

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SANTA CLARA UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2012120574

v.

PARENT ON BEHALF OF STUDENT.

DECISION

Administrative Law Judge (ALJ) Theresa Ravandi, from the Office of Administrative Hearings (OAH), State of California, heard this matter in Santa Clara, California, on January 24 and 25 and February 12, 2013.

Rodney L. Levin, Attorney at Law, represented the Santa Clara Unified School District (District). Lenore Montegna, the District's Director of Special Education and Arianna Mays, Program Specialist were present each day of hearing.

Mother represented Student and was present throughout the hearing. Student did not attend.

On December 27, 2012, the District filed an amended request for a due process hearing (complaint) naming Student. At hearing, the ALJ received oral and documentary evidence. At the close of the hearing, the matter was continued at the parties' request to March 1, 2013, for submission of closing briefs. The District timely filed a closing brief. Student did not file a closing brief. The record was closed and the matter submitted for decision on March 1, 2013.<sup>1</sup>

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<sup>1</sup> To maintain a clear record, the District's brief is identified as Exhibit D-102.

## ISSUES<sup>2</sup>

*Issue One:* Did the District offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) from October 2011 to the present, pursuant to its May 26, 2011 individualized education program (IEP) and amendments thereto, during times when Student was a resident of the District?

*Issue Two:* May the District reassess Student in accordance with its November 28 and December 14, 2012 assessment plans without parental consent?

## CONTENTIONS OF THE PARTIES

The District contends that its May 26, 2011 triennial offer of placement in a special day class (SDC) at Beacon School (Beacon), a non-public school (NPS), constituted an offer of a FAPE to Student in the LRE and was available throughout the periods of time from October 2011 to the present in which Student was a resident of the District. The District further argues it was not the local educational agency (LEA) responsible for offering Student a FAPE from sometime in April 2012 until September 2012 when Student was under the auspices of Discovery Charter School (Discovery) under the jurisdiction of the Santa Clara County Office of Education (County). Finally, the District seeks authority to conduct reassessments of Student without Parental consent pursuant to its November and December 2012 assessment plans in order to obtain current levels of functioning and update goals.

Student contends the District's offer of an SDC at Beacon does not constitute a FAPE because it is not an autism program taught by a qualified teacher with a qualified aide; it did not provide him a suitable peer group; the curriculum focused on behavior

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<sup>2</sup> At the start of the hearing, the District moved to change the word "provide" to "offer" in Issue One. The ALJ granted this request.

rather than academics; there were no mainstreaming opportunities; and Beacon misrepresented the availability of its dance and woodshop classes and the quality of its lunch program. Furthermore, Student contends that reassessment is not warranted as the District thoroughly assessed him in the spring of 2011.

## FINDINGS OF FACT

### BACKGROUND AND JURISDICTION

1. Student is an 11-year-old boy currently residing with his Parent within the District's boundaries. Student has been enrolled in the District since his preschool year. Parent removed Student from school in September of 2011, and he has not attended any formal education program since that time. His last agreed upon and implemented placement was at Beacon, which the District continues to offer.

2. Student is eligible for special education and related services due to his autistic-like behaviors and a speech and language impairment. The District initially qualified Student for special education in March of 2005. Since preschool, Student has attended various SDC's for academic instruction.<sup>3</sup> By all accounts he is a sociable child who enjoys interacting with others. However, throughout his education, Student has had difficulty controlling his behavior, which has interfered with his learning.

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<sup>3</sup> An SDC is a self-contained class for students with an IEP, taught by a credentialed special education teacher who has instructional support as well as behavior and/or therapeutic support. There is a low student to staff ratio with a typical NPS SDC having six students and at least three staff members.

## RESIDENCY AND RESPONSIBILITY FOR PROVIDING A FAPE

3. Under the Individuals with Disabilities Education Act (IDEA), an LEA is responsible for providing a FAPE to all children with disabilities who reside within its jurisdiction. A student's residency is generally determined by that of his parent.

4. The evidence established that Student was a resident of the District during all relevant times. Parent and Student resided at a fixed residence within the District from October 2011 until January 18, 2012, the date they became homeless. Since then, they have lived in a recreational vehicle which they park in a variety of places within the District boundaries. Under California law, a person does not acquire a new residence unless there is a union of act and intent, and she acquires a new residence. Parent did not gain a new residence as the evidence established she had no intent to reside elsewhere and did not take any steps to establish residency anywhere else. Communications between Parent and the District confirmed that the family was homeless after January 2012 and the District was aware of this. Student remained a resident of the District from October 2011 through the time of hearing.

### Mother's Attempts to Enroll Student in Discovery

5. The County charters Discovery and is responsible for providing a FAPE to enrolled students. The District argues in its Closing Brief that from April 2012 until September 2012 it was not responsible for Student because he was "with" or "under the auspices of" Discovery. However, Discovery was never responsible for Student because the evidence showed he never enrolled there.

6. Parent wanted Student to attend Discovery. In approximately March of 2012, Discovery accepted Student through a lottery system for the 2012-2013 school year. Parent completed a 2012-2013 Student Registration Form, requested that the District provide Discovery with Student's records, and attended an entrance IEP team

meeting convened by the County on May 31, 2012, to discuss Student's enrollment. Discovery did not have a program that could meet Student's unique needs, so the County offered to place Student at Beacon, which Parent declined. On July 9, 2012, the County sent Parent a letter confirming that it is only responsible for students enrolled in their charter schools, and since Parent declined its offer of placement at Beacon, Student would not be enrolled in Discovery.<sup>4</sup> Despite the confusion engendered by the limited involvement of the County on behalf of its charter school, Student never enrolled in Discovery.

7. At an October 2, 2012 IEP team meeting, the District informed Parent that Student was no longer enrolled in the District. However, one month later, on November 5, 2012, the District acknowledged that it never disenrolled Student. The evidence summarized above shows that the District was responsible for offering Student a FAPE from October 2011 through the present.

#### THE MAY 26, 2011 TRIENNIAL IEP OFFER

8. There are two parts to the legal analysis regarding the validity of an IEP offer of FAPE. The tribunal must determine whether the district complied with the procedures set forth in the IDEA, as well as whether the IEP was reasonably calculated to enable the child to receive educational benefit.

#### Substantive Validity of the Triennial Offer

#### STUDENT'S UNIQUE NEEDS

9. An IEP must be specially designed to address all of a student's unique needs that interfere with his access to education. The District accurately determined

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<sup>4</sup> This letter was admitted as administrative hearsay to supplement and explain Parent's testimony. (Cal. Code Regs., tit. 5, § 3082, subd.(b).)

Student's needs during the triennial IEP process based upon his previous performance at Beacon and the information furnished by its triennial assessments. This information established that in order to receive educational benefit, Student required a small, quiet, structured program and individualized assistance, along with a strong behavioral component. The May 26, 2011 IEP offer of Beacon with intensive individual service met this need.<sup>5</sup> Even so, Student struggled and regressed at times. He was easily overwhelmed with stimulation and required frequent breaks from class. The May 2011 IEP offer was reasonably calculated to provide Student with educational benefit and directly reflected the triennial assessments which unequivocally determined Student's need for a highly structured program with reduced stimulation.

#### THE PROGRAM AT BEACON AND STUDENT'S PREVIOUS PERFORMANCE THERE

10. In crafting its May 2011 IEP offer, the District relied in part on Student's previous experience at Beacon. Beginning in October 2010, Student attended Beacon's non-categorical elementary class which served students who were working on social/emotional and behavior goals. That is the class that the District continues to offer. Each student has his own individualized program, and the teacher supplies different lesson plans for each. The Beacon SDC consists of six students, one teacher, a behavior coach, and a clinician in and out of the class, along with Student's one-on-one aide. The classroom itself directs students towards academics with content standards described on the walls along with behavior systems, and white boards with the daily schedule and assignments. The class schedule is consistent from day-to-day and divided into small increments of time during which academic periods alternate with breaks.

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<sup>5</sup> The testimony of District witnesses established that "intensive individual service" means a dedicated one-on-one aide. Beacon employs "behavior coaches" who serve as aides.

11. Aida Campara was Student's full time one-on-one aide from October 2010 through the 2010-2011 extended school year while he was attending Beacon.<sup>6</sup> She was very familiar with Student and appeared caring and competent. Ms. Campara's testimony established that Student transitioned well to the schedule and structure at Beacon, was quickly making friends, and ready to learn, although his behavioral challenges remained. When upset, Student would throw things, yell, curse, kick, bite, and hit staff and peers. The evidence showed that competition was a trigger for Student, and he would tantrum when he compared himself to classmates who outperformed him. Student frequently became overwhelmed in class and needed a quiet place to go in order to succeed academically. Ms. Campara's testimony that Beacon was a great fit for Student was persuasive given her extensive involvement with him.

12. In the spring of 2011, Beacon opened an autism SDC attended by two nonverbal students. This classroom was quiet and calming with carpet and low non-florescent lights and leisure areas for Student to rest and regain composure with minimal distractions and stimulation. In May of 2010, Lori Borofka, a school psychologist for the District, recommended that Student go to the new autism class as needed to

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<sup>6</sup> Ms. Campara obtained her bachelor's degree in speech pathology and audiology in 2010 from San Jose State University, and is currently working on a master's degree in education with an emphasis in applied behavior analysis from Arizona State University. She passed the California Basic Education Skills Test, and as an undergraduate worked extensively with children with autism and provided them speech services. She also worked with children with autism and other special needs at an agency called Aspiranet, where she provided one-on-one behavior intervention in the home and community.

work on his academics.<sup>7</sup> Parent agreed. Ms. Borofka's testimony established that Student's classroom behaviors improved as he spent time in the quieter setting and experienced success with his academics. He used less profanity, and his leadership skills developed as his self-confidence improved. The evidence showed that Student was able to see his strengths compared to the two other autistic students, and was able to use his strengths in his core classroom.

#### SPRING 2011 TRIENNIAL ASSESSMENTS <sup>8</sup>

13. The District's spring 2011 triennial assessments confirmed that Student had significant difficulties in academics, social skills, behavior, communication and motor skills and that he required a small, structured class with one-on-one academic and behavior assistance and related services in speech and occupational therapy (OT).

14. Ms. Borofka's psycho-educational assessment established that Student's disruptive behaviors, more than anything else, prevented him from achieving academically. His behaviors, including tantrums, removing his clothes and physical assaults, were triggered by social demands and academic expectations. Testing revealed

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<sup>7</sup> Ms. Borofka is a licensed educational psychologist and has worked part time as a school psychologist for 30 years, the last 27 years with the District. In 1982 she obtained two master degrees in the areas of school psychology and clinical psychology from Eastern Washington University. She is pending a doctorate in psychology from Sofia University in Palo Alto, California, in June 2013. Ms. Borofka holds two lifetime pupil personnel certificates, one in Spanish adult education, and the other in school psychology.

<sup>8</sup> California state law uses the term "assessments" in lieu of "evaluation." These terms have the same meaning and are often interchanged. (Ed. Code, § 56302.5.)



that Student's verbal abilities remained in the average range; his spatial and non-verbal skills fell to below average; and his abstract reasoning skills fell to the borderline range of ability. Student was not able to engage in the abstract reasoning that occurs among typical peers at this stage of development. Student's receptive and expressive language, self-help skills and gross motor skills were at the four and a half-year-old level, and his socialization skills were at the one and a half to two-year-old level. Student's reading and math scores were at the second grade level, while his written language remained at the first grade level.

15. According to the District's speech and language assessment, Student scored significantly below his peers in pragmatic language skills, and he had difficulty with reciprocal conversations and maintaining relationships. The District learned from its triennial OT assessment that Student's gross and fine motor skills were significantly below age level. His difficulty processing sensory information impaired his daily functioning and academics. Student was distracted by auditory information, more focused in a quiet room, and benefited from a predictable environment.

#### MEETING STUDENT'S BEHAVIORAL NEEDS

16. The May 2011 triennial IEP team addressed Student's documented behavioral needs described above. When a child's behavior impedes his learning or that of others, the IEP team must consider positive behavioral interventions, strategies, and supports to address that behavior. This may require the IEP team to develop or revise a behavior support plan (BSP) to address maladaptive behaviors. The BSP identifies the behaviors impeding learning, their frequency and intensity, and the antecedents. The plan then identifies preferred replacement behaviors and provides detailed strategies to help students to engage in the replacement behaviors.

17. The IEP team updated Student's BSP. Student's behaviors impeding learning were physical aggression, profanity, and repetitive mannerisms and speech. The

team determined when Student was likely to engage in these behaviors and why. The new BSP appropriately identified replacement behaviors, environmental changes and supports, and teaching strategies. The District's witnesses consistently and credibly testified that Student's revised BSP addressed his behavior needs. The evidence established that the BSP was appropriate, sufficiently detailed, and clear such that staff could effectively implement it. Parent did not express disagreement with the content of Student's offered BSP.

#### DETERMINING PRESENT LEVELS OF PERFORMANCE AND DEVELOPING ANNUAL GOALS

18. An annual IEP must include a statement of the child's present levels of academic achievement and functional performance, which creates a baseline for designing educational programming, including the development of annual goals, and measuring future progress. The IEP must include a statement of measurable annual goals designed to meet the child's needs that result from his disability.

19. Based upon the triennial assessment, supplemented with Parent information and Beacon's progress reports, the District and Beacon team members determined and clearly described Student's present levels of performance in several areas including academics and social emotional/behavioral skills. The evidence showed that Student was much more successful working on academics in a quiet area, could not work independently, had poor coping skills, and was easily frustrated.

20. The IEP team reviewed Student's prior goals and the consensus, aside from Parent, was that Student made measurable academic, social and behavioral progress while at Beacon. The evidence showed that Student's negative behaviors decreased from daily outbursts to one to two tantrums a week; he advanced toward working on academics independently as he improved his use of coping strategies; and he enjoyed attending school and worked hard on peer relations. Parent agreed that Student made some progress at Beacon. However, she was not persuasive in her testimony that

Student's progress was due solely to normal maturation as opposed to the educational program. No professional agreed with her and no evidence supported her claim. Ms. Borofka's testing additionally revealed that Student was not achieving neurological maturation comparable to his peers.

21. The team revised Student's prior annual goals and added new goals. District witnesses established that the proposed 16 goals targeted all of Student's identified areas of need, correlated to Student's baselines, and were measurable. The IEP specified that Parent would be informed of Student's progress every trimester by provision of annotated goals.

#### PROVISION OF RELATED SERVICES

22. An annual IEP is required to 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) include such matters as transportation, OT, and speech and language services.

23. Student's triennial assessments identified related service needs in the areas of speech and language and OT. The District offered Student pull out group speech and language services, once a week for 30 minutes, to improve Student's social skills and awareness of appropriate behavior.<sup>9</sup> The District offered push in group OT services, once a week for 30 minutes. The evidence established that the triennial offer of related services adequately met Student's needs for those services. Mother does not contend otherwise.

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<sup>9</sup> "Pull out" refers to removing a student from his class environment to participate in a service outside of the class, whereas "push in" refers to the provision of related services within the student's classroom.

## DETERMINATION OF THE LEAST RESTRICTIVE ENVIRONMENT

24. The IDEA requires that a student with a disability be placed in the LRE in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. Parent contends Beacon was too restrictive and preferred placement in a District SDC, but neither party presented any evidence of a specific District SDC program. Therefore, this Decision compares placement at Beacon to the general education environment. The LRE analysis involves weighing four factors: the academic benefits of placement in a general education setting; the non-academic benefits of this setting; the effects of Student's presence on the teacher and students; and the costs of educating Student in the general education class. The District proved that Student was not able to benefit from a general education class and that its triennial offer would have placed Student in the LRE.

### Academic Benefits

25. The information before the May 2011 triennial IEP team showed that academically Student was functioning far below the level of his same-aged typical peers. Student's inability to tolerate situations where others outperformed him weighed against a general education classroom. His sense of competition caused him to act out, necessitating his removal to a more restrictive one-on-one setting. The District's witnesses established that given Student's unique combination of intellectual and behavioral needs, he required a program like Beacon which specifically targeted behavioral, emotional and social issues that impede learning. The District established that Student would not have been able to function academically in a larger class with increased expectations of behavior control.

### Non-Academic Benefit

26. The information before the May 2011 IEP team showed that Student could not have successfully interacted with other students in a general education setting. Although he adjusted to Beacon smoothly, made friends and began to develop his social skills, his teacher described him on behavioral rating scales as having significant issues with anxiety, depression, poor socialization, and aggressive and impulsive behaviors. Student lacked pragmatic social communication skills and had difficulty with relationships. These challenges, coupled with Student's propensity to act out when anxious, necessitated Student's placement in a specialized educational setting like Beacon so that he could attain age-appropriate social skills. District and Beacon witnesses established that Student was not yet able to generalize his developing social skills, and the risk of overwhelming Student in a general education setting outweighed the non-academic benefits of such a placement. Student's self-esteem increased in the more restrictive autism class where he could see his strengths as compared to students who did not outperform him.

### Impact on Others and Cost

27. Student's continuing tantrums and physical displays, even while assigned a one-on-one aide, would have had a disruptive effect on the class and teacher in a general education class. Parent contended, but did not prove, that Student's behaviors did not interfere with his learning or that of others, and argued that he could be mainstreamed, which would give him a more appropriate peer group. No other evidence supported her view. Ms. Borofka more persuasively explained that the frequency and severity of Student's tantrums, including screaming and physical outbursts were highly disruptive behaviors. Even during his triennial testing, Student acted out by cursing, pulling his shirt over his head, and grabbing the assessor's hair.

Other District witnesses and contemporaneous documents confirmed that he would be unduly disruptive if placed in general education.<sup>10</sup>

28. On balance, the information before the May 2011 IEP team established that given the nature and severity of Student's disabilities, he required placement in an NPS SDC in order to receive educational and social benefit. The District demonstrated that Student could not be educated satisfactorily in a less restrictive setting as he would not obtain academic benefit there, would not grow socially, and would be extremely disruptive to other students and staff.

#### Parent's Criticisms of the Offer

##### PROPER CREDENTIALING OF TEACHERS AND STAFF

29. Parent contended, but did not prove, that Beacon staff was not properly credentialed to teach Student. The District established, through the credible testimony of Beacon Executive Director Teresa Malekzadeh, that her staff was appropriately credentialed from October 2011 through the time of hearing.<sup>11</sup> Her testimony also established that Student's teacher was qualified to teach a student with autism. Katie

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<sup>10</sup> Neither party made an argument relating to the cost of the proposed placement. The District's decision to offer Beacon was not driven by cost but by Student's needs; it would cost the District less to place Student in a general education class as opposed to funding an NPS.

<sup>11</sup> Ms. Malekzadeh has worked with special education students for over 30 years. She obtained her bachelor's degree in elementary and special education from Marion College in Indianapolis and holds a preliminary special education teaching credential. In 1985, she started teaching at Beacon and served as the program coordinator and director prior to her current position, which she has held for over seven years.

Heberling, who previously taught Beacon's new autism class during the spring of 2011, was scheduled to be Student's teacher for the 2011-2012 school year in the elementary SDC. Ms. Heberling's possession of a moderate/severe intern permit, and her participation in a credentialing program, authorized her to teach autistic students. In addition, she had six years prior experience working at a severely handicapped SDC for the County.

30. Parent alleged but did not establish that Ms. Campara lacked requisite training in autism and experience to serve as Student's aide. Parent offered no support for her contention that an aide must have specialized training and that this must be specified in the IEP services offer. Neither Federal nor State law requires that an IEP specify the qualifications of a service provider.<sup>12</sup> Ms. Borofka, Ms. Malekzdeh and Parent all spoke highly of Student's aide and her work with him. Additionally, the evidence showed that Beacon's behavior coaches all hold bachelor degrees and have experience working with special needs children.

#### APPROPRIATENESS OF PEERS AND MAINSTREAMING OPPORTUNITIES

31. Parent contended but did not prove that the Beacon SDC was not appropriate for Student because it focused on students with emotional disturbances rather than autism. The District's witnesses credibly established that the Beacon SDC was non-categorical and composed of students who similarly were working on behaviors that impeded learning. Student had previously made progress there. There was no credible evidence in support of Parent's contention that Student acted out as a result of mimicking the negative behaviors of his classmates. Rather, the District's witnesses

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<sup>12</sup> *S.M. and G.M. v. State of Hawaii, Department of Educ.* (D. Hawaii 2011) 808 F.Supp.2d 1269, 1274; *B.V. v. Department of Educ., State of Hawaii* (D. Hawaii 2005) 451 F.Supp.2d 1113, 1125, *affd.* (9th Cir. 2008) 514 F.3d 1384.

established that Student's behaviors were more severe than those of his classmates, and Student could benefit from modeling his peers.

32. Parent provided no evidence in support of her contention that Student had previously succeeded in dedicated autism programs. During the triennial process, Ms. Borofka investigated autism programs but these were geared toward lower functioning students and would not serve Student's capacity to further develop his socialization skills. Ms. Malekzadeh who observed Student in class two to three periods each week, and Ms. Mays who observed him at Beacon every other month, both testified persuasively that Student's needs were being met and he was not yet ready to transition to a less restrictive setting.<sup>13</sup> Although Beacon fell short of the program preferred by Parent in that it did not have an after-school sports program or typical peers, the District established, as detailed above, that Student required a small, highly structured class and was not yet ready for a comprehensive campus.

#### BEHAVIORAL FOCUS IN LIEU OF ACADEMIC CURRICULUM

33. Parent contended but did not prove that due to the chaotic nature of the Beacon SDC and the presence of emotionally disturbed students, the staff focused on controlling behaviors as opposed to teaching students. Ms. Malekzadeh persuasively testified that the initial focus for an NPS student must be on addressing behaviors that

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<sup>13</sup> Since August of 2010, Ms. Mays has been a program specialist for the District. She obtained her bachelor's degree in special education and general education in 1998 from Arizona State University. Since 2001, Ms. Mays has held a Level 2 mild/moderate teaching credential. She earned her master's degree in administration in 2007, and in December 2011, she earned her authorization certificate to teach children with autism. Prior to her current employment, Ms. Mays taught for over nine years at a variety of SDC's, including an autism program.



have prevented him from learning in a traditional environment. The evidence established that Student benefitted from Beacon's behavioral strategies enough that he was able to attend to, progress and succeed in his academic tasks. Student's schedule in the SDC included all core academic classes. Parent's inconsistent testimony, that Student was not given homework but that she helped him complete his work every night, diminished her persuasiveness on this point.<sup>14</sup>

#### THE 2011 TRIENNIAL IEP SUBSTANTIVELY OFFERED A FAPE AND REMAINS AN OFFER OF FAPE

34. Overall, a preponderance of the evidence established that the May 26, 2011 IEP offer addressed all of Student's unique needs, was reasonably calculated to allow him to obtain educational benefit, and offered him a FAPE in the LRE. The goals were rooted in accurate present levels of performance, recently determined by teachers and assessors familiar with Student; Beacon provided a small structured environment with a strong behavior component; the support of a dedicated one-to-one aide ensured Student the opportunity to access his educational program; and the proposed related services sufficiently supported Student to ensure he could obtain educational benefit. The uncontroverted expert testimony of District and Beacon witnesses established that Beacon was the right place for Student.

35. Throughout numerous IEP team meetings during the 2011-2012 and 2012-2013 school years, the District continued to offer its May 2011 triennial IEP as a FAPE, with only minor modifications. For instance, during an August 24, 2011 IEP team meeting, the team agreed that Student would take the California Modified Assessment

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<sup>14</sup> Parent's additional contentions that Beacon did not offer, as promised, a dance and woodshop class or sufficiently healthy lunch program were refuted by the credible testimony of Beacon staff and documentary evidence.

test in spring of 2012, instead of the California Standards Test with accommodations as called for in the May 2011 IEP. The evidence, including Parent's testimony, established that this change was consistent with and required by Student's academic performance and occurred after IEP team discussion and with Parent's participation and agreement. It did not significantly alter the May 2011 offer.

36. During an October 2, 2012 IEP team meeting, the District continued to stand by its prior triennial offer for the current school year until new assessments were completed. Student's absence from school since September 2011 meant that the team had no updated information on his present abilities and levels of performance. The District attempted to obtain Parent's consent for new assessments which would allow the team to update Student's present levels of functioning and to develop new goals based on newer information, but Parent declined to consent to new assessments. So, the District did what it could with the information it had. Student had made progress at Beacon; the triennial assessments supported continued placement at Beacon; and there was no additional information available for the team to consider.

37. At an October 9, 2012 IEP team meeting, the team considered updated information about Beacon itself. As reflected in the meeting notes, Beacon has certified staff to teach children with autism, as well as a qualified teacher, behavior therapist and mental health therapist, and the staff members are familiar with Student based on his prior attendance. As of October 2012, six students, all of whom are verbal, attend the elementary SDC, and range from fourth through sixth grade, ages nine through eleven which is in Student's age range. The evidence showed that Beacon continues to provide a quiet, calm classroom with few distractions from which Student can still derive educational benefit. Therefore, the District's choice to continue to offer Beacon for the 2012-2013 school year was reasonably calculated to provide Student meaningful educational benefit in the LRE. Without new assessments, the District could do no more

and under these circumstances, the May 2011 IEP offer was not so stale so as to render the October 2012 offer deficient. Parent continued to decline the District's offer.

#### PROCEDURAL COMPLIANCE IN DEVELOPING THE IEP OFFER

38. The LEA must ensure that the IEP team reviews the child's IEP not less frequently than annually and revises the IEP to address any lack of progress and reevaluation results. The LEA must give the parent adequate notice of an IEP team meeting to ensure that she has the opportunity to attend. The notice must specify the purpose of the meeting, identify those likely to attend, and invite parent to bring others with knowledge or special expertise about the student. The LEA must take steps to ensure that all required IEP team members attend the meeting, and that the parent has the opportunity to participate meaningfully in the formulation of the child's IEP. At the IEP team meeting, the LEA is required to provide a parent with a copy of her rights and procedural safeguards, and must consider her views; it may not arrive at the IEP team meeting with an offer that has been predetermined.

#### Notice, Team Composition, and Procedural Safeguards

39. The District complied with all procedural requirements in conducting the triennial IEP team meeting of May 26, 2011. On April 26, 2011, the District mailed Parent a notice of the meeting. The notice set forth the time, place and location of the meeting, properly announced the purpose of the meeting, listed the team members anticipated to attend, and invited Parent to bring others to the meeting if desired. Both in timing and content, the meeting notice complied with all procedures.

40. The IEP team must be composed of the Parent, at least one regular education teacher if the child is or may be participating in the regular education setting, at least one special education teacher, a representative of the LEA who is qualified to provide or supervise the provision of specially designed instruction, and is

knowledgeable about the general education curriculum and LEA resources, an individual who can interpret evaluation results, and when appropriate, the child.

41. The District established that all required team members attended Student's May 2011 triennial IEP team meeting including Parent, Ms. Mays as administrative designee, Ms. Borofka, Ms. Campara, Ms. Malekzadeh, and the speech and language pathologist, the occupational therapist and the SDC teacher.<sup>15</sup> Parent agreed to excuse the attendance of the school nurse who submitted a written health report. At the May 26, 2011 IEP team meeting, the District offered Parent a copy of the procedural safeguards. The evidence established that the District's practice was to provide Parent with her safeguards immediately after introductions, at the start of each IEP team meeting, and that it acted accordingly.

#### Information Considered and Development of Offer

42. The IEP team must consider the strengths of the child, parental concerns, evaluation results, academic, developmental and functional needs, and in the case of a child whose behavior impedes his learning, the use of positive behavior interventions and supports. The evidence established that the IEP team considered Student's strengths in the area of expressive communication and his desire to socialize, the results of each assessment, and Parent's concerns. Based upon the triennial assessment, the team determined Student's present levels of performance and academic achievement, identified his areas of need, devised measurable annual goals, revised Student's BSP, considered various service options, and determined a placement offer.

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<sup>15</sup> Parent's recollection that Ms. Montegna attended as the District's representative and left early without signing the IEP document, rendering the resultant IEP offer "invalid," was refuted by the credible, clear testimony of Ms. Mays and Ms. Malekzadeh as well as the May 26, 2011 IEP signature page.

43. The team is required to consider various levels of service options for a student and decide together what constitutes a placement in which the student may obtain educational benefit in the LRE. During the May 2011 triennial meeting, the team considered placing Student in an SDC, an SDC inclusion program, and a Resource Specialist Program (RSP). At subsequent IEP team meetings the disagreement between the parties focused on the relative merits of Beacon, a private school requested by Parent named Esther B. Clarke (EBC), and a District SDC. On August 29, 2011, the District declined Parent's request to place Student at EBC in a prior written notice (PWN) sent by certified mail with procedural safeguards attached. The evidence showed that EBC does not serve children with a primary diagnosis of autism.

44. The District is required to provide a clear written offer of placement and services. An IEP offer must be sufficiently clear so that a parent can understand it and make intelligent decisions about it. The District made the following offer for Student: placement at an SDC at Beacon NPS including extended school year (ESY), the assistance of a one-on-one aide throughout the school day, and the related services of 30 minutes per week of speech and language support and 30 minutes per week of OT. This offer was in writing and sufficiently clear for Parent to understand. The offer remained clear throughout subsequent IEP team meetings at which it was slightly altered. The District also continued to provide Parent with PWN's in August and November 2011, and October 2012, which provided in plain, concise language the District's ongoing offer of a FAPE as originally described at the triennial IEP team meeting.

45. The IEP team continued to consider all available information at subsequent meetings when the District renewed its offer. As mentioned above, the October 2, 2012 IEP renewal offer appropriately called for assessments in order for the team to gather missing baseline information. During the October 9, 2012 IEP team meeting, the team

operated on the information available to it by reviewing current information about Beacon and briefly interacting with Student.

#### Meaningful Parental Participation

46. A parent is considered a full and equal member of the IEP team. A school district is required to conduct not just an IEP team meeting, but also a meaningful IEP team meeting. A parent meaningfully participates in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions to the IEP.

47. During the triennial IEP team meeting and in all meetings subsequent thereto, the District provided Parent an opportunity to ask questions, provide input, and share her concerns. The team considered Parent's concerns and answered her questions.

48. The District members of the IEP team may not arrive at the meeting with a take it or leave it offer. Ms. Mays testified persuasively that she did not attend the triennial IEP team meeting with the position that Student would remain at Beacon, and that it is always her hope that NPS students return to a District program. The District established that its team members approached the triennial meeting and subsequent meetings with open minds, and were willing to consider the available evaluations and discuss Parent's desire to transition Student to a less restrictive setting.

#### Procedural Violation of Failing to Timely Convene Meeting Requested by Parent

49. The day after the August 24, 2011 IEP team meeting, Parent faxed the District a written request for "a placement IEP." An IEP team meeting must be held within 30 days, not counting days between the student's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the written request. Upon receipt of Parent's written request for an IEP, the District had 30

days to convene an IEP team meeting, on or before September 24, 2011.<sup>16</sup> The District did not respond until September 29, 2011, when it sent Parent, by way of certified mail, a notice of meeting for October 12, 2011. Ms. Mays' testimony that she believed she tried to call Parent but her voicemail was full does not establish adequate diligence in timely convening the IEP team meeting, nor parental non-cooperation. The District's failure to timely convene this IEP team meeting constitutes a procedural violation.

50. 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 child'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. On the noticed date, October 12, 2011, the IEP team gathered but Parent did not appear, so no meeting took place. The evidence did not establish that this violation resulted in any prejudice to Student. Parent continued to keep Student out of school, the District continued to schedule IEP team meetings, and Parent continued to participate in the decision making process. The error was harmless and cured by the convening of an IEP team meeting on November 8, 2011.

Failure to have an IEP in place at the beginning of the School Year

BEGINNING OF 2011-2012 SCHOOL YEAR

51. Federal and State special education law require the District to have a formal written IEP in effect for each child eligible for special education services at the start of each school year. The only reason the May 26, 2011 IEP was not in effect at the

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<sup>16</sup> Beacon's 2011-2012 school year started on August 15, 2011.

start of the 2011- 2012 school year was that Parent refused to consent to it.<sup>17</sup> Since the offer was made well in advance of the beginning of the school year and was outstanding when classes began, the District satisfied its obligations to offer Student a FAPE for that school year.<sup>18</sup>

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<sup>17</sup> Given the District's subsequent filing of a complaint in December of 2012 and this Decision's determination that the District's May 2011 IEP offer and renewal offers constitute a FAPE, there is no need to address the District's failure to take steps to break the impasse sooner.

<sup>18</sup> Parent filed a complaint with the California Department of Education (CDE) in September of 2012 based upon the District's failure to file for a due process hearing when the Parent withheld consent to the proposed IEP. This investigation report is administrative hearsay which supplements and explains Parent's testimony. CDE found the District non-compliant with their responsibility to have an IEP in place for the 2011-2012 and 2012-2013 school years. CDE's findings that the District did not fulfill its legal requirements to either obtain parental consent or file for a due process hearing to obtain approval of its proposed IEP, such that it is responsible for compensating Student for the loss of educational benefit from October 2011 to the date of decision, are not binding on OAH, though they are they are entitled to some weight. (See, *People v. Sims* (1982) 32 Cal.3d 468, 479; *Student v. Los Angeles Unified School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2009010712 (Order Granting Motion to Dismiss); *Student v. Bellflower Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs Case No. 2005110764; *Student v. San Diego Unified School Dist.* (2004) Special Education Hearing Office Case No. 2739.) Based on the evidence summarized above, some of which was not available to the CDE, the ALJ independently disagrees with CDE's findings. The



BEGINNING OF THE 2012-2013 SCHOOL YEAR

52. The May 2011 triennial IEP offer expired by its own terms at the conclusion of the ESY in July 2012. The proposed annual goals expired on May 26, 2012. On May 8, 2012, Parent faxed to the District a request for an IEP team meeting. The District acknowledged receipt of this written request on May 8, 2012. Parent's request came less than 30 days prior to the end of the school year, which concluded June 1, 2012. Although the District was not required to convene an IEP team during summer vacation, on May 28, 2012, the District sent Parent a notice of an IEP team meeting for June 7, 2012.

53. The notice listed, in error, the purpose of the June 7, 2012 meeting as an "amendment IEP." Ms. Mays' testimony established that this notice should have indicated the purpose was to convene an annual IEP team meeting. In a follow-up written request for an IEP team meeting dated May 11, 2012, Parent specified that Student was due for his annual meeting. Since Parent and the District were aware of the real purpose of the meeting, this error did not render the notice inadequate and was not a procedural violation. The legal requirement to meet at least annually does not require the District to notice and convene an "annual" IEP team meeting designated as such within one year of the last annual meeting. Here, the District met at least as often as annually to review Student's progress on his goals and consider any necessary revisions, and therefore complied with the law. Parent testified she received the notice on June 4, 2012, made no attempt to reschedule the meeting, and failed to appear. This IEP team meeting did not occur, given Parent's nonappearance. The District properly discharged its duty to convene a meeting within 30 days of Parent's request.

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District's failure to file for a due process hearing does not invalidate the underlying May 2011 IEP which this Decision finds to be a substantive offer of FAPE.

54. However, the District did not fully discharge its duty to have an IEP offer in place by the beginning of the school year. At Beacon, the 2012-2013 school year began on August 14, 2012. The District failed to have an updated and revised annual IEP offer in effect at the start of the 2012-2013 school year. After its unsuccessful attempt to meet with Parent on June 7, 2012, the District took no additional steps to convene an IEP team meeting until it sent a notice of meeting dated September 18, 2012, offering a meeting date of September 27, 2012. Parent and the District agreed to meet on October 2, 2012.

55. October 2, 2012, was the first time the team met to discuss an offer for the 2012-2013 school year. Parent meaningfully participated in the IEP team meeting as established by the meeting notes entered by Ms. Mays.<sup>19</sup> The team discussed Parent's concerns, attempted to gather current information on Student, and discussed various placement options. At that IEP team meeting and a later meeting on October 9, 2012, the District discussed with Parent its continuing offer of placement at Beacon with aide support and related services for the 2012-2013 school year, and provided Parent with a clear written IEP offer in a PWN dated October 12, 2012, which Parent received through

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<sup>19</sup> Ms. Mays' testimony established that the October 2, 2012 IEP was a final document but the data system printed out a "DRAFT" version because it could not verify this IEP due to missing information, such as consent to prior IEP's, revisions to present levels, and updated goals. Additionally the system, in error, noted a total of five pages although the October 2012 IEP consisted of only three pages. These errors had no practical consequence.

certified mail.<sup>20</sup> In light of the facts of this case, the less than two-month delay in making a formal offer for the 2012-2013 school year constituted a procedural violation but was harmless. The delay did not significantly impede Parent's participatory rights, as the parties had repeatedly debated the merits of placement at Beacon, EBC and District programs, and Parent was aware that District's offer at Beacon remained available to Student.<sup>21</sup>

#### The May 2011 IEP Offer and Subsequent Renewals Were Procedurally Valid

56. As summarized above, the evidence showed that the District correctly complied with the procedural requirements for holding an IEP team meeting when it fashioned the triennial offer. At each subsequent IEP team meeting at which the May 2011 offer was renewed or slightly modified, including in August and November 2011, and October 2012, the District similarly complied with applicable procedural requirements.<sup>22</sup> At the August 24, 2011 IEP team meeting, Ms. Montegna appeared as

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<sup>20</sup> The October 2, 2012 team meeting notes clearly identify the District's offer in writing although there was no evidence as to whether or when Parent received these notes.

<sup>21</sup> Any doubt that Parent would have rejected Beacon at or before the start of the 2012-2013 school year is dispelled by Parent's rejection of Discovery's May 31, 2012 IEP offer of Beacon for the 2012 ESY and 2012-2013 school year.

<sup>22</sup> At hearing, Parent contended, but did not establish, that the District failed to invite all required team members for the June 7, 2012 IEP team meeting or list all required members on the notice. The District credibly demonstrated that, had Parent attended the meeting, the District would have been able to proceed with all required team members.

the LEA representative but failed to sign in as a participant and left abruptly, ending the meeting.<sup>23</sup> Ms. Montegna's unexplained departure did not rise to the level of a procedural violation. Parent participated fully in the IEP team meetings before and after August 24, 2011, and there was no evidence that the abrupt termination of that meeting impeded Parent's meaningful participation.

#### THE DISTRICT'S RIGHT TO REASSESS STUDENT

57. A district may reassess a student with a disability if reassessment is warranted by the student's educational or related services needs. Reassessments normally require parental consent, and to obtain that consent, the District must develop and present an assessment plan. However, if the parent does not consent to the plan, the District may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so.

#### The October 2012 Assessment Plan

58. On October 12, 2012, the District mailed Parent an assessment plan dated October 11, 2012. Parent received this and did not consent or otherwise respond. The District again mailed the October 2012 assessment plan to Parent on November 5, 2012.<sup>24</sup> The assessment plan proposed to assess Student in the following areas:

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<sup>23</sup> Ms. Malekzadeh's testimony established that Ms. Montegna left due to ongoing disagreements with Parent. The law requires the presence of an LEA representative. Ms. Montegna's departure terminated the meeting.

<sup>24</sup> Parent acknowledged receipt of Ms. May's November 5, 2011 letter which addressed both school enrollment and the assessment plan. Parent also acknowledged receipt of the attached enrollment data sheet. Parent did not contest the accuracy of this letter which also indicates the October 2012 assessment plan was enclosed.

academics, health, intellectual development, language, motor development, social/emotional, and adaptive/behavior. The assessment plan identifies the Northern California Diagnostic Center (NCDC) as the assessor with the exception of the health and motor development assessments, which would be conducted by the District nurse and occupational therapist, respectively. The purpose of this comprehensive assessment was to determine Student's present levels of performance and update annual goals.

#### The November and December 2012 Assessment Plans

59. The District introduced a letter dated November 29, 2012, addressed to Parent from Ms. Montegna with a second assessment plan dated November 28, 2012, attached. The plan identifies the same areas for assessment as those previously listed in the October 2012 plan, except for adaptive/behavior, and incorporates alternative means of assessment including observation, interview and file review. The plan identifies the District as the assessor and lists the title of the examiner for each assessment area. The District introduced another letter from Ms. Montegna to Parent dated December 14, 2012. This letter indicated the November assessment plan inadvertently left out the area of adaptive/behavior and referenced an enclosed amended assessment plan dated December 14, 2012, which proposed assessment of Student by the school psychologist and behavior specialist in the area of adaptive/behavior.

60. The District did not prove that it ever mailed the November 29 and December 14, 2012 letters to Parent. Ms. Montegna did not testify at hearing. Parent testified that she never received the November and December 2012 letters or the attached assessment plans. The District did not introduce any evidence that these letters were actually mailed and so failed to establish that it provided Parent with the November and December letters and attached assessment plans. However, the District did make reasonable attempts to obtain parental consent to the October 2012 assessment plan. Given Parent's refusal to consent to the October plan, and her

testimony at hearing that she would not consent to an assessment unless ordered to do so, it is unlikely Parent would have consented to assessments in November or December 2012. Therefore, the fact that she did not receive the November and December assessment plans prior to hearing should not prohibit assessment pursuant to those plans which list the same areas of testing as the October 2012 assessment plan, if otherwise appropriate.

#### Parental Opposition to Reassessment

61. Parent testified that the triennial assessments in spring of 2011 were thorough and accurate and that Student should not be subjected to further testing until his next triennial in spring of 2014. She indicated that the testing was hard on her as well as Student, and it would be detrimental to both of them to subject Student to the testing process again. Parent would consent to limited, academic testing if performed by Children's Health Council.

#### The District's Need for Updated Assessments

62. However, the credible testimony of Ms. Borofka, Ms. Devine, and Ms. Mays established a substantial need to reassess Student to determine his current level of functioning, programming needs, and the most appropriate placement. Ms. Borofka established that the assessment was warranted because Student's present levels and educational needs may have changed based upon the following factors: Student has not been in any educational program for the past one and a half years; autism is a disorder with many variations; he is an emotionally labile child whose skills and behaviors fluctuate as well; and, the triennial testing revealed that Student's abstract reasoning scores had dropped from his prior testing.

63. Even Parent's testimony, to some extent, supported the need for new assessments. Parent testified that since September of 2011, Student's last month of

attendance at school, she taught her son, provided academics, and provided him social opportunities through an after-school day care program, church respite programs, Friday night social night and other group settings for children. Parent indicated that Student matured and flourished in these situations and wants to interact with other children. Parent testified that Student is calmer and focused now that he is taking medication, and he is now reading beyond grade level.<sup>25</sup>

64. Developing a new program for Student is hindered by the fact that Parent removed him from school and he has not attended any formal education program since September of 2011. He has not been assessed by the District since the spring of 2011 and those assessments are now obsolete. There has been no more recent opportunity for the team to observe Student in class or obtain any teacher reports, test scores or report cards by which Student's present levels can be measured, and he has no current academic goals against which progress can be measured. In the absence of the kinds of academic information that usually supplement or substitute for assessments, the District's need for assessment information is critical. Thus, the District established a need for current assessments.

65. For the reasons above, the District demonstrated that Student's educational and related services needs warrant a reevaluation as proposed by the District in the November 28 and December 14, 2012 assessment plans.

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<sup>25</sup> Parent's testimony about his reading skills was sharply at odds with available testing data and academic reports. Parent was not aware of the grade level at which Student was reading when he last attended school.

## 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 persuasion at the due process hearing. In this case, the District filed for a due process hearing and therefore bears the burden of persuasion as to all issues.

### RESIDENCY AND RESPONSIBILITY FOR OFFERING A FAPE

2. Under the IDEA, an LEA is charged with "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law requires students to attend the public school "in which the residency of either the parent or legal guardian is located." (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57.) That district usually becomes the LEA responsible for providing a FAPE to an eligible student. (20 U.S.C. § 1401(19); 34 C.F.R. § 300.28(a)(2006); Ed. Code, § 56026.3.)<sup>26</sup> The determination of residency under the IDEA is made under state law and is no different from the determination of residency in other types of cases. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1525 (*Union*)). A parent's residence is determined as follows: (1) it is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which she returns in seasons of repose; (2) there can only be one residence; (3) a residence cannot be lost until another is gained; and (4) the residence can be changed only by the union of act and intent. (Gov. Code, § 244.)

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<sup>26</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



3. The McKinney-Vento Homeless Assistance Act is part of the No Child Left Behind Act, and it requires school districts to continue educating a homeless child in his "school of origin," usually the school student attended before he became homeless. (42 U.S.C. § 11432(g)(3)(G).) OAH does not have jurisdiction to adjudicate disputes arising under that Act.<sup>27</sup>

#### CHARTER SCHOOLS

4. A charter school becomes responsible for providing a FAPE to an eligible student once he enrolls in the school. The agency that granted the charter must ensure that all children with disabilities enrolled in the charter school receive special education pursuant to their IEP's. (Ed. Code, § 47646, subd. (a).)

#### ELEMENTS OF A FAPE

5. A child with a disability has the right to a FAPE under the IDEA and State law. (20 U.S.C. §§ 1400(d) & 1412(a)(1)(A); 34 C.F.R. § 300.101; Ed. Code, §§ 56000, 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; Ed. Code, § 56031; 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.) In California, related services are called designated instruction and services. (Ed. Code, § 56363, subd. (a).) Related services includes speech and language services, OT and other services as may be required to assist the child in

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<sup>27</sup> There is an appeal process when a dispute arises between a school district and parent concerning a homeless student's educational placement. (42 U.S.C. § 11432(g)(3)(E).)

benefiting from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a).)

6. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S. Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-53.)

7. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program, not the alternative preferred by a parent. If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided a FAPE, even if the parent preferred another program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*))

#### REQUIRED MEMBERS OF AN IEP TEAM

8. An IEP team must include at least one parent; a representative of the LEA; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of the assessment results; other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district or the parent; and, when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. 300.321(a); Ed. Code, § 56341, subd. (b).) Required IEP team members may be excused from an IEP team meeting if the parent and the school

district consent in writing, and the excused member provides input in writing to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C); 34 C.F.R. § 300.321(e)(2); Ed. Code, § 56341, subd. (f).)

#### REQUIRED CONTENTS OF AN IEP

9. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a)(1); Ed. Code, § 56341.1, subd. (a).)

10. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent

practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

#### OBLIGATION TO ADDRESS BEHAVIORAL NEEDS

11. In the case of a child 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.” (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).) In California, less serious behaviors may be addressed by the development of a BSP, though no statute or regulation uses that term.

#### LEAST RESTRICTIVE ENVIRONMENT

12. Federal and State law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers “to the maximum extent appropriate,” and may be removed from the general education environment only when the nature or severity of the student’s disabilities is such that education in general 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); Ed. Code, § 56040.1.) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit has adopted a balancing test that requires the consideration of four 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 would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404; see also *Clyde K. v. Puyallup Sch. Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.)

13. If it is determined that a child cannot be educated in the 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.* (5th Cir. 1989) 874 F.2d 1036, 1050.) Education Code section 56360 requires that the special education local plan area 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. (Ed. Code, § 56360; see also 34 C.F.R. § 300.115(a).)

#### PARENTAL PARTICIPATION IN THE DECISION-MAKING PROCESS

14. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322(a); Ed. Code, §§ 56304, 56341.5, subd. (a).) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); Ed. Code, § 56342.5.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1, subd.(f).)

15. A district must notify parents of an IEP team meeting early enough to ensure that they have an adequate opportunity to attend, and it must schedule the meeting at a mutually agreed-on time and place. The notice must indicate the purpose, time, and location of the meeting and who will be in attendance. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56043, subd. (e), 56341.5, subds. (b), (c).)

## Meaningful Participation in IEP Team Meetings

16. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485 (*Target Range*); *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.) The standard for “meaningful participation” is an adequate opportunity to participate in the development of the child’s IEP. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133 (*Vashon Island*)). A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP team meeting, expresses her disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.)

## Predetermination of Offer

17. 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 (*JG v. Douglas*)).

## SPECIFIC WRITTEN OFFER

18. A district must present to parents a formal, specific, written offer of placement that allows them to make intelligent decisions for their child. (*Union, supra*, 15 F.3d at p. 1526.) “The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about

when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any." (*Ibid.*)

#### CONVENING OF IEP TEAM MEETINGS AT REQUEST OF PARENT

19. A district must convene an IEP team meeting when a parent requests a meeting to develop, review, or revise the IEP. (Ed. Code, § 56343, subd. (c).) In California, the meeting must be held within 30 days from the date of receipt of the written request, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days. (Ed. Code, § 56343.5.)

#### REQUIREMENT THAT IEP TEAM MEET AT LEAST ANNUALLY AND TIMELY OFFER AN IEP

20. A district must have an IEP in effect for each child with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (c).) A failure to timely update the IEP is a procedural violation of the IDEA which may constitute a denial of a FAPE. (*Eley v. District of Columbia* (D.D.C. 2012) 2012 WL 3656471, pp. 7-8 [district denied a FAPE when student matriculated from eighth grade and had no identified school to attend for the first 23 days of the new school year.])

21. A school district must conduct an IEP team meeting for a special education student at least annually to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56380, subd. (a)(1) & 56343, subd. (d); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56 (*Anchorage*).) There is no requirement that an annual meeting occur at any particular time of the year. (See, e.g., Notice of Interpretation, Appendix A to 34 C.F.R. Part 300, Answer to Question 20, 64

Fed.Reg. 12476 (1999 Regulations).) Nor is there a requirement that a district hold an “annual meeting” as such.

22. The Ninth Circuit has addressed a district’s affirmative duty to timely review and revise an IEP. In *Anchorage, supra*, the Court concluded that the district was required to update a student’s present levels and goals after a year had gone by and that this would not constitute a change in placement in violation of the stay put provision of the IDEA. The Court held that the district had two options once it reached an impasse with the parents: 1) continue attempts to develop a mutually agreed upon IEP; or 2) unilaterally revise it and file for a hearing to obtain approval. (*Anchorage, supra*, 689 F.3d at p. 1056; see also *Porter v. Manhattan Beach Unified School Dist.* (C.D.Cal., Dec. 21, 2004) (Case No. CV 00-8402 GAF) 105 LRP 40577.)

#### PROCEDURAL VIOLATIONS

23. 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. (*Rowley, supra*, 458 U.S. at pp. 206-207.) 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.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG. v. Douglas, supra*, 552 F.3d at p. 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

#### Consequences of Procedural Error

24. 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 FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see *Target Range, supra*, 960 F.2d at p. 1484.)

#### Curing Procedural Error

25. Courts allow a district to cure its procedural defects with a subsequent IEP team meeting. (*Vashon Island, supra*, 337 F.3d at p. 1136; *S.J. v. Issaquah School Dist. No. 411* (9th Cir. 2009) 326 Fed.Appx. 423, p. 3 [nonpub. opn.]; *J.W. v. Fresno Unified School Dist.* (E.D.Cal. 2009) 611 F.Supp.2d 1097, 1127-1128, *affd.* (9th Cir. 2010) 626 F.3d 431.)

Determination of Issue One: Did the District offer Student a FAPE in the LRE from October 2011 to the present, pursuant to its May 26, 2011 IEP and amendments thereto, during times when Student was a resident of the District?

26. Pursuant to Factual Findings 1-7, and Legal Conclusions 1-4, from October 2011 through the time of hearing, Student resided within the District and the District fulfilled its duty to offer Student a FAPE. As established by Factual Findings 8-34 and Legal Conclusions 5-7 and 9-13, the District's offer of placement at Beacon, with one-on-one aide support and related services, substantively offered Student a FAPE in the LRE. The evidence established that in the SDC at Beacon, Student could receive the individualized services and attention he required to meet his goals. The evidence also established that Student, due to his combined intellectual and behavioral needs, especially his ongoing aggressive outbursts, could not receive a FAPE in a less restrictive environment. Pursuant to Factual Findings 38-50 and Legal Conclusions 8, 14-19, 23-25

and 56, the District complied with all procedural requirements in developing the May 26, 2011 triennial IEP offer and at all subsequent IEP team meetings. To the extent the District failed to timely convene an IEP team meeting within 30 days of Parent's August 25, 2011 written request, this delay did not affect the original offer. This error was harmless and cured by the convening of the November 2011 IEP team.

27. Based upon Factual Findings 34-37, and Legal Conclusions 20-22, the District did not impermissibly rely on an outdated IEP offer for the 2012-2013 school year. The triennial offer incorporated the most current information available to the IEP team regarding Student's present levels and unique needs. In the absence of updated information, this IEP remained reasonably calculated to ensure educational benefit, and therefore the offer continued to substantively offer Student a FAPE in the LRE through the current time. In light of the fact that Parent withheld Student from any formal schooling program for the past 18 months, and that the District had no current information as to Student's level of functioning, academic performance and related needs, it was reasonable for the District to rely on its prior offer and to pursue current assessments in order to obtain new data to form the basis for the development of a new IEP.

28. As established by Factual Findings 51-55 and Legal Conclusion 20-25, the District's failure to have an IEP offer in effect at the start of the 2012-2013 school year was a procedural violation but it was harmless. The District attempted to convene an IEP team meeting in June of 2012, but Parent did not attend. The District unduly delayed taking additional steps to hold an IEP team meeting, but the IEP team, including Parent, met twice in October 2012. The District developed an IEP offer which it confirmed in a PWN dated October 12, 2012, within two months of the start of the school year. At all relevant times the District remained ready to provide Student all necessary special education and related services at Beacon. During the IEP team meeting on October 2,

2012, Parent was clearly informed that the prior offer of Beacon remained the current offer. The District's delay in renewing its offer of Beacon was not prejudicial, as Parent was aware of the continuing offer, had already decided against it, and continued to keep Student out of school. The District's delay did not impede parental participation or cause Student to suffer an educational loss.

#### RIGHT TO REASSESS

29. In evaluating a child for special education eligibility, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) 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 may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1)). To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents and an assessment plan. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a) & 56381, subd. (d).)

30. If parents do not consent to a reassessment plan, the District may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3) & 56501, subd. (a)(3).) Parents who want their children to receive special education services must allow reassessment by the district, and cannot force the district to rely solely on an independent evaluation.

*(Johnson v. Duneland Sch. Corp. (7th Cir. 1996) 92 F.3d 554, 558; Andress v. Cleveland*

*Indep. Sch. Dist.* (5th Cir. 1995) 64 F.3d 176, 178-79; *Gregory K., supra*, 811 F.2d at p. 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48.)

Determination of Issue Two: May the District reassess Student in accordance with its November 28, 2012 and December 14, 2012 assessment plans without parental consent?

31. Based on Factual Findings 57, and 61-65, and Legal Conclusion 29, the District demonstrated that Student's educational and related services needs warrant a reevaluation of Student, as proposed by the District in its November and December 2012 assessment plans. As shown in Factual Findings 58-60 and Legal Conclusion 30, the District demonstrated that it took reasonable measures to obtain Parent's consent to its October 2012 assessment plan without success. The October 2012 assessment plan was detailed and understandable and met all legal requirements. Although the District did not establish that it provided Parent with its November and December 2012 assessment plans, taken together, these two subsequent plans sought to assess Student in the same areas as identified in the October 2012 plan. Therefore, the District established it is entitled to assess Student pursuant to its November 28, 2012 assessment plan as supplemented by the December 14, 2012 plan.

## ORDER

1. The District was the local educational agency responsible for offering and providing Student a FAPE from October 2011 through the time of hearing.

2. The District's most recent and continuing IEP offer, validly presented on May 26, August 24, and November 8, 2011, and October 2 and October 9, 2012 and reiterated in PWN's dated August 29 and November 17, 2011, and October 12, 2012, constituted an offer of a FAPE for Student in the LRE, based upon the most current information the District had of Student at each IEP team meeting, from October 2011 through the present.

3. The District is entitled to reassess Student in accordance with its November 28, 2012 and December 14, 2012 assessment plans. The District shall notify Parent in writing of the date(s) and place(s) of the reassessment of Student at least fifteen calendar days before the reassessment begins. If Student wishes to receive special education benefits at public expense, Parent shall make Student reasonably available for the reassessment.

### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues.

### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: March 14, 2013

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THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings