probation detention facility for serious, repeat offenders, in order to protect him from himself. He remained at Juvenile Hall for 11 months over an 18 month period between February 2012, and July 2013. Student knew he was

locked up because he was deaf and that the hearing professionals did not know how to help him. These lengthy periods of incarceration reinforced Student's disconnect from his deafness and further isolated him as he was confined in a setting where socialization was not encouraged, and communication assistance through an interpreter was only available for four hours or so on school days.

### *Summary of Educational Placements and Functioning*

97. Over his schooling career, Student has had six educational placements including McKinleyville Elementary and Middle Schools, two placements at the School for the Deaf in Fremont, two placements at Von Humboldt, and placement at Madison and McKinleyville High, each for less than 10 days. Across placements, Student was described as isolated, depressed, inattentive, having obsessive thoughts and compulsive behaviors, and impacted by communication barriers. His functioning level deteriorated and behavioral problems escalated over time, indicative of unmet mental health needs in addition to his inability to effectively communicate his feelings.

98. Student first entered the School for the Deaf in Fremont in August 2006, due to teacher reports of his isolation and Guardian's belief that Student needed an inclusive deaf environment in order to learn to communicate in ASL and reconnect with the world. His needs went beyond communication and included social-emotional and mental health needs. Student's April 2009 triennial IEP concluded that he met the criteria for emotional disturbance based upon his difficulty maintaining positive relationships, inappropriate behaviors under normal circumstances including anger outbursts and school refusal, and depressed mood, all of which were found to have adversely impacted his educational performance.<sup>30</sup> Humboldt County Mental Health assessed Student in September 2009, and diagnosed him with adjustment disorder with mixed anxiety and depressed mood, determined that his mental health symptoms interfered with his ability to learn, and authorized weekly therapy during the school year.<sup>31</sup> The School for the Deaf determined that Student's primary needs were in the area of mental health, as opposed to his deafness, and he returned to McKinleyville Middle School in October 2009.

99. Student transitioned well until January 2011, when he was suspended for threatening to kill a classmate and stabbing him with a pen. He was again suspended in

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<sup>30</sup> Per the January 18, 2011 IEP, emotional disturbance was removed as a disability.

<sup>31</sup> Prior to July 1, 2011, mental health services related to a disabled student's education were provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code. (Gov. Code §7570, et seq., often referred to by its Assembly Bill name, AB 3632.) Effective July 1, 2011, the obligation of the State Department of Mental Health, and its county designees, to assess and provide mental health services to special education students was suspended, and those statutory responsibilities were transferred to the LEA's instead. (Gov. Code, § 7573.)

March 2011, when he used his hands to imitate a gun and “fired several rounds” at the teacher, made an obscene gesture and laughed. Dr. Stoll was not convincing in his opinion that these incidents were not serious. These incidents were red flags consistent with the conclusions of the School for the Deaf and County Mental Health that without intervention, Student’s behaviors could escalate into harm to self or others. Student’s home behavior also escalated during this time. He punched holes in the walls, threatened to set the house on fire and physically assaulted Guardian on more than one occasion.

100. Due to his increased isolation in the mainstream setting, Student returned to the School for the Deaf in January 2012.<sup>32</sup> The School for the Deaf noted numerous concerning behaviors during his short re-enrollment prior to his suspension, including use of marijuana at home and discussing his drug use at school, seeking a high by excessive consumption of energy drinks and the choking game (choking to the point of passing out in order to get a “high”), self-harm (branding his hand with a lighter while at home), non-compliance with rules, work refusal and non-participation in class resulting in mostly failing grades. McKinleyville school psychologist Ms. Miller participated in the February 8, 2012 IEP team meeting at the School for the Deaf, voiced concern with Student’s pursuit of ways to alter his reality and recommended that the team not give in to his desire to return home. She also conducted Student’s April 2012 triennial evaluation while he was incarcerated. Therefore, the County had knowledge of the School’s concern with Student’s mental health needs. Additionally, the County received Student’s current IEP and records from the School from McKinleyville upon his initial detention in February 2012. Dr. Debra Guthmann’s testimony established that Student met the criteria for emotional disturbance upon his exit in February 2012, and that once again his mental health needs were more predominant than his deafness.<sup>33</sup>

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<sup>32</sup> The LEA’s were not persuasive in their position that Student attended the School for the Deaf simply at Guardian’s request. Dr. Debra Guthmann, former director for the School for the Deaf, established that a parent cannot self-refer a student to the School; that all referrals come from the local LEA; and that McKinleyville twice referred Student due to its inability to meet his needs.

<sup>33</sup> Dr. Guthmann has over 30 years of experience in working with individuals with deafness and is a certified sign language interpreter. She has made over 200 national and international presentations and published numerous articles and chapters focusing on treatment models for individuals who are deaf. She served as the pupil personnel services director at the School for the Deaf in Fremont from 1995 through 2013. She has held numerous faculty positions in the area of deaf education including at Gallaudet University, and taught and counseled students with deafness through the high school level for four years. She currently is a consultant for several federally funded special education projects. She earned her undergraduate degree in deaf education and history in 1979, her master’s degree in counseling psychology in 1983, and her doctorate in educational administration from the University of Minnesota in 1995.

101. Guardian also reported increasingly disturbed behaviors of Student brandishing a knife and demanding money. Within a week of his return to McKinleyville Middle School, Student was arrested for physically assaulting his grandfather and detained at Juvenile Hall where he remained for three months. He was unable to maintain at Bridgman or the shelter, was re-incarcerated and held for eight months until he was released to his grandparents in July 2013, with the support of wrap-around services.<sup>34</sup>

#### *Unique Setting of the Juvenile Hall*

102. The Juvenile Hall is a locked institution run by Probation which temporarily houses only the most serious offenders with significant criminal history, as Probation does not want the less criminally sophisticated to intermingle with more hardened delinquents. Student presented an exception. A detainee's day is controlled by a structured schedule maintained by the correctional officers: he is awoken at a set time each day, and eats his meals, attends class, completes chores and recreates, all according to a set schedule. Each detainee is under constant watch through camera surveillance and routine checks. Development of friendships is not encouraged. In class there is a teacher, instructional aide, part time resource teacher, and one to two correctional officers; compliance is encouraged through use of a point system which rewards good behavior.

103. County witnesses testified that because Student received benefit from his program at Von Humboldt by attending class, earning credits and demonstrating academic progress, he would benefit from placement at his local high school. Their testimony was not persuasive as it failed to account for the unique setting of Juvenile Hall. In essence, Juvenile Hall is a locked residential placement, and within this setting, Student received academic benefit. That he benefited from his academic program at the Juvenile Hall does not mean he did not require a residential placement. Rather, his progress supports his need for a locked residential placement with a behavioral modification program plus intensive mental health treatment. Further, in determining that Student received "educational benefit" from his program at Von Humboldt, the County erroneously characterized his needs as solely academic and therefore did not develop appropriate goals and services in the areas of mental health and communication.

#### *Least Restrictive Environment*

104. LEA's are to provide a program in the least restrictive environment for each special education student, ensuring to the maximum extent appropriate, that students with disabilities are educated with students who are not disabled. In determining what constitutes an appropriate education to meet the unique needs of a deaf student in the least restrictive environment, the IEP team shall consider the related service and program options that

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<sup>34</sup> Wrap-around services are a child welfare family reunification service consisting of various service providers who determine what a family needs in order to safely function as a family unit, and attempt to address those needs.

provide the student with an equal opportunity for communication access. Any setting which fails to meet the communication and related needs of a student who is deaf, cannot be considered the least restrictive environment for that student.<sup>35</sup> As discussed below, both parties introduced expert testimony as to Student's placement needs.

#### *Weighing the Expert Recommendations*

105. Dr. Stika is a highly credentialed clinical psychologist with over 30 years of extensive experience in assessing the needs of deaf individuals. She is an expert in educational programming for deaf students and her testimony was highly credited. She has assessed 1,000's of deaf students. At the request of Child Welfare and the Juvenile Court she conducted a comprehensive neuropsychological assessment of Student to determine his intervention, education and service needs. Dr. Stika reviewed Student's educational and psychiatric history, utilized an extensive array of assessment tools, gathered and reported a large amount of data, conducted interviews, directly interacted with Student via his mode of communication in ASL, and reported her conclusions.

106. Dr. Stoll is a licensed educational psychologist with experience conducting approximately 1,000 psycho-educational evaluations. Aside from Student, he has assessed only one other deaf student. He utilized certified ASL interpreters to assist him in his interviews with Student and the assessment process. In his report, Dr. Stoll acknowledged the possibility of misunderstanding inherent in conducting an assessment through an interpreter. However, at hearing he did not acknowledge this challenge which detracted from his persuasiveness.

107. Dr. Stoll's assessment of Student was limited to a social-emotional assessment for the purpose of determining whether he qualified for special education as emotionally disturbed. Dr. Stoll concluded that Student did not meet the criteria. The issue of whether Student is emotionally disturbed is not, however, dispositive of whether he requires residential placement in order to access his education.<sup>36</sup> Student did not identify as an issue for hearing his eligibility for special education under the category of emotional disturbance. Even so, Dr. Stoll's opinion in this regard was unsupported by the law or the facts and

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<sup>35</sup> See the United States Department of Education, Deaf Students Education Services Policy Guidance, "The Secretary recognizes that the regular classroom is an appropriate placement for some children who are deaf, but for others it is not. There are cases when the nature of the disability and the individual child's needs dictate a specialized setting that provides structured curriculum or special methods of teaching." (57 Fed. Reg. 49274-01 (October 30, 1992).)

<sup>36</sup> Former Government Code section 7572.5 required the determination that a student was emotional disturbed in order to qualify for residential placement. With the abolishment of AB 3632 and the repeal of related regulations as of January 1, 2012, an LEA is responsible for providing mental health services, including a residential placement, should the needs of the Student require, regardless of the eligibility category.

undermined his recommendations. The evidence, as summarized herein, established that Student demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; and a general pervasive mood of unhappiness or depression, all of which have existed for a long period of time, to a marked degree, and adversely impacted his educational performance.

108. Dr. Stika credibly concluded that the significant discrepancy between Student's cognitive potential and academic achievement was due to his deafness, his significant language delays secondary to his hearing loss, as well as serious social-emotional adjustment problems which stemmed from his disability. He had not demonstrated the academic benefit and progress from his educational programming one would expect based upon his ability. His low self-esteem and difficulty making friends was only partly due to communication challenges as he has a long history of interpersonal difficulties in settings designed for the deaf. Her determination that his disturbance in behavior was longstanding and pervasive across settings, and that it began early and has escalated over the years, causing clinically significant impairment in his academic and social functioning, is supported by a review of his educational records and placements.

109. Dr. Stika confirmed that her December 2012 recommendations regarding Student's placement and service needs remained unchanged and that there is even more information since her assessment that supports her recommendations. She testified convincingly at hearing that in order to benefit from any educational program, Student required and continues to require a locked residential treatment program as he demonstrated repeatedly that he was capable of running away for extended periods and did not appreciate the risks he placed himself in.

110. Dr. Stika further concluded, after careful consideration of Student's negative feelings about deaf individuals, that he requires placement at a treatment facility that specifically serves the deaf. Although he does not want to affiliate with the deaf, he requires sign language to communicate which has significant implications for both his socialization needs and access to treatment. Use of an interpreter has not benefitted him in the education setting as he frequently would not attend to the instruction, and attempting therapy through a third party interpreter is difficult at best. The evidence established there are no residential treatment centers for deaf adolescents in California. Dr. Stika determined during her assessment and established at hearing that the most appropriate program for Student is the National Deaf Academy. The National Deaf Academy is a residential treatment facility with a therapeutic school certified by the Florida Department of Education. It is not certified by California. All staff are fluent in ASL. Although the doors to the classes and dorms are not locked, the facility is on several acres and surrounded by locked gates.

111. The testimony of both Dr. Guthmann and Richard Willis, executive director of the National Deaf Academy, corroborated that of Dr. Stika.<sup>37</sup> These two individuals also have extensive experience, in excess of thirty years each, serving deaf youth in the educational arena. Both testified that Student required and continues to require residential treatment and placement in order to access his educational program. Dr. Guthmann observed Student during his years at the School for the Deaf, supervised his direct providers, and participated in regular meetings regarding his functioning. She recalled specifics of Student's presentation and needs during his enrollment at the School for the Deaf. Although her last direct contact with Student was in February 2012, she recently spoke with Guardian and learned of Student's current deterioration.

112. The testimony of Dr. Stika, Dr. Guthmann, Dr. Willis, and Guardian established that Student's rejection of his deafness is a rejection of his very being and until he is able to come to terms with his own identity, he will remain at conflict with those around him and unable to benefit from his educational program. It is not a matter of forcing Student to become a part of deaf culture but, rather, a matter of Student developing a healthy identity and having the tools to deal with his disability. These are mental health needs inseparable from his educational needs, for which Student requires residential treatment because he cannot access mental health related services in any other setting as established by his educational placement chronology.

113. Dr. Stoll concluded Student requires a behaviorally oriented class with hearing peers, specialized instruction, deaf and hard of hearing supports, and mental health counseling. He believed that Student would do well in either a special day class or a general education class at his local high school. His testimony that Student demonstrated that his local high school was the least restrictive environment as he received "educational benefit" the few days he attended was not persuasive. Dr. Stoll concluded that because Student's problem behaviors occurred predominantly outside the school setting, they did not adversely impact his education. His contention that Student's behaviors were distinct from his educational needs was not convincing as it failed to acknowledge that Student's mental health and social-emotional needs have negatively impacted his academic performance for years, and he performs significantly below his cognitive ability. In addition, Dr. Stoll did not appreciate that Student's behaviors, including continual elopement from home and school, and self-harming, stemmed from Student's mental health issues which in turn stemmed from his communication and social deficits related to his disability and his own rejection of his deafness. Dr. Stoll's insistence that Student was able to control his behaviors, and that his behaviors were a means to an end and therefore willful, rather than the manifestation of an emotional disturbance, overlooked the atypicality of Student's behaviors. His attempts to

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<sup>37</sup> Dr. Willis is a licensed clinical psychologist who has worked in the area of mental health services for the deaf for 35 years. Prior to serving as the clinical director of the Academy, he was a psychological consultant. He also served as the director of a mental health center for the deaf in Virginia for 13 years. He received his undergraduate degree in psychology in 1973, as well as his master's degree in psychiatric rehabilitation in 1975, and his doctorate in psychology from the Florida Institute of Technology in 1984.

normalize Student's actions were inconsistent with his findings that Student has educationally related mental health needs that require services, and detracted from his persuasiveness.

114. Other LEA witnesses also testified unpersuasively that Student was simply acting out while at Bridgman so that he would be returned to Humboldt, and excused his behavior of brandishing a knife at Guardian because he believed he was being deprived of his allowance. This is a further example of a misplaced attempt to normalize Student's abnormal behaviors and further minimize his needs. Whereas Dr. Stoll insisted that Student's affinity for living with the homeless, whom he referred to as family, evinced his ability to build and maintain interpersonal relationships, Dr. Stika more persuasively concluded that his fixation on the homeless was a reflection of his mental health issues and adjustment disorder, which is supported by past reports of interpersonal difficulties and his prior diagnosis of obsessive compulsive disorder as well as an adjustment disorder.

115. Dr. Stoll recommended that Student be educated with hearing peers given his negative feelings about the deaf and the importance of obtaining his "buy-in." He based his recommendation in part on his interview with Ms. Gross, Student's deaf and hard of hearing teacher at Madison High, who held the opinion that Student would "shut down completely" if he were forced into a deaf environment. However, her only involvement with Student was during the five days he attended school. Ms. Hernandez' testimony that it would "destroy him" if Student were forced to attend a deaf treatment program was also not persuasive. Her struggle to maintain her composure at hearing, failure to stay within a professional relationship with Student as demonstrated by inviting Student into her home, and her belief that she was the only person Student trusted, all undermined her objectivity. Ms. Gordon more persuasively established that while it would be preferable to have Student's buy-in, at times adults must make difficult decisions to further a young person's best interests and it cannot reasonably be left up to the youth.

116. Dr. Stika credibly attributed the disparate conclusions reached by Dr. Stoll to a common mistake made by professionals who are not experienced or trained in working with the deaf: minimization of the needs of the deaf individual. The testimony of Dr. Guthmann and Dr. Willis established that such minimization is common and attributed it to both a lack of expertise and personnel to address the identified treatment needs of the deaf, as well as an inability to accurately identify needs. Dr. Willis and Dr. Stika established the difficulty inherent in conducting a mental status evaluation of a deaf individual given the linguistic and cultural differences that impede effective communication and the nuances in differentiating between the presentation of the individual versus a clinical indication of concern.

117. By the time of the April 2013 IEP team meeting, the County had sufficient knowledge that Student, due to unique, complex and intertwined mental health, identity, behavior, communication and socialization needs, required a residential treatment placement in order to access his education. The County was not equipped to meet his needs at Von Humboldt. In abdicating its duty to offer Student placement at a residential treatment center, and petitioning the Juvenile Court for an appropriate placement order to meet Student's

education needs, the County supported Student's incarceration in an isolated setting at Juvenile Hall for far too long. The County, as Student's LEA, failed to address Student's unique needs as a deaf student including communication challenges and his own rejection of his deafness and resultant mental health issues, and was not able to provide a therapeutic environment in which Student could develop his ability to interact with the hearing world. Student's needs could only be met in a residential treatment placement and the County's failure to offer this denied him a FAPE.

*Substantive Denial of FAPE for the 2013-2014 School Year*

*Development of Goals*

118. The District attended all of Student's IEP team meetings held by the County during the 2012-2013 school year and, therefore, were aware of his areas of need as determined above. On August 12, 2013, the District, as Student's LEA after his release from Juvenile Hall, timely convened an IEP team meeting prior to the start of the school year to discuss Student's transition to a comprehensive high school. The team reviewed Student's present levels of performance as determined in March 2013. The District members of the team identified academics as Student's sole continuing area of need, specifically reading, writing and math, and concluded that Student's annual academic goals from the March 2013 IEP remained appropriate. Student did not establish that the District failed to develop necessary goals in the area of academics or that his academic goals were inappropriate given his new educational setting.

*Behavior, Including Attendance and Attention Goals*

119. The August 12, 2013 IEP team reviewed Student's behavioral functioning at Von Humboldt. Student was able to generally maintain the highest level on the step-score system, so the District concluded that behavior was not an area of need. The school year began on August 26, 2013. Student attended the first seven days of school with minor disciplinary warnings. Teachers noted he would frequently doodle (including drawing pot leaves and swastikas) and refuse to work, respond to directions, or attend to the interpreters. At a follow-up IEP team meeting on September 3, 2013, Ms. Gordon recommended that Student be assessed in the area of both attention and memory, based upon Ms. Hernandez's concern that Student only looked at his interpreter part of the time, and Student's complaint that he was having a hard time concentrating and was forgetting things. The District developed an assessment plan which Guardian signed at the meeting. Student did not prove his claim that the District was required to develop a behavior goal in the area of attention pending its assessment in this area.

120. By August 9, 2013, Child Welfare had once again removed Student from his Guardian's care due to his escalating violence and placed him at the Youth Services Bureau. Guardian informed the District of Student's new living situation at the August 12, 2013 IEP team meeting. Student reengaged in his compulsive runaway behavior and ran away from the Bureau to the homeless camp. Student failed to attend school from September 5-17,

2013. Child Welfare placed Student on an extended visit with Guardian on or about September 15, 2013, and Guardian brought Student to school on September 18-20, 2013. Student left school at noon on September 20, 2013, and by the time of hearing, had not returned.

121. On September 10, 2013, Guardian requested an emergency IEP team meeting to discuss Student's need for residential treatment. The District convened a meeting on September 19, 2013. At this meeting, the District developed a plan to try to ensure Student's successful school attendance. Guardian was to take Student to the office where he would check in with either Ms. Gordon or Assistant Principal Melanie Susavilla each morning. Guardian would call if Student would not be in attendance. The District contended but did not prove that Guardian prevented Student from attending school, resulting in a truancy issue best handled through the School Attendance Review Board (SARB) process, rather than a disability related issue to be addressed by an IEP team meeting.<sup>38</sup> The District's informal attendance plan supports Student's contention that the District was on notice that school attendance was an area of need. Ms. Gordon's testimony that she did not have any information at that time or currently indicating that Student's truancy was related to a mental health issue such as anxiety or school phobia, ignores Student's educational records and assessments and fails to account for the District's responsibility to determine why Student was not attending school. The District's failure to develop a behavior goal in the area of school attendance denied Student a FAPE.

#### *Mental Health Goals*

122. The August 12, 2013 IEP offered three 30 minute sessions of counseling through September 20, 2013, to support Student's integration into a public high school setting and to increase his self-advocacy skills. The District contended that Student did not have mental health needs nor was it required to develop a goal in this area, as it planned to reconvene within 30 days of the start of the school year to determine how Student was transitioning and consider whether he required continued counseling services. The District never scheduled an IEP team meeting after 30 days to review Student's need for mental health services due to his non-attendance. The District was required to develop mental health goals related to the provision of the mental health counseling services, designed to target the specific areas of need identified by Dr. Stoll. Because there were no goals, the District wrongly assumed that its counseling services could focus on transition issues rather than mental health and disability issues.

123. The August 2013 IEP team notes specified that although Student was receiving weekly counseling from County Mental Health, this was not an IEP service. The

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<sup>38</sup> Students who violate compulsory education laws by a pattern of unexcused absences, may be referred to the SARB. The goal of the SARB is to keep students in school by accessing community resources, although when necessary, students and their parents can be referred to formal court proceedings to address truancy issues. (See Ed. Code, § 48320 et seq.)

District compartmentalized Student's county mental health services as a non-educational need. It initially refused to even check the box on the IEP indicating that County Mental Health was involved as an outside agency. Student's receipt of County Mental Health services further supported Dr. Stoll's assessment that Student's mental health needs went beyond a need for support as he transitioned onto a comprehensive campus. However, his receipt of outside psychological services did not relieve the District of its obligation to develop a mental health goal by which to measure the effectiveness of its educationally related mental health services.

124. During the two counseling sessions that Ms. Gordon had with Student, he appeared sad and angry. Student clearly required counseling to address his anxiety, depression, and disability awareness and advocacy, and goals were required in these areas to ensure the effective delivery of services. Had the District developed necessary counseling goals, quite likely the counseling services would have been more intensive including of greater length, frequency, and duration. The District's failure to develop mental health goals denied Student a FAPE.

#### *Speech and Language Goals*

125. During the August 2013 IEP team meeting, Guardian shared his concern that Student required a systematic approach to his acquisition of ASL, and to improve his writing skills. The District initially only offered consultation services from the deaf and hard of hearing teacher. The team discussed, at Guardian's request, Student's need for direct instruction in ASL, and the District included in its formal offer 60 minutes per week of ASL instruction. The District attempted to convene an IEP team meeting the first week of school to develop goals for this new service, but Guardian was not available. The IEP team convened a week later on September 3, 2013, to develop ASL goals. Ms. Hernandez reported on Student's present levels in ASL fluency and proposed two measurable goals in the areas of communication and comprehension, reasonably related to his present levels. These goals were appropriate for Student's signing needs based upon information then available pending further assessment.

126. However, the District did not develop goals to address Student's known pragmatic and social skills needs. The District was awaiting the results of its pending communication assessment of Student by the speech language pathologist in conjunction with Ms. Hernandez. Guardian had signed a speech and language and assistive technology assessment plan at the August 12, 2013 team meeting. The District began its assessment, but then Student stopped attending school. Even so, pending further assessment, Student required goals in the area of pragmatic language as detailed above, and the District, which participated in the County's monthly IEP team meetings from March through June 2013, was aware of Student's needs even without its own assessment results. Just as the County was on notice of Student's needs for pragmatic language goals as determined above, so too was the District, and its failure to develop goals in this area denied Student a FAPE.

## *Related Services*

### *Behavioral Services*

127. The District had a duty to review and revise Student's IEP and convene a team meeting to address new information. Student's decreased functioning level and increasing mental health manifestations presented an evolving situation that the District needed to timely address. Student's claim that he required behavior supports includes two areas of need: school attendance and attention to his academics. When Student was removed from Guardian a second time in August 2013, due to escalating violence, he continued his pattern of running to the homeless camp. During the 2013-2014 school year, he only attended a few days of school, with his last day being September 20, 2013, as of the time of hearing.

128. District witnesses held steadfast to their theory that Guardian prevented Student from attending school, but the claim was not supported by the evidence. District witnesses' characterization of Guardian's reports of Student's "AWOL" status as outright lies, detracted from their credibility.<sup>39</sup> The District claimed that if Guardian had asked for help to get Student to school, then it would have met this need. This overlooks the fact that upon the start of the 2013-2014 school year, Guardian was not Student's caretaker, aside from an extended visit from approximately September 15 through 20, 2013, during which time he brought Student to school.<sup>40</sup> The fact that Student frequently showed up at his door and that Guardian did not turn him away, does not mean that Guardian was required to call the school to report his transient passings.

129. At the September 19, 2013 IEP team meeting, Guardian informed the team that it was not easy to get Student to school that morning and there were several times it appeared he would bolt from the moving car. Child Welfare placed Student with Jaz Kids, Inc., on September 26, 2013. Again, he continued his runaway behaviors and went to stay with the homeless. Leah Hanrahan-Gee, the executive director of Jaz Kids, established that there was no way anyone would be able to ensure Student's school attendance given his mental state at that time.

130. The District's assistant principal, Ms. Susavilla, testified that on or about October 17, 2013, she offered to have Ms. Gordon come talk to Student to encourage him to

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<sup>39</sup> AWOL is a term frequently used by child welfare services in reference to a child being absent without leave or permission from his placement.

<sup>40</sup> Whenever the Court orders the child removed from his parent or guardian, the court shall order the care, custody, control, and conduct of the child to be under the supervision of the social worker who shall arrange suitable placement. (Welf. & Inst. Code, § 361.2(e).)

return to school but that Guardian refused to allow this.<sup>41</sup> Guardian was more persuasive and clear in his testimony that he informed the District that Student adamantly refused to attend school, that he was very reactive and volatile when asked about school and would become enraged. He informed the District that with Child Welfare's knowledge and acquiescence, he was allowing Student into his home, but that Student would wake early and left each morning. Guardian never knew where he went or if he would return. Guardian informed the District that Student's mental health was deteriorating each time he saw him and that he was in need of a speedy intervention to address his emotional crisis.

131. By September 19, 2013, it was clear that Student was in need of behavior services to address his failure to attend school. The District's plan to have Student check in with the office each morning for a two-week period was, in effect, an acknowledgement of Student's need for behavior supports. The District had no data in support of its belief that Student's non-attendance was nothing more than willful truancy as opposed to a mental health, and disability-related issue, particularly in light of his prior assessments and diagnoses. Student had, at the time of hearing, attended less than two weeks of his sophomore year. Therefore, the District's failure to offer Student behavior services including a behavior support plan targeting school attendance, denied Student a FAPE.

132. To the extent Student contends the District was required to provide him behavior supports and services or a behavior plan to address his failure to pay attention to his interpreters in class, and attend to his academics, he did not prove this claim. During the few days Student attended McKinleyville High, his interpreters reported that he was watching them approximately 50 percent of the time, thereby missing a large portion of instructional time. However, the District appropriately identified attention as a possible area of need and was in the process of assessing Student pursuant to the September 3, 2013 assessment plan. The District was entitled to await the results of its pending assessment.

#### *Educationally Related Mental Health Services*

133. Student established that the District's limited offer of three 30-minute sessions of counseling during his first month, to support his transition and integration into a public high school setting and to increase his self-advocacy, denied him a FAPE. The offer did not include weekly counseling, nor was it targeted to address his areas of need including

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<sup>41</sup> Ms. Susavilla has worked at McKinleyville High since 1995, starting as a math teacher, then as the international baccalaureate coordinator, next as dean of students, and since 2010, has served as the assistant principal. She earned her undergraduate degree in math education from Humboldt State University in 1992 as well as her master's degree in education in 2006. She holds a single subject and multiple subjects teaching credentials as well as an administrative services credential. Although she has attended close to 600 IEP team meetings over her career, aside from Student, none of the meetings were for students who are deaf.

depression, anxiety, and disability awareness and advocacy, which Dr. Stoll established were requirements in order for Student to receive educational benefit.

134. To the extent Student contended that the District failed to provide mental health services in accord with his August 12, 2013 IEP, he did not prove this contention. During the nine and one half days that Student attended McKinleyville High, Ms. Gordon conducted two counseling sessions with Student. Based upon his non-attendance, Ms. Gordon was not able to provide the remaining counseling session pursuant to his IEP.

#### *Speech and Language and Social Skills Services*

135. Given its participation in the County convened IEP team meetings for Student, the District was aware of Student's need for speech and language services including social skills services from at least April 2013, yet it failed to offer these. Factual Findings 84-85 regarding Student's need for these services, are incorporated herein. Student established that the District's failure to offer any speech and language services, including social skills services, resulted in a denial of a FAPE. Dr. Stika's testimony established that Student required intensive speech and language therapy and at least twice a week and pragmatic instruction through individual and group sessions. Although the District was in the process of assessing Student to better understand his communication needs, Student established his current need for such services. The District was not entitled to await the results of its own evaluation prior to offering required communication services. Further, due to Student's non-attendance, the District had not completed this assessment by the time of hearing.

#### *Deaf and Hard of Hearing Services*

136. At the August 2013 IEP team meeting, the District offered 60 minutes per week of direct ASL instruction with the deaf and hard of hearing teacher, as well as 15-30 minutes a week of on-site consultation with Student's teachers, and an additional 90 minutes per month of collaboration with staff on technology and classroom suggestions. There was no evidence that this level of service was insufficient. Student did not prove that the District failed to offer adequate deaf and hard of hearing services.

137. Ms. Hernandez provided deaf and hard of hearing consultation to Student's teachers at McKinleyville High at the start of the 2013-2014 school year pursuant to his August 2013 IEP. As determined in Factual Finding 88, she possessed the proper authorization to provide such services. She reviewed with Student's teachers deaf education, his individual needs, and how to best work with an interpreter. Ms. Hernandez was responsible for providing Student 60 minutes each week of direct ASL instruction. She met with Student at school at least seven of the nine and one half days he attended McKinleyville High. She introduced him to his interpreter, showed him around and ensured he was effectively transitioning into high school. There was no evidence whether she did or did not provide the 60 minutes of ASL instruction during the two weeks he attended. Therefore, Student did not meet his burden of proof that the District failed to implement this service.

### *Extended School Year*

138. Consistent with Student's prior IEP's, the box "No" was checked next to extended school years services on his August 12, 2013 IEP. That Student had academic deficits, despite his average intelligence, did not prove that he required extended school year services. Student did not establish that he was likely to suffer undo regression with limited recoupment capacity such that the failure to offer services over the summer would result in a denial of a FAPE.

### *Need for Residential Placement, 2013-2014 School Year*

139. Due to its participation in the monthly County-convened IEP team meetings for Student from March through June 2013, the District was on notice of Student's needs for a residential treatment center during the 2012-2013 school year as detailed above. The evidence of his need for such a placement continued to grow. By the time of the September 19, 2013 IEP team meeting, the District additionally knew that Student was struggling with school attendance and learned more details of his emerging mental health issues including his growing paranoia. By the time of hearing, the District was aware of Student's possible psychotic break and repeated involuntary psychiatric holds.<sup>42</sup> Student's need for a residential treatment center became even more apparent by October 2013.

140. During the few days Student attended school, Student told Ms. Hernandez that he was "really depressed" and she reported this to Ms. Gordon. Near his last day of attendance, he shared with Ms. Hernandez that he did not see the point of continuing to attend school if his Guardian and Ms. Maldonado continued to believe he needed to be locked up. However, at hearing Ms. Hernandez held to her unsupported opinion that Student's depression had no impact on his school attendance.

141. The District advanced several unsubstantiated claims in its defense, blaming Guardian for Student's lack of school attendance and withholding information about his whereabouts. These claims were not valid because Guardian was no longer the custodial parent. Guardian was instrumental in ensuring Student's attendance during the time Student was on an extended visit with him, and Guardian kept the District apprised of Student's status to the extent he knew of his whereabouts. For instance, on October 17, 2013, Guardian reported that Student was at home, and had been off and on the prior week. LEA witnesses testified that this proved they caught Guardian in a lie, as he had informed the school the week prior that Student remained AWOL. This argument was not persuasive because Student came and went unpredictably. Guardian focused on obtaining necessary mental health interventions in order to save his grandson's life; the District's misplaced focus

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<sup>42</sup> Under Welfare and Institutions Code, section 5150, police and other designated professionals, may, upon probable cause, place an individual who, as a result of a mental disorder, is a danger to himself or others, or who is gravely disabled, in an approved health care facility for treatment and evaluation for up to 72 hours.

on why Guardian did not ask for help to get Student to school, and where Student was and when, demonstrated a minimization of Student's needs and a lack of understanding of the severity of his mental decline.

142. The District also theorized, but did not prove, that Ms. Maldonado was coaching Guardian to seek a residential placement for Student and to keep Student from attending school so the District could not prove he was receiving educational benefit. The LEA's conspiracy theory that the request for residential placement was driven by Child Welfare and the Guardian clouded their judgment and kept them from seriously considering Student's educational need for a residential treatment center.

#### *Least Restrictive Environment*

143. The District contends that its offer of placement at Student's local high school with services as specified in the August 12, 2013, and September 3 and 19, 2013 IEP's, constituted an offer of FAPE in the least restrictive environment. In support of its position, the District pointed to Student's successful attendance for three weeks of summer school at Von Humboldt while residing with Guardian. However, Probation mandated his attendance.<sup>43</sup> Additionally, McKinleyville High teachers reported that Student was appropriately placed "academically" and they had no reason to believe they could not work with him at his local high school. However, Student only attended a total of nine and a half non-consecutive school days, so LEA witness testimony that Student received educational benefit in such a short period of time was not persuasive, was not supported by any evidence that he made progress towards his IEP goals, and was contradicted by the fact that Student was only watching his interpreters 50 percent of the time, and therefore missing critical instructional time. Further, the District had mischaracterized Student's needs as solely academic and failed to develop goals in all areas of need including mental health and behavior. Student is manifestly deriving neither academic nor non-academic benefits from McKinleyville High, a placement from which he has been chronically truant due to his unmet needs discussed herein.

#### *Evolving Mental Health Needs, the September 19, 2013 IEP Team Meeting*

144. In response to Guardian's September 10, 2013 written request for an emergency IEP team meeting to address Student's need for residential treatment, the District convened a team meeting on September 19, 2013. During the meeting, Guardian reported that Student's mental state had rapidly deteriorated. Student told Guardian he heard voices when he was under the influence of drugs, and Guardian shared his concern that this was the beginning of a paranoid schizophrenic state. Rather than discuss an offer of mental health services, Ms. Susavilla asked Guardian if he had arranged for Student to be treated. Guardian reported Student was tense, nervous, and irritable with a flashing temper and

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<sup>43</sup> According to the June 4, 2013 IEP team notes, Probation mandated Student to attend summer school pursuant to the terms of his transition plan.

increasingly angry outbursts and that his mental health issues precluded him from participating in his educational program.

145. Although the District convened this IEP team meeting to discuss Guardian's request for residential placement, the team never discussed residential placement. Ms. Susavilla reported that Student's behavior was not impeding his learning or that of others, so he was appropriately placed. However, the District indicated it would re-address Student's placement needs once it completed the outstanding assessments in the areas of speech and language, assistive technology, and attention and memory. The District continued the 30-day IEP team meeting that was set for September 23, 2013, to October 7, 2013.

146. By September 26, 2013, Child Welfare placed Student at Jaz Kids, Inc. He remained in placement for less than five hours. On October 1, 2013, Ms. Susavilla wrote to Guardian informing him that there was no need to hold an IEP team meeting unless Student returned to school and that his continued non-attendance prevented the District from completing its assessments. She cancelled both the 30-day IEP team meeting and the IEP team meeting calendared to review the results of the pending assessments. However, if the District believed the assessments were critical to a determination of placement, then it had an obligation to go to Student to complete the assessments. Otherwise it had a duty to convene an IEP team to address Student's need for residential placement without the assessment results and to review and revise his IEP in light of his changing circumstances and non-attendance.

*5150 Holds in October 2013*

147. On October 1, 2013, Student was found in an alley, unconscious and under the influence. He was released to Jaz Kids but left placement the next morning. On October 3, 2013, Student was placed on his first psychiatric hold and taken to Sempervirens Psychiatric Health Facility. He returned to Jaz Kids on October 5, 2013, but left within minutes. Ms. Hanrahan-Gee reported that she observed an increase in Student's paranoia from September 26, 2013, through her last contact with him on October 5, 2013. She is fluent in ASL and therefore able to communicate directly with Student. She testified persuasively that Student had lost touch with reality, and displayed disjointed thinking and communication such as talking about needing to hijack the power plant so that no one could hear his thoughts.

148. Guardian testified that on or about October 11, 2013, Student's pediatrician, in consultation with a colleague at Sempervirens, devised a plan to place Student on a 5150 hold, and keep him hospitalized long enough to assess him for a Lanterman-Petris-Short (LPS) conservatorship and have him declared gravely disabled.<sup>44</sup> Student was placed on a 5150 hold later that day, but the plan for a hold and assessment did not materialize. Student was released the next morning and found his way back home. He ended up spending the

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<sup>44</sup> The LPS Act was enacted in 1967 and established the procedures to be utilized for an involuntary commitment to a mental health institution. (Welf. & Inst. Code, § 5000 et seq.).

nights at Guardian's home from October 13 through 24, 2013, but left each morning. Guardian persuasively established that during this time he saw the depths of Student's disturbance, his loneliness and isolation, and described him as "completely lost."

149. During this 10 day period, Guardian observed Student display erratic behavior and a quick and violent temper. Most concerning, Student evinced increasing paranoia. He talked of the cars driving by the house being part of the Russian mafia; he destroyed the house deaf video relay system, ripping it from the wall and disconnecting the router while proclaiming that the CIA was spying on the deaf through this technology; and he proclaimed his belief that he never had meningitis and that it was all a conspiracy to insert implants to steal his hearing and control him.<sup>45</sup>

150. The incidents leading to Student's last two involuntary holds occurred at Guardian's home. On October 23, 2013, Police placed Student on a 5150 hold when Student took a knife and attacked the bookcase in his room. Medical professionals secured a bed for Student at St. Mary's in San Francisco. However, Student bolted from the ambulance and was once again released without explanation or a plan. On October 30, 2013, Student held his grandmother down on the bed while he used a knife to again destroy the bookcase above his bed. Later that night Guardian saw Student flash to anger and charge at his grandmother with a kitchen stool, whereupon Guardian called the police who once again placed Student on an involuntary hold. This time, Student was transferred to the psychiatric unit at St. Mary's and remained there as of the last day of hearing. During October 2013, law enforcement placed Student on four separate 5150 holds. Ms. Susavilla's steadfast conviction that Student's pattern of involuntary psychiatric holds did not constitute grounds to convene an IEP team meeting and was not a special education issue detracted from her credibility in light of the more persuasive testimony of Student's experts.

151. Dr. Willis and his clinical team at the National Deaf Academy reviewed a comprehensive packet of Student's educational history and assessments. Dr. Willis was persuasive that Student's profile of continued psychological dysfunction and instability indicated that he could not benefit from a traditional educational program. Dr. Willis provided his professional opinion that, given Student's failure to adjust to the School for the Deaf, or to benefit from wrap-around services, and his continued runaway status which placed him in harmful environments, Student requires more specialized treatment and placement that can only be provided in a residential facility. His opinion was credited as it was supported by facts and reason. Dr. Willis persuasively established that acting out behaviors such as those displayed by Student are often the only way for a young person to express affective distress. Although he did not evaluate Student, Dr. Willis' testimony provided context to Student's mental decline and was accorded great weight.

152. Guardian also established that, in his observations, Student acted out because he did not have the tools to successfully navigate in a hearing world and lacked the self-

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<sup>45</sup> Student had three unsuccessful surgeries for cochlear implants close in time to his hearing loss.

confidence that he could ever conform to societal expectations. His testimony that Student required a residential treatment center to meet his needs was persuasive in light of his knowledge of Student and commitment to him.

153. As found above, Dr. Stika also provided compelling testimony that, based on her assessment and Student's performance since that time, Student requires a residential placement in order to access his education.

154. The District decided that Student's changing circumstances, declining mental health, and non-attendance were unrelated to the learning process and therefore, if Student needed a residential treatment placement, it was not the District's responsibility. The evidence established otherwise. Student's behaviors are related to his disabilities which include deficits in social communication, which further impede his ability to verbalize his distress. The evidence established that Student's deafness, his orientation toward his deafness, his communication challenges in terms of expressive and receptive language skills as well as social interaction, his depression and mental health needs, his compulsive and self-destructive behaviors, his psychotic manifestations, and his continual runaway behaviors and total non-attendance at school, are all inextricably intertwined with his ability to access his educational program.

155. In summary, both LEA's were on notice of Student's need for a residential placement during the 2012-2013 school year. Student's need for residential placement continued into the 2013-2014 school year. Student's resurfacing non-attendance was a manifestation of his disability-related needs, and his mental health functioning declined dramatically. His unmet mental health needs are intimately related to his disability, adversely impact his education, are inseparable from the learning process, and can only be met in a residential setting. Student met his burden of proof that the District denied him a FAPE by failing to offer residential placement.

### *Remedies*

156. In remedying a denial of FAPE, the student is entitled to relief that is appropriate in light of the purposes of the IDEA, and ALJ's have broad latitude to fashion appropriate equitable remedies. School districts may be ordered to provide compensatory education or additional services or assessments to a student who has been denied a FAPE. An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs.

157. This Decision finds that Student requires a specialized residential treatment center. Although the remedy of a residential treatment center reasonably reduces the award of compensatory services, it does not completely account for the LEA's violations which denied Student a FAPE for his 2012-2013, and 2013-2014 school years, and compensatory services are therefore also awarded. In the absence of any evidence of what Student required to compensate for these denials, the ALJ calculated the hours of compensatory services based in part on Dr. Stika's assessment of his service needs.

### *County*

158. To remedy its failure to timely assess Student, the County will be required to fund independent educational assessments of Student by an assessor who is trained to assess deaf students in the areas of: (1) mental health and social-emotional functioning, including attention; and (2) communication including ASL fluency, speech and language, related assistive technology and pragmatics. If the assessors chosen by Student are not fluent in ASL, the County shall fund the provision of a certified ASL interpreter for the assessment. The County shall fund the presence of the assessors at IEP team meetings convened to review the results.

159. To remedy its violations of failing to offer a residential treatment placement from at least April through June 2013, predetermining Student's placement for the 2012-2013 school year, failing to convene a 30-day IEP team meeting, failing to develop goals in the areas of mental health and communication including pragmatics, failing to offer speech and language services from April 2013, and failing to offer mental health services from February through May 2013, the County will be required to provide Student a total of 32 hours of mental health counseling (calculated at two hours per week for a period of four months) by a clinician of Student's choice and the provision of a certified ASL interpreter for the sessions if Student's chosen clinician is not fluent in ASL; a total of 16 hours of social skills instruction (calculated at two hours per week for a period of two months) by a qualified provider chosen by Student and the provision of an ASL interpreter if Student's provider is not fluent in ASL; a total of 56 hours of direct instruction in ASL (calculated as two hours per week for the seven months Student's program was predetermined, December 2012 through June 2013) by a credentialed deaf and hard of hearing teacher fluent in ASL. Given Student's prospective placement in a residential treatment center, Student will be allowed to access these services until he turns 22 years of age or graduates with a high school diploma, whichever occurs first. The County shall bear all transportation costs associated with these compensatory services.

### *District*

160. To remedy its violations of failing to offer Student an interim IEP upon his transfer to the District from October to November 2012; its failure to develop goals for the 2013-2014 school year in the area of mental health, behavior, specifically school attendance, and pragmatics; failing to offer adequate mental health services and any speech and language services from August 26, 2013, through the date of this Decision; and failing to offer any behavior support services from October 2013, through the date of this Decision, the District will be required to fund an IEE in the area of functional behavior by an assessor chosen by Student and who is experienced in working with the deaf, and the provision of a certified ASL interpreter for the assessment if the assessor is not fluent in ASL, and to fund the presence of the assessor at an IEP team meeting convened to review the results. The District will additionally be required to provide 32 hours of mental health counseling services (calculated as two hours per week for the months of September through December 2013) by

a clinician of Student's choice and the provision of a certified ASL interpreter for the sessions if Student's chosen clinician is not fluent in ASL; a total of 32 hours of social skills instruction (calculated at two hours per week for a period of four months) by a qualified provider chosen by Student and the provision of an ASL interpreter if Student's provider is not fluent in ASL. Student will be allowed to access these services until he turns 22 years of age or graduates with a high school diploma, whichever occurs first. The District shall bear transportation costs associated with these compensatory services.

161. To remedy its failure to offer a residential treatment center placement, the District will be required to locate an appropriate residential treatment center and offer and fund this as an educational placement for Student within 45 days of this Decision, as specified in full below.

162. Student is under the jurisdiction of the Juvenile Court which has ordered Student's care, custody and control to be under the supervision of Child Welfare which is charged with arranging suitable placement. The Juvenile Court makes all orders regarding Student's treatment and placement needs. The Juvenile Court may join any agency with a legal duty to provide services to a dependent child and order that agency to appear before the Juvenile Court. Therefore, the County and the District will be required to petition the Juvenile Court of Humboldt County to be joined as related agencies in Student's juvenile court proceedings and explain the services they have been directed to provide to Student and the residential treatment placement options available to Student, consistent with this Decision.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, 58 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of proof at the due process hearing. In this case, Student bears the burden of proof as to all issues.

### *Determination of Responsible LEA*

2. Special education due process hearing procedures extend to students who are wards or dependents of the court, to their parents or guardians, and to the public agencies involved in any decisions regarding the students. (20 U.S.C. §§ 1401(36) [definition of ward of state], 1415(a)&(b); 34 C.F.R. § 300.519; Ed. Code, § 56501, subd. (a).) IDEA due process hearing requests brought by a student against a public agency properly include determinations of the public agency responsible for providing special education. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525.)

3. In California, for the most part, the determination of which agency is responsible to provide education to a particular child is controlled by residency as set forth in

Education Code sections 48200 and 48204. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57.) Barring exceptions, children between the ages of six and 18 must attend school in the district “in which the residency of either the parent or legal guardian is located.” (Ed. Code, §§ 48200, 56028 [definition of parent].) Residency in a particular LEA is also established if a student is placed in a licensed children’s institution, or a foster home, or a family home pursuant to a commitment or placement under the Welfare and Institutions Code, or is residing in a state hospital. (Ed. Code, § 48204, subs. (a)(1) & (6).) Special education students who are placed in a psychiatric hospital are the educational responsibility of the LEA in which the hospital is located. (Ed. Code, § 56167, subd. (a).)

4. Under state law, the county office of education is responsible for the provision of a FAPE to qualified students detained in the juvenile hall within that county, regardless of the residence of the parents or legal guardians. (Ed. Code, §§ 48645.2, 56150.) The California Supreme Court recently held that the residence of the parent determines which LEA is responsible for providing special education and related services to a qualifying individual between the ages of 18 and 21 who is incarcerated in a county jail. (*Los Angeles Unified School District v. Garcia* (Dec. 12, 2013, S199639) \_\_ Cal. 4th \_\_ (*Garcia*).) The *Garcia* case is not controlling here as Student is under the age of 18 years and has not been incarcerated in jail. The Supreme Court reaffirmed the duty of the county office of education, as the single LEA designated by the Legislature, to provide a FAPE to qualified students placed in a juvenile detention facility pursuant to Education Code sections 48645.2 and 56150. (*Id.* at pp. 16-17.)

5. When a residential placement is recommended by an IEP team, the LEA, such as a county office of education, is financially responsible for the residential placement. (Cal. Code Regs., tit. 2, § 60010, subd. (k) [including county offices of education within the definition of local educational agency].) Previously under the Code of Regulations, the LEA was only responsible for the special education and non-mental health related services for a student at a residential treatment center (former Cal. Code Regs., tit.2, § 60110, subd. (b)(2).). The changes to the Government Code, discussed below in Legal Conclusion 44, transferred responsibility for all aspects of an residential treatment center placement to the LEA’s.

### *Assessments*

6. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); See 34 C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all areas related to the suspected disability].) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment shall also be conducted if the LEA determines that the educational or related services needs including functional

performance of the student warrant a reassessment or if the parent or teacher requests reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).)

7. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) The district must deliver an assessment plan to a parent within 15 days of an assessment request not counting days between the regular school sessions. (Ed. Code, §§ 56321, subd. (a), 56043, subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent. (Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a), 56344, subd. (a).) In California, the term “assessment” has the same meaning as the term “evaluation” in the IDEA. (Ed. Code, § 56302.5).

8. Assessments must be conducted by individuals who are both knowledgeable of the student’s disability and competent to perform the assessment. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c); Ed. Code §§ 56320, subd. (b)(3) & (g), 56322.) The legislature has determined that it is “essential” that all special education personnel including teachers, psychologists, assessors and administrators working with hard of hearing and deaf students understand the unique nature of deafness and are specifically trained to work with students with hearing loss and that special education teachers are proficient in the student’s primary language mode. (Ed. Code, §§ 56000, subd. (b)(3), 59001.2, subd. (b).)

#### *Provision of FAPE*

9. A student with a disability has the right to a FAPE under the IDEA consisting of special education and related services. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, subd. (a), 56026.) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student’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, subd. (a).) A child’s unique educational needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 (*Seattle*), citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, the educational needs include functional performance. (Ed. Code § 56345, subd. (a)(1).)

10. There are two parts to the legal analysis of a school district’s compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 at pp. 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*)). Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child’s unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

## *Procedural Violations*

11. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*.)

*Issue 1: Did the County and the District fail to adequately assess Student during the 2012-2013 school year in the following areas: (a) mental health and social/emotional functioning; (b) speech and language including ASL, expressive-receptive communication, and pragmatics; (c) assistive technology; (d) intellectual functioning; (e) academics; and (f) attention?*

12. As determined in Factual Findings 5, 8-10 and 12, and Legal Conclusions 2, 6-7 and 19-21, the District was on notice of Student's transfer into the District by the beginning of October 2012, and therefore was the responsible LEA for Student's educational programming for a 30 day period until his re-incarceration at Juvenile Hall on November 5, 2012. However, Student did not establish that the District had a duty to assess him in this brief period of time.

13. As established by Factual Findings 5, 7, and 10, and Legal Conclusion 4, beginning on November 5, 2012, the County was the responsible LEA through the remainder of the 2012-2013 school year. Based on Factual Findings 11-19 and 37, and Legal Conclusions 6-8 and 10-11, the County was on notice of Student's dramatic decline in functioning including disturbed behaviors, school refusal and new mental health manifestations, such that it had a duty to reassess Student in the area of social emotional functioning and mental health upon his detention at the Juvenile Hall in November 2012. The County failed to timely assess Student. As determined in Factual Findings 20-21, the County partly corrected this violation in February 2013, when it agreed to conduct a social-emotional assessment to determine whether Student was eligible for special education services under the category of emotional disturbance. Dr. Stoll's assessment determined that Student had mental health needs that required counseling services, and hence, demonstrated that the County's violation of not timely assessing Student, denied him a FAPE from November 2012 until February 2013.

14. In February 2013, the County received Dr. Stika's evaluation of Student and was placed on notice of her findings that he had significant communication deficits. In addition, the County's social-emotional assessment found that Student's communication needs, including pragmatics, assistive technology, and attention were additional areas of suspected need warranting further assessment. As determined in Factual Finding 22-33 and

Legal Conclusions 6-11, the County's failure to conduct these assessments substantially impeded Guardian's participatory rights as he was without full assessment data. Further Dr. Stika's assessment determined that Student had communication needs and attention deficits such that he required related goals and services. Therefore, the County's violation of not assessing in the areas of communication including pragmatics, assistive technology, and attention denied Student a FAPE beginning April 2013.

*Issue 2(c): Did the County procedurally deny Student a FAPE during the 2012-2013 school year by failing to provide an assessment plan within 15 days of Guardian's June 4, 2013 request for an assistive technology assessment?*

15. The County committed a procedural violation when it failed to provide Guardian with an assessment plan within 15 days of his June 4, 2013 request as established in Factual Findings 38, and 54-55, and Legal Conclusions 7 and 10-11. This violation however, did not result in a substantive denial of FAPE as Student left the Juvenile Hall prior to the expiration of the 60-day time frame in which the County would have been required to complete an assistive technology assessment.

#### *Requirements of an IEP*

16. At the beginning of each school year, each LEA must have an IEP in effect for each child with a disability within its jurisdiction. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, and an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The IEP consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A)(i); Ed. Code, §§ 56032, 56345.) The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.)

17. Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (20 U.S.C. §§ 1401 (14), 1414 (d)(4)(A); Ed. Code, §§ 56032, 56340, 56341, subd. (a); *Honig v. Doe, supra*, 484 U.S. 305, 311.) An IEP team is required to include: one or both of the student's parents or their representative along with other required members. (20 U.S.C. §1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

18. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d

1141, 1149 (*Adams*.) “An IEP is a snapshot, not a retrospective.” (*Ibid.*, citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041(*Fuhrmann*).) Under this “snapshot rule,” whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Ibid.*)

### *Interim IEP Requirements*

19. If a child with a disability transfers between school districts within the same academic year, enrolls in a new school, and has an IEP in effect, then the receiving LEA shall provide services comparable to those described in the previously approved IEP, in consultation with the parents until such time as the LEA adopts the previously approved IEP or develops, adopts, and implements a new IEP that is consistent with federal and state law. (20 U.S.C., §1414(d)(2)(C)(i)(I); 34 C.F.R. § 300.323(e).)

20. Education Code section 56325, subdivision (a)(1) sets forth similar requirements for the transfer of a special education student with an IEP from one district to another in a different SELPA, within the same academic year.<sup>46</sup> During the first 30 days the transferring student is in the transferee district, that district must provide the student a FAPE, including services comparable to those described in his previously approved IEP, in consultation with the parent. Within 30 days, the receiving district must adopt the previously approved IEP, or develop, adopt, and implement a new IEP that is consistent with federal and state law. For a student who transfers between districts located within the same SELPA in which he was last enrolled, within the same academic year, the new district must continue to provide services comparable to those in the prior district’s approved IEP unless the parent and district agree to develop a new IEP. For these intra-SELPA transfers, there is no 30-day time requirement. (Ed. Code, § 56325, subd. (a)(2).)

21. A district that receives an in-state transfer student is not entitled to develop his comparable services and goals unilaterally or informally. The IDEA regulations requiring an IEP team meeting to develop an IEP and defining who must attend apply equally to determining a transfer student's interim goals and services. However, a parent and a public agency may agree not to conduct an IEP team meeting and may develop a written document to amend or modify the child's current IEP to address temporary IEP goals for comparable services consistent with the requirements of the federal regulations. The written amendment would be in effect only until a new IEP becomes effective. (20 U.S.C. §1414(d)(3)(f); 34 CFR § 300.324(a)(4); *Letter to Fitch* 59 IDELR 15 (OSEP 2012).)

*Issue 2(a): Did the County procedurally deny Student a FAPE during the 2012-2013 school year by failing to hold an IEP team meeting within 30 days of transfer to a new educational placement?*

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<sup>46</sup> For transfers between SELPA’s, state law is more inclusive in that it does not require that the student enroll in a new school.

22. Student's transfer in September 2012, from Bridgman within the San Diego Unified School District to the Children's Center in Eureka, was a transfer back into the educational boundaries of the District. However, Student never enrolled in the Humboldt-Del Norte SELPA, and the District never developed an IEP for Student, so the inter-SELPA transfer provisions with their 30-day timeline apply as to the County. Therefore, as determined in Factual Findings 38-44 and Legal Conclusions 10-11, 16-17 and 19-21, the County was required to convene an IEP team meeting within 30 days of Student's transfer from the District's jurisdiction to Juvenile Hall on November 5, 2012, and failed to do so. This violation resulted in a denial of FAPE by causing delay in reviewing and revising Student's IEP in light of significantly changed circumstances, which impeded Student's right to a FAPE, and denied Guardian his participatory rights.

### *Parent Participation in the IEP Process*

23. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304.) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting, and is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.322(a), 300.501(c); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkleman v. Parma City School District* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*)). Violations that impede parental participatory rights "undermine the very essence of the IDEA." (*Id.* at 892.)

24. Under these guidelines, an educational agency must permit a student's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*); *Target Range, supra*, 960 F.2d at p. 1485; *Fuhrman, supra*, 993 F.2d at p. 1036.) A school district cannot independently develop an IEP without parental input and then present the IEP to the parent for ratification. (*Vashon Island, supra*, 337 F.3d 1115, 1131; *Target Range, supra*, 960 F.2d 1479, 1484.) A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J., supra*, 267 F.3d at p. 891.)

### *Predetermination*

25. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.)

26. School officials may permissibly form opinions prior to IEP meetings. However, if the educational agency goes beyond forming opinions and, instead, becomes “impermissibly and deeply wedded to a single course of action,” this amounts to a pre-determination of placement. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio 2013) 2013 WL 209478, \*7.).

### *Continuum of Program Options*

27. Education Code section 56360 requires that the SELPA must ensure that a continuum of alternative programs is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) This continuum of program options must include, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (34 C.F.R. § 300.115(b)(1); Ed. Code, § 56361.)

*Issue 2(b): Did the County procedurally deny Student a FAPE during the 2012-2013 school year by predetermining his placement and refusing to consider a continuum of placement options?*

28. The County predetermined that Student did not require a residential placement when he re-entered Juvenile Hall in November 2012, and at the time of his annual IEP team meeting in March 2013, based on Factual Findings 45-53 and Legal Conclusions 10-11, 17, and 23-27. The County focused exclusively on transitioning Student from Juvenile Hall to a traditional high school campus and refused to convene an IEP team meeting for the purpose of considering residential placement despite his documented mental health needs, behavioral issues and the assessment data from both experts. The County failed to discuss residential placement at the April, May and June 2013 IEP team meetings. The County was committed to a single course of action, without considering Guardian’s input, which constituted predetermination and a failure to consider a full continuum of appropriate placement options given the unique facts in this case.

### *Educational Records*

29. Parents have a right to review and inspect their child's education records in relation to their child's special education identification, assessment, educational placement and receipt of a FAPE. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, § 56504.) The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3 & 300.611(b); Ed. Code, § 56504.) The United States Supreme Court defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." Records are maintained when the agency keeps the records in one place with a single record of access. (*Owasso Indep. Sch. Dist., No. I-011 v. Falvo*, (2002) 534 U.S. 426, 433-34 [122 S.Ct. 934, 151 L.Ed.2d 896].)

30. An LEA must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the district under the IDEA. The district must comply with the request without unnecessary delay and before any meeting regarding an IEP, any due process hearing, or resolution session, and in no case more than 45 days after the request has been made. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.613 (a).) Under California law, the parent shall have the right and opportunity to examine all school records of his or her child and to receive copies within five business days after the request is made by the parent, either orally or in writing. (Ed. Code, §§ 56501, subd. (b)(3), 56504.)

*Issue 2(d): Did the County procedurally deny Student a FAPE during the 2012-2013 school year by failing to maintain his education records?*

31. Pursuant to Factual Finding 56-63 and Legal Conclusions 10-11 and 29-30, the County did not fail to maintain Student's original education records. Rather, it was prevented from taking possession of these records until the end of August 2013, because of the actions or inaction of Child Welfare. Even if the County had requested Student's education records from the prior LEA sooner than it did in February 2013, the evidence showed that as of December 2012, Student's original records were in the possession of Bridgman, which gave them to Dr. Stika, who gave them to Ms. Maldonado, Student's county social worker. The County provided Student a copy of the education records it had and was maintaining at the time of his request. Student did not meet his burden of proof.

### *Educational Benefit*

32. In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The IEP must be "reasonably calculated to enable the child to receive educational benefit." (*Rowley, supra*, 458 U.S. at p. 207; *Adams, supra*, 195 F.3d at p.1149; *Fresno, supra*, 626 F.3d at p. 439.) The IDEA does not require school districts to provide special

education students the best education available or to provide instruction designed to maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p.198.) It does require school districts to provide a "basic floor of opportunity" that consists of access to specialized educational benefit to the student. (*Id.*, at p. 201; *J.L. v. Mercer Island School Dist.* (9<sup>th</sup> Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*)). Although sometimes described in Ninth Circuit Court of Appeals (Ninth Circuit) cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

33. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 131; *E.S. v. Independent School District, No. 196* (8th Cir. 1998) 135 F.3d 566, 569.) However, an LEA may not discharge its duty under the IDEA by providing a program that "produces some minimal academic advancement no matter how trivial." (*Amanda J., supra*, 267 F.3d at p. 890.)

34. To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) "[T]he correct standard for measuring educational benefit under the IDEA is not merely whether the placement is 'reasonably calculated to provide the child with educational benefits,' but rather, whether the child makes progress toward the goals set forth in her IEP." (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*)).

### Goals

35. Federal and state special education laws require generally that the IEP developed for a student with special needs contain the present levels of the child's educational performance and a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) The IEP must show a direct relationship between the present levels, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345, subd. (a).)

*Issue 3(a): Did the County and the District deny Student a FAPE by failing to develop and offer measureable goals in all areas of need?*

*The 2012-2013 School Year*

*The District's Responsibility to Offer FAPE*

36. Student transferred into the District from San Diego Unified School District on September 24, 2012. As determined in Factual Finding 9, the District was aware of Student's transfer by the beginning of October 2012. Therefore, in accord with Legal Conclusions 3, 9-11, 16 and 21, and based on Factual Findings 38-40 and 64, the District was required to immediately offer Student an IEP, in consultation with Guardian, with services comparable to his operative IEP from April 2012. Student's residency and the inter-district transfer provisions triggered this duty. There is no requirement under state law that Student enroll in the District. The District's failure to offer Student an interim IEP denied him a FAPE from October 2012 until November 5, 2012.

37. The County's failure to develop required goals in all areas of need including mental health and communication denied Student a FAPE as established by Factual Findings 65-72 and Legal Conclusions 9-10, 16, 18, and 32-35. By April 2013, the County knew of Student's needs in the areas of depression, anxiety, disability awareness and advocacy. Without goals targeting these specific identified areas of need, the focus of counseling remained limited to self-advocacy and to supporting Student's transition onto a comprehensive high school campus, rather than treating his educationally related mental health needs. Based on Student's social isolation at Juvenile Hall, and testing data from Dr. Stika's and Dr. Stoll's evaluations which identified communication, including pragmatics, as areas of need, the County was required to develop goals in these additional areas by April 2013. Student met his burden of proof on this issue.

*The 2013-2014 School Year*

38. In accord with Factual Findings 118-126 and Legal Conclusions 9-10, 16, 18, and 32-35, the District denied Student a FAPE by failing to develop required goals in the areas of behavior, specifically school attendance, pragmatic language, and mental health. By September 3, 2013, the District determined that Student required reassessments in several areas of need, including attention, speech and language, and assistive technology. Guardian consented to these assessments; however, Student's non-attendance at school resulted in their suspension. Even so, having attended all of Student's 2012-2013 IEP team meetings, the District was on notice since April 2013, that Student required goals in the area of pragmatic language. The District's decision to wait for its own speech and language assessment results denied Student a FAPE.

39. Although school started on August 26, 2013, Student attended less than 10 days of school as of the time of hearing. The District's informal plan to support Student's successful attendance did not relieve it of its duty to develop a behavior goal in this area.

Further, the District was on notice that Student had mental health needs for which he required specific goals based upon his sad and angry affect, his reports of being depressed, the involvement of county mental health, and Dr. Stoll's identification of his need for educationally related mental health services. In the absence of mental health goals, the District's offer of counseling services focused on short term transition issues rather than intensive mental health and disability issues which Dr. Stoll identified as areas of need impacting his education.

### *Related Services*

40. The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); 34 C.F.R. §§ 300.34, 300. 107; Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).) Therapeutic residential placements may be related services that must be provided if they are necessary for the pupil to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

### *Behavior Services*

41. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (e).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

*Issue 3(b)(i): Did the County and the District deny Student a FAPE by failing to offer adequate behavioral services including a behavior intervention plan?*

*2012-2013 School Year*

42. Student did not establish that the County should have provided him specialized behavior services or a support plan while at Von Humboldt as determined in Factual Findings 73-76 and Legal Conclusions 9,10, 16, 18, 32 and 40-41. He was compliant and responded well to the behavior modification program in place at the Juvenile Hall. Student did not prove that he required an individualized behavior support plan or that the County was required to incorporate its step-score system into his IEP. Student attended class and although he was inattentive during class, he responded to redirection within the confines of Juvenile Hall.

*2013-2014 School Year*

43. Pursuant to Factual Findings 73 and 127-132, and Legal Conclusions 9, 10, 16, 18, 32 and 40-41, the District denied Student a FAPE when it failed to offer behavior services to support school attendance. It had a duty to review and revise Student's IEP in light of his non-attendance, a disability-related issue. Student attended the first seven days of school, missed the next two weeks, then attended two and a half days and never returned to school from September 21, 2013, through the time of hearing. The District did not establish that Guardian prevented Student's attendance. Its own plan requiring Student to report to the office each morning was an acknowledgment of Student's need for behavior supports.

*Mental Health Services*

44. Prior to July 1, 2011, mental health services related to a student's education were statutorily provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code. (Gov. Code §7570, et seq., often referred to by its Assembly Bill name, AB 3632.) Significant portions of Chapter 26.5 and related laws, particularly with respect to mental health services were suspended effective July 1, 2011, and repealed by operation of law on January 1, 2012. The obligation to assess and provide related mental health services to special education students was transferred to the LEA's. (See Gov. Code, § 7573.) As of July 1, 2011, the LEA's, including the County and District in the instant case, have the lead responsibility to provide related mental health care services, including residential placement to its qualifying students.

*IEP Implementation*

45. 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.)

*Issue 3(b)(ii) and Issue 3(c): Did the County and District deny Student a FAPE by failing to offer and provide sufficient educationally related mental health services?*

*2012-2013 School Year*

46. Student did not prove that going forward, the May 17, 2013 offer of six mental health counseling sessions from May 28, 2013, through July 5, 2013, denied him a FAPE as determined in Factual Findings 73 and 77-82, and Legal Conclusions 9-10, 16, 18, 32, 40 and 44. Nor did Student prove that the County failed to provide these counseling sessions based upon Factual Finding 83 and Legal Conclusion 45. However, had the County timely assessed Student upon his re-incarceration, it would have determined much sooner, no later than February 2013, that mental health was an area of need for which Student required weekly counseling services. The County's failure to timely offer these services therefore resulted in a denial of FAPE from February through May 2013.

*2013-2014 School Year*

47. The District's offer of three 30-minute sessions of counseling during the first month of school to support Student's transition and integration into a public high school setting and to increase his self-advocacy resulted in a denial of a FAPE as determined in Factual Findings 70, 78, 80, 81, 123-24 and 133, and based upon Legal Conclusions 9-10, 16, 18, 32, 40 and 44. The evidence showed Student required weekly counseling in targeted areas identified by Dr. Stoll, including depression, anxiety and disability issues. However, Student did not prove based upon Legal Conclusion 45, that the District failed to provide the counseling services that were listed in his August 2013 IEP. Pursuant to Factual Findings 124 and 134, Ms. Gordon conducted two counseling sessions with Student during the two weeks he attended school, and Student thereafter did not attend school.

*Issue 3(b)(iii): Did the County and District deny Student a FAPE by failing to offer appropriate speech and language services, including social skill services?*

*2012-2013 School Year*

48. As determined in Factual Findings 71 and 84-85, and pursuant to Legal Conclusions 9-10, 16, 18, 32 and 40, the County's failure to offer speech and language and social skills services denied Student a FAPE. The evidence showed that Student had a communication disorder, including pragmatic deficits, which impeded both his academic and social functioning, yet the County failed to offer any services in this area. Based upon Student's documented history of communication struggles, and Dr. Stika's unrefuted testing data, the County should have identified communication as an area of need requiring the provision of related speech and language services. Dr. Stoll's conclusion that Student did not require such services to receive a FAPE was not supported by any testing data and was

outside his area of expertise. Dr. Stika's assessment established that Student had significant deficits such that he required weekly speech and language services.

*2013-2014 School Year*

49. In failing to offer any speech and language or social skills services, the District denied Student a FAPE as it was aware of his need for such services and was not entitled to await the results of its own evaluation as established by Factual Findings 84-85 and 135, in accord with Legal Conclusions 9-10, 16, 18, 32 and 40. The District was familiar with Student's need for services based upon its attendance at all of his IEP team meetings during the 2012-2013 school year.

*Issue 3(b)(iv) and Issue 3(d): Did the County and District deny Student a FAPE by failing to offer and provide sufficient deaf and hard of hearing services?*

*2012-2013 School Year*

50. Although the County discontinued Student's direct deaf and hard of hearing services in its March 28, 2013 IEP offer, and only afforded him an interpreter for slightly over four hours each school day, Student did not introduce any evidence that he required a specific frequency, duration, or type of deaf and hard of hearing services or ASL instruction such that the County's offer of consultation only was insufficient as established by Factual Findings 86-87 and pursuant to Legal Conclusions 9-10, 16, 18, 32 and 40. Further, Student was making progress on his academic goals. In accord with Factual Finding 88 and Legal Conclusion 45, there was no evidence that the County failed to implement Student's April 2012 and March 2013 IEP's by failing to provide deaf and hard of hearing services. Ms. Hernandez has an authorization through her master's program which allows her to teach deaf students and she provided deaf and hard of hearing services to Student.

*2013-2014 School Year*

51. In its August 2013 IEP, the District offered 60 minutes per week of direct ASL instruction with the deaf and hard of hearing teacher, as well as consultation services. Based upon Legal Conclusion 9-10, 16, 18, 32, 40 and 45, and Factual Findings 136-37, Student failed to meet his burden of proof that this level of service was insufficient such that the District denied him a FAPE or failed to provide these services consistent with his IEP.

*Extended School Year Services*

52. California Code of Regulations, title 5, section 3043, provides that ESY services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Students to whom ESY services must be offered under section 3043:

“ . . . shall have handicaps which are likely to continue indefinitely or for a

prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.”

(See also 34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *N.B. v. Hellgate Elementary School District*, (9th Cir. 2008) 541 F.3d 1202, 1210-1212 [ESY services to be provided if necessary to ensure the provision of FAPE].)

*Issue 3(e): Did the County and the District deny Student a FAPE during the 2012-2013 and 2013-2014 school years by failing to offer any extended school year services?*

53. Pursuant to Factual Findings 89-91 and 138, and Legal Conclusion 52, Student did not meet his burden of proof that he would regress academically, socially, behaviorally, or emotionally and be unable to recoup his losses, such that he required the provision of extended school year services during either the 2012-2013 or 2013-2014 school years.

#### *Least Restrictive Environment*

54. Federal and state laws require LEA's to provide a program in the least restrictive environment to each special education student. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114; Ed. Code, §§ 56033.5, 56040.1.) In order to provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and removal of children with disabilities from the regular education environment occurs only when the nature and the severity of the student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2); Educ. Code, § 56040.1.)

55. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has required four factors to be evaluated: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect [the student] had on the teacher and children in the regular class; and 4) the costs of mainstreaming [the student]. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]. However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.)

### *Consideration of Special Factors*

56. In determining what constitutes an appropriate education to meet the unique needs of a deaf student in the least restrictive environment, the IEP team shall consider the related service and program options that provide the student with an equal opportunity for communication access. The IEP team shall specifically discuss the language and communication needs of the student, including the student's primary language mode and language; the opportunities for direct communications with peers, and the availability of a sufficient number of age, cognitive and language peers of similar abilities; appropriate, direct, and ongoing language access to a special education teacher and other specialists who are proficient in the student's primary language mode and language; and services to ensure communication-accessible academic instructions, school services, and extracurricular activities. (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code § 56345, subds.(d)(1)-(4).)

57. The Legislature finds and declares, "Deafness involves the most basic of human needs – the ability to communicate with others. "...It is essential for the well-being and growth of deaf and hard-of-hearing pupils that educational programs recognize the unique nature of deafness and ensure that all deaf and hard-of-hearing pupils have appropriate, ongoing, and fully accessible educational opportunities." (Ed. Code, §§ 56000.5, subd. (b)(1), 59001.2, subd. (a). This includes the opportunity to directly communicate with a sufficient number of language mode peers. (Ed. Code, § 56000.5, subd. (b)(4).)

### *Residential Placement*

58. A school district must provide a residential placement to a student with a disability, if such a placement is necessary to provide the student with special education and related services. (34 C.F.R. § 300.104.) Generally, the further a residential placement is located from a student's home and community, the more restrictive it is considered to be. (*Todd D. v. Andrews* (11th Cir. 1991) 933 F.2d 1576, 1582.)

59. Cases decided subsequent to *Rowley* have refined the parameters of what constitutes a child's unique needs. A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs, but do not include medical needs. (*Clovis Unified School Dist. v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635 (*Clovis*).) In *Clovis* the parties agreed that the student needed a residential placement, but disputed whether the psychiatric hospital constituted "related services" or a "residential placement" that the district must fund. The Ninth Circuit held that, to determine whether a student's residential placement was an educationally related placement that is the responsibility of the school district, the "analysis must focus on whether [the student's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social or emotional problems that is necessary, quite apart from the learning process." (*Id.* at 643.) The Ninth Circuit identified three possible tests for determining when a school district is responsible for the cost of a residential placement: (1) when the placement

is “supportive” of the child’s education; (2) when medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement primarily aids the student to benefit from special education. The Ninth Circuit determined that the student’s psychiatric hospitalization was for medical rather than for educational reasons and therefore did not satisfy any of the three enumerated standards.

60. The outcome was different in the case of *Seattle, supra*, 82 F.3d 1493. There, the school district found the student eligible for special education under the category of serious emotional disturbance after the district had expelled her for assaultive behaviors and after she had been hospitalized at a psychiatric facility. The district offered a specialized self-contained behavioral classroom with counseling services. Student’s parents disagreed and obtained an independent educational evaluation that recommended placement of student in a residential treatment center. The Ninth Circuit affirmed decisions by an ALJ and the United States District Court in favor of the student. The District Court found that an out-of-state residential treatment center was the least restrictive environment for the student, who did not derive any meaningful educational benefit from a district school, despite obtaining appropriate scores on standardized tests. The Ninth Circuit reiterated that “unique educational benefit” means more than academic achievement. (*Id.* at p. 1500.)

61. In *San Diego, supra*, the Ninth Circuit found that a residential treatment center was necessary and appropriate for a teenager diagnosed with intermittent explosive disorder because she had not achieved the mental health treatment goals in her IEP. Psychological, behavioral and emotional goals are properly addressed through an IEP when they “affect academic progress, school behavior and socialization.” (*San Diego, supra*, 93 F.3d at p. 1467.). In determining that student required a residential placement, the Ninth Circuit applied all three tests announced in *Clovis, supra*. It found that the placement was “supportive” of student’s education as it provided the necessary structure and discipline for her to achieve her goals; student’s challenges included substantial educational problems that are related or intertwined to her non-educational problems; and student’s primary problems are educational such that the primary purpose of her placement was for educational reasons. (*Id.* at 1468.).

62. The Ninth Circuit decided two cases in 2009 addressing residential placements. Both concerned the Ashland School District in Oregon. The student in the first case, *Ashland School District v. Parents of Student E.H.* (9th Cir. 2009) 587 F. 3d 1175, suffered from emotional problems and migraine headaches that led to suicide attempts and hospitalizations. The District Court reversed the hearing officer’s award of reimbursement for a residential placement on several grounds, including that the student’s educational and medical issues were not intertwined and that the parents had placed the student at the residential placement primarily for medical reasons. The Ninth Circuit affirmed, finding that the evidence supported the District Court’s findings that the parents had placed the student at the residential placement based on problems at home and that the placement was for medical not educational reasons. Similarly, in *Ashland School Dist. v. Parents of Student R.J.* (9th Cir. 2009) 588 F.3d 1004, the Ninth Circuit upheld the District Court’s ruling finding a residential treatment center was not necessary for the student to receive educational benefit

as her risky behaviors occurred outside of the school setting and that the placement “stemmed from issues apart from the learning process, which manifested themselves away from school grounds.” (*Id.* at p. 1010.)

63. The district’s responsibility under the IDEA is to remedy the learning related symptoms of a disability, not to treat other, non-learning related symptoms. (*Forest Grove School District v. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-39 [no abuse of discretion in denying parent reimbursement where district court found parent sought residential placement for student’s drug abuse and behavior problems.])

*Issue 3(f): Did the County and the District deny Student a FAPE by failing to offer placement in a residential treatment facility?*

*2012-2013 School Year*

64. As established by Factual Findings 92-117 and Legal Conclusions 5, 9-10, 16, 18, 32-34, and 54-63, Student required placement at a residential treatment center during his 2012-2013 school year in order to access his education due to his unique, complex and intertwined disability related needs including mental health, identity, behavior, communication and socialization needs, along with lowered academic performance compared to his cognitive ability. By April 2013, the County was on notice of his need for residential placement, and its failure to offer such a placement denied Student a FAPE. Student’s needs are compounded by his rejection of his deafness and his extensive stays at Juvenile Hall which he aptly attributed to his disability, and which further alienated him from his deafness, reduced his access to a visual communication system, and increased his isolation and depression. Student’s relative “success” at Juvenile Hall, as reflected in his ability to comply with the rules and demonstrate progress on his academic goals at Von Humboldt established that Student responded to a locked, structured program, and supported his need for a behaviorally-oriented, locked residential placement. Dr. Stika established that Student’s need to develop a healthy identity of himself as an individual who is deaf, and tools to deal with his disability, are mental health needs inseparable from his educational needs.

65. Dr. Stika’s recommendation that Student required a locked residential treatment facility for the deaf was highly credited based on her extensive credentials and experience, her comprehensive assessment of Student’s needs, and her common sense rationale. Student required residential treatment as he could not access mental health related services in any other setting given his repeated runaway behavior. Student’s need for ASL, to access his education as well as treatment, supported placement in a facility set up for individuals with hearing loss and deafness, and staffed by those fluent in ASL.

66. Dr. Stoll’s recommendation for a behaviorally oriented classroom with hearing peers on a comprehensive high school campus was not persuasive for several reasons. He has virtually no experience and no special training assessing deaf students; his assessment focused exclusively on whether Student had an emotional disturbance; and his determination

in that regard was not supported by the law or the facts. His attempts to normalize Student's behaviors by describing them as willful, minimized the atypicality of Student's actions and detracted from his persuasiveness. So, too, did his attempt to broaden the divide between home and school and educational versus non-educational needs. His contention that Student's behaviors were distinct from his educational needs was not convincing as it failed to acknowledge that these behaviors were a result of Student's mental health issues which are related to his communication and social deficits which are a component of his disability and his own rejection of his deafness. Finally, Student witnesses, themselves experts in the field of deaf education, convincingly attributed the disparate conclusions reached by Dr. Stoll to a common mistake made by professionals who are not experienced or trained in working with the deaf: minimization of the needs of an individual who is deaf.

67. By the time of the April 2013 IEP team meeting, the County had sufficient knowledge that Student required a residential placement to support his education in that the structure and discipline of a residential placement would allow him to access his instruction; his mental health issues and behavioral manifestations which required residential placement were intertwined with his educational challenges such that the placement would primarily aid his education; and that a traditional school setting had been unable to address his communication, socialization and mental health issues which, at their core, are a part of his disability and his orientation towards his disability, and therefore, necessarily related to the learning process.

#### *2013-2014 School Year*

68. Student's non-attendance at school, his increasingly disturbed thinking and repeated psychiatric hospitalizations demonstrated his continued and growing need for a residential treatment placement into the 2013-2014 school year. The District's failure to offer Student a residential treatment center denied Student a FAPE as determined by Factual Findings 92-117 and 139-155, and Legal Conclusions 5, 9-10, 16, 18, 32-34 and 54-63. The District was not persuasive in its attempt to characterize McKinleyville High as the least restrictive environment for Student based upon the few school days he attended. LEA witness testimony that he received "educational benefit" at McKinleyville High was not credited for the following reasons: 1) it was purely speculative whether Student made progress during such a short period of time, during which he was attending to his interpreters only 50 percent of the time; 2) the LEA witnesses' operational definition of educational benefit did not encompass progress on his IEP goals; and 3) the District mischaracterized Student's needs as solely academic and failed to develop goals in all areas of need including mental health, pragmatic language, and behavior. The District's misplaced focus on blaming Guardian demonstrated a minimization of Student's needs in light of the severity of his mental decline.

69. Guardian and Ms. Hanrahan-Gee persuasively established that Student exhibited increasing paranoia from September through October 2013. Student had lost touch with reality, and displayed disjointed thinking and communication and was placed by law enforcement on four separate psychiatric holds. Given Student's profile of continued

psychological dysfunction and instability, the evidence established that he could not benefit from a traditional educational program.

70. The District's position that Student's decline in functioning was unrelated to the learning process was not supported by the evidence. Student's mental health needs including depression, and recent psychotic manifestations, his behavioral manifestations of his social and emotional needs including his compulsive and self-destructive behaviors, his continual runaway behaviors, and his complete non-attendance at school, as well as his disability, his orientation toward his deafness, and his communication challenges in terms of expressive and receptive language skills as well as social interaction, are all inextricably intertwined and inseparable from his ability to access his educational program.

### *Remedies*

71. 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 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.). An IEE at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp. 2d 815, 822-23.)

72. Appropriate equitable relief, including compensatory education, can be awarded in a decision following a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 citing *Puyallup, supra*, 31 F.3d at p. 1496.) An award to compensate for past violations must rely on an individualized fact-specific analysis, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must 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." (*Ibid.*) Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d 1489, 1497.)

73. A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).) However, the District Court for the Northern District of California upheld an ALJ's authority to reimburse, as compensatory education, a student's ongoing placement at a noncertified school. (*Ravenswood City School Dist. v. J.S.*, (N.D. Cal. 2012) 2012 WL 2510844, p.7.)

### *Juvenile Court Jurisdiction*

74. While a child is under the jurisdiction of the juvenile court, all issues regarding his custody are heard by the juvenile court, which retains exclusive jurisdiction over its orders. (Welf. & Inst. Code, §§ 245.5, 304; *In re William T.* (1985) 172 Cal.App.3d 790, 797.) Whenever the juvenile court orders the child removed from his parent or guardian, the juvenile court shall order the care, custody, control, and conduct of the child to be under the supervision of the social worker who shall arrange suitable placement. (Welf. & Inst. Code, § 361.2(e).) 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 ....”

75. The juvenile court has the authority join in the juvenile court proceedings any agency that has a legal obligation to provide services to a dependent child. The juvenile court has no authority to order services unless it has been determined through the administrative process of an agency that has been joined as a party, that the minor is eligible for those services. (Welf. & Inst. Code, § 362, subd. (b)(1).)

76. In accord with Factual Findings 156-59 and Legal Conclusions 71-72, and as specified in full below, as an equitable remedy, the County shall fund independent educational assessments of Student in the areas of (1) mental health and social emotional functioning, including attention and (2) communication including ASL fluency, speech and language, related technology and pragmatics, and fund the provision of any needed interpreter services and the presence of each assessor at an IEP team meeting, including a reasonable hourly rate. Further, as a compensatory remedy, the County shall provide Student 32 hours of mental health services by a clinician of Student’s choice; 16 hours of social skills instruction by a qualified provider chosen by Student; and a total of 56 hours of direct instruction in ASL by a credentialed deaf and hard of hearing teacher fluent in ASL. In order to ensure Student’s ability to utilize these services in light of his placement at a residential treatment center, Student will be allowed to access these services until he turns 22 years of age or graduates with a high school diploma, whichever occurs sooner, and the County shall bear transportation costs and any interpreter costs.

77. Pursuant to Factual Findings 156-157 and Legal Conclusions 71-72, and as specified in full below, as an equitable remedy, the District shall fund an IEE in the area of functional behavior along with any interpreter costs and fund the assessor’s presence at an IEP team meeting, along with a reasonable hourly rate. In addition, as a compensatory remedy, the District shall provide Student a total of 32 hours of mental health counseling services by a clinician of Student’s choice; and provide 32 hours of social skills instruction by a provider of Student’s choice. Student will be allowed to access these services until he turns 22 years of age or graduates with a high school diploma, whichever occurs first. The District shall bear transportation costs and any interpreter costs for these services.

78. Pursuant to Factual Finding 161 and Legal Conclusions 56-63, 71 and 73, the District shall offer and fund a residential treatment center for Student. He is entitled to

receive special education as well as related services that will assist him to accept his disability, become proficient in ASL, communicate his needs, form interpersonal relationships, and participate in an academic program. In order to access his educational program, Student established that he requires a residential treatment center. Given his related communication and treatment needs, all efforts shall be made to offer placement in a residential treatment center specifically designed for students who are deaf or hard of hearing, with staff, educational providers and mental health clinicians fluent in ASL, such as the National Deaf Academy. Recognizing the limited availability of such a specialized placement, if the District chooses to instead offer placement at a residential treatment center that does not specifically serve students who are deaf, the Order below specifies the required components that District will be responsible for providing.

79. As determined in Factual Findings 3 and 162, and Legal Conclusions 74-75, the Juvenile Court makes all placement orders concerning Student and must develop a plan for meeting his educational needs. The LEA's shall, within 30 days of this Decision, petition the Juvenile Court to be joined as related agencies required to provide services to Student and appear in the juvenile proceedings to explain the services they are required to provide and identify to the Juvenile Court, residential placement options consistent with this Decision.

## ORDER

1. The County shall fund independent educational assessments of Student by an assessor chosen by Student who is trained to assess deaf students in the areas of: (1) mental health and social-emotional functioning, including attention; and (2) communication including ASL fluency, speech and language, related assistive technology and pragmatics. If the assessors chosen by Student are not fluent in ASL, the County shall bear the costs of certified interpreter services. The County will bear all associated costs of travel, lodging and per diem at the state rate for each assessor and interpreter to complete the assessments. The County will also fund round trip travel and one night lodging to ensure the attendance of each assessor at an IEP team meeting convened to review their results, as well as a reasonable hourly rate.

2. The County shall provide Student a total of 32 hours of mental health services by a clinician of Student's choice and fund certified interpreter services for each session if Student's chosen clinician is not fluent in ASL. Additionally, the County shall provide Student a total of 16 hours of social skills instruction by a qualified provider chosen by Student and the provision of a certified ASL interpreter if Student's provider is not fluent in ASL. The County shall also provide Student a total of 56 hours of direct instruction in ASL by a credentialed deaf and hard of hearing teacher fluent in ASL. Student will be allowed to access these services until he turns 22 years of age or graduates with a high school diploma, whichever occurs first. The County shall bear round trip transportation costs for Student, the interpreter, and/or the provider.

3. The District shall fund an IEE in the area of functional behavior by an assessor chosen by Student who is a board certified behavior analyst, and preferably experienced in working with the deaf. If the assessor chosen by the Student is not fluent in ASL, the District shall bear the costs of certified interpreter services. The District will bear all associated costs of travel, lodging and per diem at the state rate for the assessor and interpreter to complete the assessment. The District will also fund round trip travel and one night lodging to ensure the attendance of the assessor at an IEP team meeting convened to review the results, as well as a reasonably hourly rate.

4. The District shall provide Student a total of 32 hours of mental health counseling services by a clinician of Student's choice, and the provision of a certified ASL interpreter for each session if Student's chosen clinician is not fluent in ASL. Additionally, the District shall provide Student a total of 32 hours of social skills instruction by a qualified provider chosen by Student and the provision of a certified ASL interpreter if Student's provider is not fluent in ASL. Student will be allowed to access these services until he turns 22 years of age or graduates with a high school diploma, whichever occurs first. The District shall bear round trip transportation costs for Student, the interpreter and/or the clinician.

5. The District shall within 45 days of this decision, locate, offer and fund an appropriate residential treatment center as an educational placement for Student.<sup>47</sup> If Student's identified residential treatment center is not specifically designed to serve deaf students, then the District must ensure the following additional components:<sup>48</sup>

(a) services of a certified ASL interpreter from the hours of 7 a.m. through 10:00 p.m. daily, including weekends and holidays; and

(b) direct ASL instruction by a credentialed deaf and hard of hearing teacher fluent in ASL for one hour per day during the school year; and

(c) mental health services a minimum of two hours per week delivered by a clinician experienced in working with the deaf and fluent in ASL.

6. If the residential treatment center is not a locked facility, the District shall provide Student a one-on-one behavioral aide who is fluent in ASL to ensure his safety and presence in order to benefit from his instruction and related services from the hours of 7:00 a.m. through 10:00 p.m. daily including weekends and holidays.

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<sup>47</sup> The LEA's did not introduce evidence of any parameters on an award of residential placement or services should Student prevail, aside from the need to ensure that any prospective placement be certified by California.

<sup>48</sup> Nothing in this Decision prohibits the parties from exploring whether the California Department of Education has a waiver process or policy for out-of-state placements not currently certified by the Department, such as the National Deaf Academy, and whether Student would be an appropriate candidate for that waiver.

7. The District shall fund all transportation costs associated with this placement. This will include the cost of ensuring that Student safely travels to his placement including funding the round-trip expenses of placement staff or other professionals (up to two individuals) to safely escort Student; as well as twice yearly round-trip travel for Student to visit home; and bi-monthly round trip travel for Guardians to participate in family therapy and visitation, including per diem at the state rate and reasonable lodging for two nights each trip.

8. Within 30 days of this Order, the County and the District shall petition the Juvenile Court to be joined as related agencies in Student's juvenile court proceedings and explain the services they have been directed to provide to Student and the residential treatment placement options available to Student, consistent with this Decision.

9. Within 10 days of this Order, the District shall provide the Juvenile Court a copy of this Decision and Order to be maintained in Student's Juvenile Court file.

10. The ALJ understands that Student is still under the jurisdiction of the Juvenile Court and, as such, the ALJ cannot override the Juvenile Court's placement orders. The ALJ therefore, orders placement as herein described within 45 days of the date of this Decision unless otherwise countermanded by order of the Juvenile Court.<sup>49</sup>

#### 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, Student prevailed on Issue 1 as to the County only; the District prevailed as to Issue 1. Student prevailed as to Issue 2(a) and 2(b); the County prevailed as to Issue 2(c), and 2(d). As to the 2012-2013 school year, Student prevailed on Issue 3 as to the District. As to the County, Student prevailed as to Issue 3(a), 3(b)(ii), 3(b)(iii) and 3(f); the County prevailed on Issue 3(b)(i), 3(b)(iv), 3(c), 3(d), and 3(e). As to the 2013-2014 school year, Student prevailed as to Issue 3(a), 3(b)(i), 3(b)(ii), 3(b)(iii) and 3(f). The District prevailed as to Issue 3(b)(iv), 3(c), 3(d), and 3(e).

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<sup>49</sup> This Order is not intended to prohibit the parties from mutually agreeing to modify any terms of this Order by written agreement.

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 24, 2013

/s/

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THERESA RAVANDI  
Administrative Law Judge  
Office of Administrative Hearings