

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of: LAWNDALE ELEMENTARY SCHOOL DISTRICT,  v. PARENTS, ON BEHALF OF STUDENT,	OAH CASE NO. 2008040889
PARENTS, ON BEHALF OF STUDENT,  v. LAWNDALE ELEMENTARY SCHOOL DISTRICT.	OAH CASE NO. 2008060851

DECISION

Administrative Law Judge Christine L. Harwell, Office of Administrative Hearings (OAH), State of California, heard these consolidated matters in Lawndale, California, on September 15, 2008, September 16, 2008 and September 17, 2008. The record was closed on September 17, 2008, and the parties timely filed closing briefs on September 30, 2008.

Sharon A. Watt, Attorney at Law, represented Lawndale Elementary School District, (District) accompanied by Roxanna Khan, Attorney at Law. Peggy Budding, Special Education Coordinator for District, and Linda Jones, School Psychologist, attended the hearings on all days on behalf of District.

Jessica Toth, Attorney at Law, represented Student and was accompanied by Melissa Canales, Attorney at Law, on September 15, 2008 and September 16, 2008, and by Elizabeth Drugga, Advocate, on September 17, 2008. Student's mother (Mother) attended the hearing on all days on behalf of the Student. Ana Juliao, Spanish

interpreter, provided interpretation for Mother on all days, including during Mother's testimony.

On April 25, 2008, District filed a Request for Due Process Hearing (OAH case number 2008040889). A request for continuance was granted May 5, 2008. On June 18, 2008, Student filed a Request for Due Process Hearing (OAH case number 2008060851). On June 26, 2008, OAH granted the Student's request for consolidation. The consolidated matters were jointly set for due process hearing September 15, 2008 through September 19, 2008.

## ISSUES

1. Did District deny Student a FAPE by failing to provide appropriate behavioral support?
2. Has District denied Student a free appropriate public education (FAPE) by failing to offer placement in the least restrictive environment (LRE) since February 7, 2008, and specifically, does the District's subsequent offer of placement at a non-public school (NPS) constitute an offer of FAPE in the LRE? <sup>1</sup>

## FACTUAL FINDINGS

1. Student is an 11-year-old female, presently in the sixth grade, who, at all relevant times, resided in the District and was eligible for special education under the category of mental retardation due to Down syndrome. Student is an English language learner; Spanish being the language spoken at home. Student requires small group and individualized instruction to make progress toward her goals and objectives. She is below basic in English and language arts and at basic level for mathematics. She follows

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<sup>1</sup> The issues have been restated from those set forth in the Prehearing Conference Order. Because issues 1 and 3 of that Order are essentially identical, this Decision addresses them as one issue.

two-step directions more often than not and she accurately and legibly traces her home address and home phone number. Student is able to point to and identify numerals contained in her home phone number and she is knowledgeable about the significance of money. Student independently brushes her teeth and is toileting proficient. Student is verbal and engaging but her communicative skills are inconsistent.

2. Student had a history of running away from teachers on the school grounds (eloping); hitting or biting other students; being obstinate or strong-willed; and tantruming. In December of 2003, when Student was in the first grade, the IEP team developed a positive behavior support plan (BSP) to address non-compliance (including running away) and hitting other children. Student's January 20, 2005 IEP also contained a BSP. The BSP stated that Student engaged in "[e]loping behaviors defined as leaving designated areas, leaving classroom, leaving designated playground areas and running away from the group when walking to and from places outside the classroom, interferes (sic) with class routine and is a safety issue." By December 5, 2005, when Student was in the third grade, Student's on-campus eloping had reduced from 6 times per day to 2 times per week.

3. On January 11, 2006, when Student was eight and a half and in a third grade special day class (SDC) at Franklin D. Roosevelt – Kit Carson Elementary School (Roosevelt), Student ran away from the class by running through the cafeteria and off campus. An aide retrieved her. Thereafter, the gates and doors used by Student to leave campus were equipped with locks that required a key.

4. At a January 25, 2006 IEP meeting, Student's IEP was amended to include provision of a one-on-one aide during unstructured times of the day. The BSP was revised because of the January 11, 2006 incident. The BSP stated that Student's behavior impeded her learning and consisted of "leaving designated seating area; leaving the classroom; leaving the playground area and/or running away from the group/class when

walking to and from places outside the classroom.” The need for the BSP plan was deemed “moderate.” The BSP described Student’s behavior as due in part to environmental factors and stated it occurred more frequently when new or unfamiliar staff supervised her, such as a substitute teacher. The IEP team noted that “Student wants the attention of a staff member/adult chasing after her.”

5. Student’s special education teacher at Roosevelt, Melanie Hart (Hart), is credentialed with the highest clear credential in California. She has a bachelor’s degree and a master’s degree in psychology and has taught special education for ten years. She had experience with behavior intervention in undergraduate and graduate school performing case studies. Hart’s master’s degree thesis was on behavior intervention for children with autism. She has received 40 hours of training in behavior intervention through the Southwest Special Education Local Plan Area (SELPA) but did not submit the required paperwork to complete the program. Hart also learned from and was supported by District-provided behaviorists from Kaufman and Associates who provided consultation services to her classroom.

6. Hart started teaching Student in June 2006, when Student transitioned from third grade to Hart’s fourth and fifth grade class for students with moderate to severe disabilities. In that class, Student had many opportunities for interaction with general education students. During the morning recess and after lunch, general education students also came in to read with the class. There were combined classes in science, math and art on Mondays, Wednesdays and Fridays, and on Fridays there was a combined cooking lesson. Student also went on field trips with general education peers and the positive influence of the general education peers assisted Student in remaining on task in a group setting. Student benefited in the areas of speech and social interaction by associating with higher functioning peers. Hart implemented a behavior plan that involved use of praise and reminders for all students in her class. Hart

described a positive prompting hierarchy under which all directions to students are made with a first and second verbal prompt, followed by a physical gesture. If the verbal and gestural prompts are not obeyed, then a physical prompt would follow to guide a student toward the desired task. Compliance was reinforced by praise for good behavior and the earning of preferred classroom privileges. Hart explained that Student understood the routine prompting hierarchy, but that Student desired to act in a manner to get attention from adults so she did not always comply with the prompts in order to get attention from adults.

7. On November 9, 2006, when Student was nine years old and attending fourth grade, the IEP team met to consider Mother's request for a behavior therapist at school and for speech and language services. Hart explained to the team that Student did not exhibit significant behavior concerns at school for which a behavior specialist was required beyond the current level of support that the classroom received. An assessment plan was signed by Mother that day for District to evaluate Student's behavior, and for speech and language. No evidence was presented that the assessments Mother agreed to were performed.

8. At the annual IEP team meeting on December 5, 2006, the issues raised in November were addressed; however, no assessments were reviewed. Hart explained that she had observed decreased incidents of Student's eloping behavior and that Student had not used expletives or hit other students as she had the previous year. Hart attributed the improved behavior to having three classroom aides present at all times during the school day. A BSP was revised to address Student's behavior of using expletives and hitting other students. The BSP identified that Student's "behavior impeded her learning because Student must be consistently redirected and very closely supervised by Classroom Staff/ a one-on-one aide during recreation times." The BSP concluded that the function of the behavior was to garner attention. Goals were written

for social skill development, receptive language, expressive language and motor speech for the special education teacher, classroom staff, speech and language teacher and the family to address. The IEP provided for 352 minutes per day, 240 minutes of which were academics in life skills,<sup>2</sup> and the balance was allocated to Student's special education related services. In the BSP, Student was provided a one-on-one assistant "due to safety concerns about [Student's] running off campus."

9. During the 2007/2008 school year, when Student was in fifth grade, the operative IEP dated December 5, 2007, was essentially identical to that of the former year except that speech and language services were changed from 60 minutes per week to 180 minutes per month. Student retained the services of a full-time one-on-one aide because of safety concerns due to her running off campus, and because of "her non-compliance with specific school staff members (e.g., saying 'no' when given a directive, falling to the floor and refusing to get up, running away from staff when it is time to transition from outside to inside) and hitting/grabbing classmates." Hart reported the following: (1) Student was non-compliant with specific school staff members and Student hit and grabbed classmates; (2) Student must consistently be redirected as well as closely supervised by classroom staff (including a one-on-one instructional assistant assigned to her) most notably during recreational activities that take place outside of the classroom (e.g., morning recess, lunch, lunch recess, community walks, walking around the [Roosevelt] campus, and P.E.); (3) the need for a BSP was serious; and (4) the frequency or intensity of Student's non-compliant behavior varied, but occurred as many as three to four times a day. The IEP developed a civics/behavior goal for

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<sup>2</sup> Life skills, also sometimes called daily living skills, is a course of adapted curricula and training to develop a student's ability to function independently and in the community.

classroom staff and parents to implement to address the issues of the BSP. The BSP identified teaching strategies to be provided by classroom staff. Staff was to give verbal reminders of classroom norms, rules and expectations as they pertain to the incident at hand. They were to give praise when Student adhered to these rules and norms, as well as model replacement behaviors. The December 5, 2007 IEP also offered extended school year (ESY) at Roosevelt followed by a transition to a middle school SDC at Will Rogers Middle School (Rogers) for sixth grade beginning in September of 2008.

10. Hart testified at hearing that she believed that Student had the potential to learn and behave. She explained that when she kept Student in class during recess as a consequence for aggression or using expletives, and when Student was reminded of why she was given limited down time, or if she was given a reward for good behavior, that Hart noticed a change in Student's behavior about sixty percent of the time. In Hart's class, her students had classes with general education students in science, math, art and cooking on Fridays. She explained that Student particularly enjoyed the cooking classes. She also explained that there was a time in Student's fifth grade when Student missed school because her family had moved away. Student returned in March 2007. Hart characterized Student's return as a "honeymoon" because Student demonstrated a readiness to listen, she was excited about being at school with familiar peers, she enjoyed camaraderie from the general education peers, and she had a disposition of happiness and contentment about being back at school. Student reverted to her former behavior in May 2007. After May 2007, Hart noted that Student took advantage of non-assertive adults, or of substitutes that were new to her. Hart routinely rotated the aides thereby teaching her students to learn to accept direction from different individuals. All of Hart's aides were taught the same prompt protocol and were to administer it uniformly and strictly. Hart believed that Student did not need further behavior therapy at school at the time of the December 5, 2007 IEP because of the successful procedures

she had initiated, and that there were sufficient aides who were well-taught regarding Student's particular behaviors.

11. Kirsten Martin (Martin) has been an instructional aide at Roosevelt since fall of 2006 and was assigned to Hart's class in September 2007, when she first met Student. Martin has a master's degree in speech pathology and behavioral science. Martin was assigned to be Student's one-on-one aide every third week. On February 4, 2008, during the lunch recess, Student was outside with three assistants, one of whom was a substitute, and the rest of the class were lining up to go back into their classroom. Student was to be the line leader because she chose to go first. Martin approached Student midway between the fence and the gate. When Martin was within about five feet of Student, Student ran to the breakfast room area then through an unlocked door and got outside the school grounds.

12. When Student first began running, as part of the protocol taught to Martin and required by Hart, Martin spoke two short verbal prompts for Student to stop and, when that was ignored, Martin followed through with the gesture to stop. Martin explained that Student would not have seen the gesture because Student was running away from her.

13. Martin ran after Student but there was a substantial distance between them. Student ran to a pathway by a canal that abutted a parking lot and a playground. Others present yelled for Student to stop. Student turned around with her hands on her hips and said "no," then continued running. Martin ran after Student but Student was able to reach a public residential street that had heavy traffic. School principal, Dr. Dayla Sims (Sims), joined Martin in the chase. Student was ultimately stopped and caught by a bystander near two heavily traveled boulevards and was returned to school. Student was in great danger of being hit by a car. Martin questioned Student, who was excited and



happy. Martin concluded that Student had no comprehension of the seriousness of her behavior.

14. Mother was called to school that day after the incident. Mother met with Sims, Special Education Coordinator, Peggy Budding (Budding) and Hart, who described the incident to her through a translator. Student was sent home with Mother. Budding has a bachelor's degree in English and master's degree in educational psychology. She is credentialed in administrative services, special education: learning handicapped, as a developmental specialist, and has professional clear multiple and single subject teaching credentials. Budding testified to Student's behavioral history at school. She had attended all of Student's IEP meetings since fall of 2001. She was responsible for District's life skills program for severely handicapped students, and she assists District psychologist Linda Jones (Jones).

15. On February 5, 2008, Mother advised District in writing that Student would not return until District provided assurances of Student's safety. Mother requested an IEP meeting to be held as soon as possible.

16. On February 7, 2008, Budding arranged for an IEP team meeting as requested by Mother. Mother attended, as did Budding, Sims, and Hart. District provided Mother with a Spanish language interpreter at the meeting. At the meeting, an addendum IEP document was drafted to describe the events of February 4, 2008 and to add 300 minutes per week of intensive individual instruction at home for the thirty day period February 7, 2008 through March 7, 2008. The IEP does not describe whether the intensive individual home instruction was to be academic or behavioral. It also increased speech and language services from 180 to 240 minutes per month. At the meeting District requested that during those thirty days Mother visit two non-public schools that District considered to be more suited to containing Student's eloping behavior. Mother agreed and signed the IEP addendum. While the February 7, 2008 IEP retained Student's

instruction in the Roosevelt SDC, Budding testified at hearing that she understood the IEP to mean that Student's only instruction would be at home during the following thirty days. Budding's interpretation of the IEP is rejected as it conflicts with the express language of the IEP document.

17. Hart began providing Student's home academic instruction for five hours per week on February 12, 2008. The related services of speech and language and adapted physical education were suspended during the thirty days of home instruction while Mother was to visit the two non-public schools District recommended.

18. Budding decided to convene another IEP team meeting on February 21, 2008 to make corrections to the February 7, 2008 IEP. However, the only participants were Mother and Budding. No special or general education teacher was present and Mother met only with Budding and a translator. Mother advised Budding that she had visited one of the schools and rejected it as inappropriate. Budding told Mother that she should visit Carousel, the other NPS recommended by District. Carousel provides special education services for students from preschool through age twenty-two. The school is a more restrictive environment than a public school and is located approximately ten miles from Lawndale, where Student lives. Budding prepared a February 21, 2008 IEP addendum that changed the placement of Student from District's schools to an NPS. District offered Student all of the related services as set forth in the December 5, 2007 IEP, including a one-on-one aide. Mother refused to sign the February 21, 2008 addendum.

19. Student did not return to any school after the February 21, 2008 meeting. Hart continued to provide five hours per week of academic instruction at Student's home. Budding unilaterally suspended speech and language and adapted physical education related services. Budding believed at the time that Mother would agree that Student would be placed in an NPS within thirty days of February 7, 2008. However,

Budding's understanding was not consistent with the express terms of the operative December 7, 2007 IEP as amended on February 7, 2008, which placed Student in the Roosevelt SDC.

20. Nellie Chavez (Chavez) was the Special Education Director at Carousel. Chavez has bachelor's degree and master's degree in psychology, behavioral science, and special education from California State University, Dominguez Hills. Chavez testified that there are approximately 80 students at Carousel, which is an NPS licensed by the state of California. There are nine credentialed teachers and eight classrooms. Each classroom has at least one non-credentialed assistant, plus a teacher. All classes have from four to five adults at all times because some students have one-on-one aides assigned as well. All students have moderate to severe disabilities and there is no possibility of typical peer interaction. Most of the students have autism, but there are students with mental retardation due to Down syndrome, such as Student. Some other students have cerebral palsy and some are orthopedically impaired. The teacher for the sixth grade classroom, which would be Student's class, has been there for three years and prior to that taught in public school. The teacher has a current clear state credential for mild to moderately disabled students. There are some higher-functioning students who could be role models for Student. Carousel also has community based instruction that includes outings to the grocery store, post office, re-cycling center, movies, restaurants, and to the local farmers' market. Carousel provides its own transportation by vans. Students are dropped off and picked up at the front door. There is an enclosed parking area in the back of the building, however, that could be used to pick up and deliver a student who had a propensity to elope.

21. Chavez was confident that Carousel could provide Student with the security she needed to benefit educationally and to overcome her eloping behavior. The school has had students who were "runners" in the past. Those students were assigned

their own assistant as a safety precaution, and no student has ever run away from the school. Additionally, there are video cameras in all parts of the school for viewing the fences and the gates, as well as the interior of the school. The entire school is monitored by the cameras 24 hours per day, and most of the offices have glass walls so that all staff can see students as they travel from one area of the school to another. Carousel is located in a two-story building that is entirely fenced. There are two locked doors to enter the building, one is Plexiglas with a security buzzer, and the next is a metal gate with rods and handle with a latch too high for students to reach. Student, who is a middle school student, would be on the second floor. The stairway leads only to the playground within the enclosed complex.

22. Later in February 2008, Mother, Budding, Student, Student's sister, and a neighborhood friend of Mother, visited Carousel. Mother did not think Carousel was appropriate because she perceived that the students at Carousel had differing physical and cognitive disabilities than those of Student. Mother also objected because the student population ranged in age up to twenty-two years.

23. When Student failed to enroll in Carousel, District continued to provide home instruction through Hart, but would not allow Student to return to Roosevelt. Budding explained that District did not perform a FAA regarding Student's February 4, 2008 elopement because Student did not return to school in March 2008.

24. District filed its due process request, including the request that Student's home instruction be her stay-put placement. Student requested return to her permanent placement in a special day class in the public school setting as described in the December 5, 2007 IEP and February 7, 2008 addendum IEP.

25. On June 4, 2008, District convened an IEP team meeting to discuss Mother's request that Student return to Roosevelt. Mother explained that Student would feel like she was in jail at Carousel and she would not be with her typical peers. District

refused to allow Student to return to Roosevelt and offered placement only at Carousel. Mother did not approve the IEP amendment.

26. On July 2, 2008, OAH ruled on District's stay put motion and determined that Student's stay put placement was Roosevelt as described in the December 5, 2007 IEP and the February 7, 2008 addendum IEP. After denial of District's stay-put motion in July, Student attended a portion of the Roosevelt ESY between July 7, 2008 and July 24, 2008. Approximately twenty-one weeks elapsed between February 7, 2008 and July 7, 2008. The IEP of December 5, 2007, had provided Student three hours per month of speech therapy and the February 7, 2008 IEP increased Student's speech therapy to four hours per week. Nevertheless, Student was not provided speech and language services during that twenty-one week period.

27. Student's teacher at Roosevelt ESY was Jorene Butacan (Butacan). Butacan is the Learning Center Teacher at Roosevelt for first through fifth graders. She is credentialed to teach mild to moderately disabled students. Butacan's class was a life skills class. Butacan worked on the goals set forward in Student's IEP of December 5, 2007. The hours of class each day were shorter than during the normal school year and there were fewer students present on campus than during the regular school term. Butacan was advised of Student's propensity to run away. She arranged for Student to sit in the farthest seat from the door and she sometimes held Student's hand or had her hand parallel to Student's hand. Student was not present for the entire ESY term. Student did not attempt to run away from Ms. Butacan's class. Mother observed that Student enjoyed being back at school at Roosevelt. No evidence was provided that Student's related services were provided during ESY.

28. Pursuant to stay put, Student is presently enrolled in the sixth grade at District's Rogers Middle School (Rogers) where she has been enrolled in an SDC since September 3, 2008. Rogers has a large campus with many areas that cannot be secured

and many areas where a student could disappear. Rogers has a fourteen acre campus with from twenty to twenty-five exits that cannot be secured or locked for various reasons, including fire safety. There are three large boulevards with heavy traffic on the boundaries of the school.

29. Student's class is taught by Susan Adams (Adams), a credentialed teacher in California. Adams has a bachelor's degree in elementary education and has taught special education for twelve to thirteen years. In Adams' class, Student has a dedicated one-on-one aide, and there are also two general assistants for the class of twelve students. All of the adults in the class are aware of Student's behavior issues.

30. Adams testified that at the end of Student's first day at Rogers, Student ran from her aide in the lunchroom and was immediately caught by that aide. Adams observed that Student has left her seat in the classroom and has run under a table in the classroom when she was not allowed to be the "boss" in class. Adams opined that Student should be placed at Carousel.

31. Adams was not persuasive in describing why Student should be placed at Carousel. First, Adams could not offer a credible opinion about whether behavior intervention would work with Student because her experience with Student had been very brief. In fact, Adams speculated that over time, Student may learn to stay with the group and to understand that she is not in charge of other children and that her friends can make their own choices. If Student would socially interact with other children, her elopement behavior may slowly cease. Second, while Adams' class is on the general education campus, she thought that Student had no real ability to mingle with the general education students in that setting because Student was not socially mature enough to understand middle-school general education students' interests. Although Student is eleven years old, her mental behavior is at about age four, preferring princesses and horses. Adams opined that Student's neuro-typical peers on campus are

young girls who are giggly, talk about boys, and may go to the mall together. Third, Adams testified based upon her information about Carousel, Carousel would be a better placement for Student because it is secured and would be safe for Student at this time. Because she had never visited the facility, Adams, who is not a trained behaviorist, was not credible on the issue of Student's proper placement and did not assist the District's position that District's offer to Student for placement at a more restrictive environment than Rogers was appropriate.

32. Hart also did not visit Carousel, nevertheless, she agreed that Student should be placed at Carousel even if it is a more restrictive environment than public school. Hart's opinion that Carousel was the appropriate placement was not changed by knowing that Student would not interact with typical peers at recess or lunch, art class or general education assemblies, as she did with her placement at Roosevelt or Rogers. Hart explained that in a more secure environment Student could focus and learn to follow directions better than in the public classroom. Hart observed that Student required eye-to-eye instruction, so that Student realizes that her instructor was serious which impacts her decision to comply. Hart also believed that Student requires repetition and continuity. For these reasons, Hart did not think that Student would learn by emulating non-disabled peers. Hart believed that Student would not stop eloping while placed in a public school setting. Hart was unable to identify a specific cause or antecedent for Student's eloping except that Student sought the attention of a chase by teachers. She thought that the best way to discourage Student from eloping was to ignore the behavior rather than to redirect Students behavior through instruction.

33. Hart did not believe that an FAA was necessary but believed that the more restrictive placement a Carousel was the solution. However, Hart's testimony about her observation of some earlier success with Student in Student's fifth grade year and her testimony that Student learned from consequences and rewards is inconsistent with her

current belief that Student required a more restrictive environment like that at Carousel. In November and December 2006, Hart did not recommend that Student have additional behavior support beyond those already in place. At the time, she had stated that Student had decreased incidents of eloping in the classroom and on the school grounds, and that Student had shown improved behavior through the hierarchy of prompting, and the use of classroom aides. Also, Hart did not explain why she felt that Student could not behave and develop more sustained concentration as she had during the “honeymoon” period in 2007. Hart’s opinion regarding Student’s placement at Carousel is not credible.

34. Mother, and Student’s older sister (Sister) explained that Student’s behavior has improved in the community. Specifically, Student used to run away from Sister in the community, but no longer does if offered a positive reinforcement like a gift. Similarly, Mother used to take Student out in the community in a stroller up to the age of eight in order to control her behavior. Mother explained that Student now obeys her and she no longer has to take Student out in a stroller.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The petitioning party has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof for the Issue One Student raised in OAH case number 2008060851, whereas the District has the burden of proof for the Issue Two raised as the sole issue in its complaint OAH case number 2008040889.



## ISSUES ONE AND TWO<sup>3</sup>

2. Student contends that District denied Student a FAPE by failing to provide a behavioral intervention plan (BIP) based on a functional analysis assessment (FAA) of Student's off-campus eloping behavior on February 4, 2008. Student further contends that she was denied a FAPE in the least restrictive environment because in response to the off-campus eloping incident, the District prohibited Student from attending the Roosevelt placement, unilaterally stopped the provision of speech and language services and only offered a placement at Carousel. District contends that after Student's February 4, 2008 off-campus elopement, it provided Student a FAPE when it changed Student's fifth grade placement from the SDC at Roosevelt to home schooling for thirty days, and then for her placement to a more restrictive environment at Carousel commencing March 7, 2008. For the reasons set forth below, Student met her burden of proof on the issues, whereas the District failed to meet its burden of proof.

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

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed

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<sup>3</sup> Because resolution of Issue One impacts resolution of Issue Two, they will be considered together.

to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*)

5. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

6. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment with removal from the regular education environment occurring only when the nature and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids

and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

7. Children who are eligible for special education are entitled to a FAPE that not only includes specially designed instruction to meet the child's unique needs, but related services as well. (20 U.S.C. §§ 1400(d), 1401(a)(9), (26) & (29); Ed. Code, § 56000.) "Related services" are transportation and other developmental, corrective and supportive services, such as speech therapy, that may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

8. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (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].)

9. When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. §

1414 (a)(2),(3); Ed. Code, § 56320, subds. (e) & (f).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025 at pp. 1031-1033.) In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

10. When a Student's behavior impedes his learning or that of others, a school district is required to consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. The IEP team itself can develop a behavior support plan (BSP) to address minor behavior issues that a student's teacher or other educational providers can implement in the classroom. However, when a child exhibits a serious behavior problem – defined as behaviors that are harmful to the child, to others, or to property – that significantly interferes with the implementation of the goals and objectives of his or her IEP, a district must develop a formal behavior intervention plan (BIP), which becomes part of the child's IEP. A BIP may only be developed after a district has administered a functional analysis assessment (FAA) to the child. An FAA is justified when the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment. The failure to perform an FAA when one is warranted is a procedural denial of a FAPE and an IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim high School Dist., supra*, 464 F.3d 1025, 1032; *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Ed.* (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

11. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Federal law does not contain a specific definition of "behavioral intervention" and does not impose any specific requirements for how to conduct or implement a functional analysis assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Community Unit School Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.)

12. California has specific regulations regarding FAA's and BIP's. California has defined "behavioral intervention" as the systematic implementation of procedures that result in lasting positive changes in behavior through skill acquisition and the reduction of problematic behavior. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) "Behavioral interventions" are designed to provide the individual with greater access to a variety of community settings, social contacts and public events and to ensure placement in the least restrictive environment. (*Ibid.*) California defines a "behavioral intervention plan" as a written part of an IEP "that is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (f).) The BIP must contain a statement of the frequency of consultation between the behavior intervention case manager and the parents and staff responsible for implementing the plan. In addition, the BIP must contain: 1) a summary of relevant and determinative information gathered from a functional analysis assessment; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of

the use of the interventions and the frequency of the targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness, or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other noneducational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. (*Ibid.*) The California Legislature intended that if behavior interventions were used for a special education student, that the behavioral interventions “ensure a pupil’s right to placement in the least restrictive environment.” (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).)

13. Under California regulations, the following criteria apply to BIP’s: 1) they must be developed by the IEP team, which must include the behavior intervention case manager; 2) they must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) they must be based on an FAA, be in the IEP and used in a systematic manner; 4) emergency interventions shall not be a substitute for a BIP; 5) behavioral interventions cannot cause pain or trauma; and 6) to the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

14. Under California regulations, an FAA must be conducted by a person with documented training in behavior analysis with an emphasis on positive behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).) The information gathered for the FAA must include information from: direct observation; interviews with significant others; and review of available assessments and records. The FAA procedure must

include, in relevant part: 1) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity; 2) systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; 3) systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior; 4) ecological analysis of the settings in which the behavior occurs most frequently by looking to factors such as the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities; 5) review of records for health and medical factors that may influence behaviors such as medication levels, sleep cycles, health, and diet; and 6) review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (*Ibid.*)

15. Under California regulations, an FAA report must include: 1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms; 2) a description of the targeted behavior(s) that includes baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs; 3) a description of the rate of alternative behaviors, their antecedents and consequences; and 4) recommendations for consideration by the IEP team which may include a proposed BIP. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2).) An IEP must be held after the FAA is completed. (Cal. Code Regs., tit. 5, § 3052, subd. (c).)

16. Based on the FAA, interventions may include: 1) altering the antecedent event to prevent the occurrence of the behavior (e.g., providing choice, changing the setting, offering variety and a meaningful curriculum, removing environmental pollutants such as excessive noise or crowding, establishing a predictable routine for the individual); 2) teaching alternative behaviors that produce the same consequences as the inappropriate behavior (e.g., teaching the individual to make requests or protests using socially acceptable behaviors, teaching the individual to participate with alternative communication modes as a substitute for socially unacceptable attention-getting behaviors, providing the individual with activities that are physically stimulating as alternatives for stereotypic, self-stimulatory behaviors); 3) teaching adaptive behaviors (e.g., choice-making, self-management, relaxation techniques, and general skill development) which ameliorate negative conditions that promote the display of inappropriate behaviors; and 4) manipulating the consequences for the display of targeted inappropriate behaviors and alternative, acceptable behaviors so that it is the alternative behaviors that more effectively produce desired outcomes (i.e., positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behaviors). (Cal. Code Regs., tit. 5, § 3052, subd. (d).) Acceptable responses to the targeted behaviors are: 1) the behavior is ignored, but not the individual; 2) the individual is verbally or verbally and physically redirected to an activity; 3) the individual is provided with feedback (e.g., "You are talking too loudly"); 4) the message of the behavior is acknowledged (e.g., "You are having a hard time with your work"); or 5) a brief, physical prompt is provided to interrupt or prevent aggression, self-abuse, or property destruction. (Cal. Code Regs., tit. 5, § 3052, subd. (e).)

17. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the



disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 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]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE 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. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, 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. (Ed. Code, § 56361.)

18. Here, as to Issue One, the evidence showed that Student was denied a FAPE because the District should have conducted an FAA and developed a BIP in response to the February 4, 2008 incident. Specifically, the off-campus elopement of

February 4, 2008, was a "serious" behavior problem, not only because of the danger that Student would be injured by traffic and because Student did not comprehend the danger but also because it demonstrated an escalation of eloping behavior. District relies on the history of Student's IEPs that implemented positive supports to address Student's various behaviors, including running away from staff. However, that IEP history works against the District. Beginning in 2003, a BSP was developed to address Student's propensity to elope, among other behaviors. That behavior continued, though at times at a reduced level. For instance, in December 2005, Student's eloping was reduced from six times a day to two times per week. Nevertheless, in January 2006, she ran off campus necessitating a modification of the BSP to add one-to-one aide for the times when Student was leaving designated seating areas, the classroom and playground and generally when she was in places outside of the classroom. The December 2006 IEP provided one-on-one for Student's entire day, when she was both in and out of class. Student was absent from school for a period of time after the December 2006 IEP. When she returned in March 2007 there was a two-month period during which she behaved and was generally happy and content. However, in May 2007 Student reverted to her former behaviors. The December 2007 IEP retained the one-to-one aide and noted that the need for the BSP was "serious," and the frequency of Student's noncompliant behavior varied but it occurred numerous times per day. Then, on February 4, 2008, Student escaped from Roosevelt. Student's elopement off-campus was the serious behavior that required District to perform an FAA. (Factual Findings 2-16 and 18; Legal Conclusions 7-16.)

19. District had a legal obligation to perform an FAA to identify the reasons for the behavior and the types of positive supports that could be considered by the properly constituted IEP team. Districts' failure to do so denied Student a FAPE. (Factual Findings 19, 27, 31, and 34; Legal Conclusions 9-16.)

20. As to Issue Two, Student was denied a FAPE because the District's offer of placement at Carousel school was not the result of a procedurally appropriate IEP and was made without considering whether a less restrictive placement could be successful with behavioral supports. Specifically, District's placement at Carousel was a more restrictive environment than placement at the SDC at Roosevelt. The terms of the February 7, 2008 IEP did not change Student's placement from Roosevelt; it added 300 minutes per week of home instruction and provided for Mother to view District's recommended NPS schools. The change of placement occurred at Budding's February 21, 2008 meeting. That meeting was not procedurally proper because only Budding was the only District person present with Mother (and a translator). There was neither a special nor general education teacher present. There were no assessments and, most important, there was no FAA, upon which to base a decision to change placement. By failing to conduct an FAA, District did not have the necessary assessment to make a decision to change Student's placement. Therefore, District's decision to change Student's placement from the Roosevelt SDC with mainstreaming opportunities to a restrictive nonpublic school was not appropriate and District's offer of placement at the NPS did not constitute an offer of FAPE in the least restrictive environment. In February 2008 District sent Student home, which is the most restrictive environment, then placed Student at Carousel, which had no general education population, and is, as admitted by District's witnesses Chavez, Hart, Adams and Budding, more restrictive than District's schools. Both decisions were made without the benefit of an FAA considered by a properly constituted IEP team. (Factual Findings 8-10, 14-23, 25, 26, 28, 31-34; Legal Conclusions 3-11.)

21. By forgoing behavior interventions without determining whether District could meet Student's behavioral needs with supplemental services, District denied Student a FAPE. The operative IEPs were those of December 5, 2007 and February 7,

2008, both of which provided for Student to receive academic instruction in a regular classroom in a special day school and for her special education related services to be provided in a separate classroom in a public integrated facility. District denied Student a FAPE by failing to provide Student the services provided by her IEPs at District's schools. (Factual Findings 1, 8, 9, 16; Legal Conclusions 3-18.)

22. Accordingly, Student prevailed on all issues. (Factual Findings 1-34; Legal Conclusions 1-21.)

## REMEDIES

23. As discussed above, Student met her burden of proving that she was denied a FAPE by the District's failure to conduct an FAA in response to the February 4, 2008 off-campus elopement and by subsequently changing Student's placement to a more restrictive environment. As a remedy, Student contends she should be awarded: permanent school placement at Rogers or an equivalent public middle school; 25 hours of compensatory speech and language services for educational loss between February 7, 2008 and July 8, 2008; one-on-one assistance by an individual trained in behavior intervention; and that District ensure that an FAA is completed and an IEP held to discuss the results within the statutory timeframe. District asserts that it provided appropriate behavior support to Student and that no compensatory education should be awarded Student.

24. Compensatory education is an equitable remedy; it is not a contractual remedy. (*Parents of Student W v. Puyallup Sch. Dist., No. 3* (9th Cir.1994) 31 F.3d 1489, 1497.) The law does not require that day-for-day compensation be awarded for time missed. (*Ibid.*) Relief should be designed to ensure that the student is appropriately educated within the meaning of the law. (*Ibid.*) An award to compensate for past violations must rely on an individualized 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.*)

25. In regard to Student’s request for permanent placement at Rogers or a like public middle school, the evidence did not support a finding that such a placement would be appropriate on a “permanent” basis. Furthermore, the law requires an annual IEP to address a Student’s educational needs and placement. Therefore, the relief is denied.

26. Student requested twenty-five hours of speech and language to compensate for the lost services between February 7, 2008 and July 8, 2008. Budding’s explanation that the services were not provided because Student did not return to school is not helpful to District because District prevented Student from returning to school. The February 7, 2008 IEP, which was Student’s last IEP, provided for 240 minutes (four hours) per month of speech and language services and District provided no valid justification for eliminating those services. The time period for lost services is approximately 21 weeks, or five months. Student was not appropriately educated during this time period because she did not receive the speech and language services that the IEP team had determined would meet her needs. Therefore, Student is awarded twenty hours of compensatory speech and language therapy from District through a nonpublic agency at District’s expense. (Factual Findings 9, 16, 18, 19; Legal Conclusions 22, 24, and 25.)

27. In regard to Student’s request for one-on-one assistance by an individual trained in behavior intervention, the evidence at hearing did not address whether this would be required to provide a FAPE, particularly when a BIP based on an FAA has yet to be developed. Therefore, the relief is denied.

## ORDER

1. District shall conduct an FAA and develop a BIP to address Student's off-campus elopement behavior within sixty days of this order.
2. Student's placement shall remain Rogers Middle School through the end of the 2008-2009 school year and ESY.
3. Student shall receive twenty hours of speech and language therapy as compensatory education, to be provided between the date of this decision and the end of the 2009 ESY by a nonpublic agency at District's expense.

## 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 all issues in this consolidated case.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: October 28, 2008

\_\_\_\_\_/s/\_\_\_\_\_  
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CHRISTINE L. HARWELL  
Administrative Law Judge  
Office of Administrative Hearings