

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL

DISTRICT,

Respondent.

OAH CASE NO. N2007050316

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter in San Juan Capistrano, California. The hearing commenced on February 6, 2008, and continued on February 7, 8, 11, 13, and 14, 2008.

Edwin Egelsee, Esq., represented Student. Student's mother (Mother), attended each day on behalf of Student. Danielle Augustin, Esq., also representing Student, attended the hearing on several days.

Caroline A. Zuk, Esq., represented the District. Jennifer Fant, Program Specialist for the District, attended on behalf of the District.

OAH granted Student's request to file an amended request for due process hearing on October 16, 2007. The hearing commenced on February 6, 2008, and continued for an additional five days. The record closed on March 17, 2008, upon receipt of written closing arguments.

ISSUE

The sole issue in this matter is whether the District's offer of placement contained in Student's October 4, 2006, October 31, 2006, and November 2006, Individual Educational Plan (IEP) documents constitutes a free appropriate public education (FAPE).

OBJECTION RAISED ON CLOSING BRIEF

On March 20, 2008, the District filed an Objection to Student's Addition of New Issues to be Decided, contending that Student's Closing Brief introduces two new issues, specifically (1) whether the District failed to conduct an appropriate Functional Analysis Assessment (FAA) and (2) whether the District failed to include all necessary parties at the November 17, 2006 IEP. Student contends that these are not new issues, but rather are arguments in support of his contention in Issue One. At the Prehearing Conference, the ALJ determined that the sole issue to be decided was whether the District's offer of placement and services contained in the October 4, 2006, October 31, 2006, and November 17, 2006 IEPs constituted a FAPE to meet Student's significant behavioral needs.

Student's contention regarding the attendance at the November 17, 2006 IEP is wellfounded. A student is entitled to both the procedural and substantive protections of the IDEA. The determination of the attendance and input of the parties participating in an IEP is a relevant component to the determination of whether an IEP constituted a FAPE. Parents, in particular, are a protected party. Among the most important procedural safeguards created by the IDEA are those that protect the parent's right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F. 3d. 877, 882.) Student's contention regarding attendance at the November 17, 2006 IEP shall be considered as part of Issue One.

Student's contention regarding the FAA is less convincing. Student's First Amended Due Process Complaint states that the issue to be decided is whether the District's offer of placement and services, as contained in the October 4, 2006, October 31, 2006, and November 17, 2006 IEPs, constituted a FAPE designed to meet Student's significant behavioral needs. Further, Student in his Prehearing Conference Brief indicated that "the evidence presented at the due process hearing will demonstrate that Student's emotional instability required an educational environment familiar to him where he had already established trusted relationships." No mention is made of the components of an FAA or invalidity of the District's assessments. While Dr. Patterson provided brief testimony regarding FAAs, a review of all of the testimony indicates that Student's approach to the FAA dealt more with whether the District acted properly in seeking the FAA's rather than with the content of the FAA and Behavior Intervention Plan (BIP). Student cites *Anaheim School District v. Student* (N2005100214/N2007020449, August 8, 2007), which contains an erudite analysis of the necessary components of an FAA. In that case, however, the FAA and subsequent BIP constituted a separate issue and involved several days of issue specific expert testimony. In this matter, Student did not raise the issue of the FAA in his amended complaint. Consequently, Student's arguments regarding the FAAs shall be limited only to the determination of whether the District acted properly in seeking the FAAs to meet Student's significant behavioral needs.

CONTENTIONS

Student contends that the offer of placement in Student's October/November 2006 IEPs should be deemed deficient as the District failed to appropriately address Student's reported maladaptive behaviors within the October 4, 2006, October 31, 2006 and November 17, 2006 IEPs; failed to include all necessary parties at the November 17, 2006 IEP meeting; failed to offer a transition plan in the November 17, 2006 IEP; and,

ultimately, failed to offer Student a placement which met his unique needs. As a result of this denial of FAPE, Student contends that his unilateral placement at Pyramid Autism Center (Pyramid) was appropriate, and Student's Mother should be reimbursed the sum of \$29,025 for Student's privately funded educational services for the period of November 27, 2006 through June 21, 2007.

The District contends that Student is a complex child with unique needs in behavior. When Student's behavior deteriorated, the District acted promptly and properly to review Student's IEP on October 4, 2006, October 31, 2006, and November 17, 2006, to ensure that his needs were appropriately met. Further, Mother withheld vital medical information; failed to make Student available for a second FAA and psychiatric assessment; and selected Student's private placement at Pyramid while the IEPs were being developed.

FACTUAL FINDINGS

BACKGROUND:

1. Student, age 12, qualifies for special education services under the classification of autistic-like behaviors. He has also been medically diagnosed with a seizure disorder and attention deficit/hyperactivity disorder (ADHD).
2. Student resides in the District. Student attended Pyramid, a non-public school, from June 2005 through March 2006. On March 20, 2006, Student, then a third grade student, entered the District's structured autism special day class (SDC) at Palisades Elementary School (Palisades). Student required no formal transition plan to reenter the District SDC from Pyramid.

3. Amanda Miller, Psy.D.,¹ has been Student's treating psychologist since June 2002. Dr. Miller prepared a Treatment Narrative, dated January 7, 2008, which provides Student's history of treatment. While this information was not provided to the District until 2008,² it nevertheless provides some insight to an extremely complex child. Clearly, from Dr. Miller's narrative, Student's cyclical meltdowns and anxiety issues have been apparent since 2002, when his parents reported concern regarding what they perceived to be a general regression in his behavior and functioning. While Student's behavior calmed and his thoughts became more organized, the cycles of regression continued. A new "backward slide" began in 2004. By April 2005, Student could not attend school for medical reasons. His medications were changed. He presented with increased aggression, hyperactivity and increased blurting out, including a focus on "poo poo." This episode resulted in Student's initial attendance at Pyramid. Also, by June 2005, Student was observed attempting to touch female breasts and his own private parts. Dr. Miller indicated that therapy continued with an intensive focus on appropriate touching, boundaries, and personal space. Student's inappropriate touching continued and, by January 2006, Student began loudly and repeatedly stating the "f-word" under seemingly random circumstances. In February 2006, Student's behaviors calmed, and he made an easy transition into the SDC at Palisades in March 2006.

¹ Dr. Miller is a licensed psychologist. She has a Psy. D. in Individual, Family, and Child Clinical Psychology. She is currently in private practice and primarily serves children and young adults diagnosed with Autism Spectrum Disorders.

² Dr. Miller states that "consultation with school personnel has been conducted but to a limited degree per parent direction."

4. Student's structured autism SDC at Palisades used specific teaching strategies for autism, including behavior interventions, one-to-one aides, and visual and sensual modifications. His teacher, Michelle Colburn, has a special education teaching credential, and has been employed as a SDC teacher with the District for three years. While the District did not provide Student with a formal transition plan into Palisades, none was needed. Ms. Colburn reported that Student transitioned well into the SDC and was able to adapt and function well in class. Beginning in April 2006, Ms. Colburn began observing Student's tics, which intensified over time. Student's school attendance became a problem. Mother reported that Student was often late to school due to his anxiety and behavior. By May 2006, Ms. Colburn noted that Student began to slip. He began exhibiting aggressive behavior, including hitting and kicking. He made threats and acted out. His attention decreased. In mid-May 2006, the District began logging Student's maladaptive behaviors. The District requested Student's school records from Pyramid, to no avail. The District requested information from Student's private therapist, Dr. Amanda Miller, and Student's psychiatrist, Dr. Tatiana Tetrikova, but Mother limited the District's access to only current school performance and behavior, specifically omitting Student's history.

5. The District held Student's triennial IEP on June 9, 2006. The results of Student's triennial assessments revealed that Student was aggressive, and that his behavior impeded his learning. At that time, the District requested information from Student's private doctors. Mother refused authorization of complete records. In response to Student's increasing aggressive behaviors, the District requested a FAA. The IEP notes indicate that Mother informed the IEP team that Student's psychiatrist began

noticing possible side effects of Student's ADHD medication in the beginning of April and had recently changed his medication.³

6. Student's June 9, 2006 IEP provided Student with placement in a District SDC at Palisades, along with Occupational Therapy (OT) and Speech and Language (S/L) services.⁴ Extended School Year (ESY) services also consisted of an SDC, and OT and S/L services. Mother consented to the IEP and signed the FAA Plan on June 16, 2006. The District scheduled the FAA for September 2006, upon the beginning of the new school year.

7. A series of traumatic events occurred in Student's life during spring/summer 2006, presenting Student with nothing less than "emotional chaos." During this period of time, Student's grandfather died, and Student was uprooted from familiar settings, in order for his mother to handle the death and family business. Subsequently, Student's grandmother, who suffers from dementia, moved in with Student's family. Student's parents separated and divorced during this period as well. Student developed sexually inappropriate behavior which resulted in the initiation of a juvenile dependency investigation by the Department of Children and Family Services (DCFS). Lastly, Student's medications were frequently changed.

8. Student attended only eight of the 19 days of the ESY program. Student's removal from ESY was logically due to family issues. In August 2006, when Mother

³ Once medical documents were received by the District, it was noted that Dr. Tetrikova had discontinued Student's Adderall in the spring 2006, around the time Student began to exhibit aggressive behaviors. Dr. Tetrikova noted that Adderall, as it is a stimulant, causes adverse side effects, in Student's case, "tics."

⁴ No issues have been raised regarding goals or Student's OT and S/L services as contained in the June 9, 2006 IEP.

returned home, she unilaterally placed Student in summer school at Pyramid. This placement is understandable, as the District's ESY program was over, and Student could benefit from continuing a summer program.

9. When a district determines that the instructional and behavioral approaches contained in a student's IEP are not effective, it is required to conduct a FAA. Based upon the behaviors observed in April, May, and June 2006, the District initiated the FAA on September 5, 2006. The targeted undesirable behavior included physically aggressive behavior towards targeted peers and staff, and threatening comments and gestures towards a targeted peer.

10. The initial FAA commenced upon Student's return to Palisades in September 2006. By that time, Student's behavior had changed remarkably. Pamela Ender, the District's School Psychologist, observed that Student's attention disintegrated. His joint attention decreased. He was distracted, agitated, aggressive, acting out and making sexual comments. Other witnesses who observed Student from May 2006 to October 2006, noted "Student's rapid disintegration."

OCTOBER 4, 2006 IEP:

11. The District completed the initial FAA on September 29, 2006, and prepared a BIP which the IEP team discussed at the October 4, 2006 IEP meeting. Mother attended the October 4 IEP, along with Dr. Miller. Ms. Ender presented the FAA report. As explained at the IEP meeting, the FAA encompassed Student's behaviors which were observed during spring/summer of 2006. After the commencement of the FAA in September, Student began exhibiting new maladaptive behaviors. Most of these new behaviors involved increased aggression and sexually inappropriate statements and gestures. A district must consider conducting a FAA where a serious behavioral problem is demonstrated in which the student's behavior(s) are self-injurious, assaultive, or cause serious property damage. The IEP team members determined that the newly observed

maladaptive behaviors required another FAA. The team noted that Student's behavior in the classroom had deteriorated, including a decrease in attending. Often Student could not be redirected. Since September 2006, Student required not only a one-to-one aide, but on many occasions, required two-to-one supervision. Mother informed the team that Student's Seroquel⁵ dosage had been increased when she started to see a negative change in behavior at home.

12. Student's expert, Dr. Robert Patterson,⁶ provided some discussion of the components of a FAA; however, his most insightful testimony emphasized that sexual behavior is not an appropriate issue for an FAA. It is his opinion that an FAA would not solve Student's sexual issues, but therapy would. As example, if a child is molested, one does not attempt to modify behavior or provide consequences. Instead, one seeks therapy, generally through playtime, to resolve sexual issues. Dr. Patterson, however, developed his opinion in hindsight. Further, he had access to all of Student's medical and psychological records and assessments informing his opinion. The District did not. At the IEP, the District requested authorization to speak with Dr. Tetrikova.⁷ Mother declined to provide authorization for full access. With what information the IEP team

⁵ Seroquel is an anti-psychotic medication prescribed by Dr. Tetrikova to reduce Student's aggression.

⁶ Robert Patterson has a Psy. D. in Psychology and Family Therapy. Dr. Patterson has numerous additional degrees and credentials relating to both psychology and education. Dr. Patterson has presented a remarkable number of lectures, workshops and other presentations, and is highly qualified to discuss vast areas of behavior.

⁷ Dr. Tatiana Tetrikova is Student's private Psychiatrist. Dr. Tetrikova is Board Certified in Psychiatry and Neurology.

had available to them at the time, the team also offered Mother a counseling consult, and offered Student a referral to Orange County Health Care Agency for an AB3632 Mental Health Assessment.⁸ The IEP team further offered to perform a new FAA to address new target behaviors observed beginning in September 2006. Mother signed the new FAA assessment plan at the IEP meeting. Although the District asked to observe Student at home as part of the FAA, Mother refused access to her home. With what limited information was provided to the District regarding Student's psychological and medical history, the District acted properly in seeking another FAA, if for no other reason than to protect the other students from Student's maladaptive behaviors.

13. In October 2006, Student's tics became more severe. Student exhibited constant drastic movement of his head, legs, and arms that interfered with his ability to sit, lay, walk and communicate. Mother implied that Student's decline resulted from the initiation of the BIP. This is highly unlikely. Student's increasingly maladaptive behaviors were well documented long before the introduction of the BIP. Further, Ms. Colburn indicated that although she utilized many behavioral interventions prior to the BIP, she did not initiate the BIP itself until October 8, 2006. Student left the SDC on October 11, 2006.

14. On October 13, 2006, Mother had Student admitted to Children's Hospital of Orange County (CHOC) due to intensification of the tics. A pediatric neurologist took charge of Student's care in the hospital. Neurological testing identified no definitive neurological basis for the tics, resulting in the suggestion that Student's tics were likely anxiety based and/or driven. During his hospitalization, Student's medications were altered, discontinued, changed and reinstated. At various points of his hospitalization,

⁸ The District made an AB 3632 referral for Student on October 16, 2006; however, Mental Health ultimately rejected the referral.

Student received Keppra, Benadryl, Clonidine, and, upon his release on October 16, 2006, Student's Seroquel was reinstated along with the other drugs. Student remained home for outpatient treatment until October 23, 2006. At that time, Mother readmitted Student to CHOC for increased tics and aggressive behavior directed mainly towards himself. Student's medications were again changed.

OCTOBER 31, 2006 IEP:

15. On October 31, 2006, the District held an emergency IEP meeting. Mother attended with her attorney and Dr. Miller. Student had not returned to school because he was so heavily medicated he could not walk. Dr. Miller concurred with the neurologists and believed that Student's tics were anxiety-based. Mother indicated that the doctors recommended that Student be in a familiar setting, hopefully for a short term. Additionally, she indicated that Student would need a lot of OT and S/L to regain his skills.

16. As of the IEP date, Student's medication included Lorazepam for severe tics, Clonidine for tics, Clonopan for tics, Keppra for seizures, and Seroquel, an anti-psychotic, for aggression. The tic medication combination was new and was introduced to calm Student down. Dr. Miller indicated that two weeks prior to the IEP, Student was so heavily sedated, he was not ready to come back to school. At the time of the IEP, however, Student had improved and she could see him moving into a school setting. The IEP team requested to observe Student in his home setting to determine his present levels of performance (PLOP) before making a final offer of placement. As before, Mother declined to allow a home visit with Student. Instead, she suggested observation in a "neutral setting" such as Dr. Miller's office.

17. The IEP team discussed several possible placements, including Palisades, Pyramid, Reilly Elementary School (Reilly), and home/hospital schooling. Mother

emphasized that Student did not wish to return to Palisades, and became agitated at the mere mention of Palisades. Student expressed a strong desire to attend Pyramid.

18. The IEP meeting concluded with Mother indicating that she would observe the SDC at Reilly with Dr. Miller. In the interim, the IEP team recommended providing Student with home/hospital instruction. The parties set a follow-up IEP meeting for November 17, 2006, to take place after their respective observations. At this point, Mother's attorney reiterated that Student would be placed at Pyramid and would have appropriate program and services provided to him. Further, Mother would be seeking public funding from the District for this placement. The District responded that it had made no offer of placement other than home/hospital, and if the District could provide an appropriate placement, it would not fund placement at Pyramid. Student remained out of school, but did not utilize the District's offer of home/hospital instruction. With regard to this October 31, 2006 IEP, given that Student had been hospitalized twice, and was heavily medicated upon his release, the District acted properly in offering home/hospital placement until Student's PLOP could be determined. Further, the proposed FAA could not be completed until Student returned to school.

19. Based upon discussions of Student's unique needs at the October 31, 2006 IEP meeting, the probable site under consideration for Student's placement was Reilly. William Thompson, a school psychologist for the Orange County Department of Education (OCDE), who works at Reilly, described the Reilly program at the October 31, 2006 IEP meeting. Reilly School is operated by the OCDE. The projected placement discussed at the IEP described a SDC for children with autistic-like behaviors and behavior problems. As explained at the IEP, placement at Reilly had many advantages. The SDC had six students, and three assistants. The teaching methodology is based upon Applied Behavioral Analysis (ABA). Although some instruction is done in whole group, the educational focus is more individualized. Staff/student ratios are almost

always two-to-one. The staff takes data on all goals and behavior, and is highly involved with the students. There are integration opportunities. Community-based instruction is done weekly. Peer tutors come into the classroom on a daily basis. Mainstreaming is available with the general education classrooms on campus. Further, Reilly represented a much less restrictive environment than Pyramid.

20. Reilly also benefited Student's unique needs. The students were all boys, ages seven to 10, which the District considered a plus in dealing with Student's sexualized behaviors and targeting of females. Ancillary staff is available on campus daily. There is an Autism Specialist on staff. The school has two registered nurses who could deal with Student's medications and medical problems. There is an OT/PT on-site with a room in which to work. District S/L services were available on campus which comported with Student's IEP. There is a bathroom attached to the classroom making it easier to assist with Student's bathroom behaviors. Lastly, the school year at Reilly is longer, with only four weeks off in the summer, which would give Student additional time to restore his prior skills.

21. Janet Fischman, the SDC teacher at Reilly, has been employed as a special education teacher at Reilly for 23 years.⁹ Her classes have been primarily SDCs for children with autism and severe behaviors. Ms. Fischman indicated that her SDC is structured, with specific schedules for each child which can be individualized to each child's needs. The classroom has OT supports, and sensory diets in the classroom. The SLP supports the classroom and provides group services in the classroom and individual services on a pull-out basis. Ms. Fischman displayed a thorough knowledge of how to

⁹ It is noted and admired that Ms. Fischman has been an OCDE special education teacher for 23 years, yet this hearing represents the first time she has needed to testify in a due process hearing.

transition behavior impaired-children into her SDC. As she pointed out, she has yet to lose a child to increasing maladaptive behaviors.

EXPERT OPINIONS:

22. Dr. Miller visited the Reilly program as well as a classroom at Pyramid. At the November 17, 2006 IEP, Dr. Miller indicated that while a definitive conclusion could not be drawn about the cause of Student's tics, it appeared that they were either caused and/or exacerbated by increased anxiety. It was her primary goal to stabilize Student; therefore, she believed that placement in a novel school situation could be anxiety producing, placing him at risk for further mental health, academic, social and behavioral decompensation. In view of Student's familiarity with Pyramid and positive response to the program, it would likely be the best placement for facilitating Student's stabilization.

23. Joseph Kenan, M.D.,¹⁰ and Dr. Patterson testified as expert witnesses. Dr. Kenan had the disadvantage of not having full access to all of Student's medical history or assessments until after he prepared his own report. By the time of the hearing, Dr. Kenan had the opportunity to review all documents and records for his testimony. It is clear that Student exhibited severe body movements (tics). Dr. Kenan opined that while a number of psycho-social stressors contributed, they alone could not have caused the tics. Medication and genetic factors most likely also contributed to Student's problems.

¹⁰ Joseph Kenan is a licensed Psychiatrist. He is Board Certified in Psychiatry and Neurology, Child and Adolescent Psychiatry, and Forensic Psychiatry. In addition to his private practice, Dr. Kenan is on faculty at U.C.L.A. and Cedars Sinai Medical Center, and is a court appointed Child Custody Evaluator for the Los Angeles County Superior Court. Dr. Kenan's history of research, lectures and awards is equally impressive with that of Dr. Patterson.

Dr. Kenan indicated that the evidence throughout Student's medical records leads to Seroquel. Both akathesia and dystonia¹¹ are side effects of anti-psychotic medications such as Seroquel. Regardless of the cause, Student's tics were extremely severe and constituted a health emergency. Dr. Kenan would not necessarily change Student's medications if they were the only ones that helped Student, or if the side effects could be altered. He did emphasize, however, that any medication would need to be closely monitored. Dr. Kenan further emphasized that whatever was selected as Student's educational program needed to be customized to deal with Student's medical and psychiatric problems. He stressed that the school must have a nurse, highly trained about autism and behavior disorders, and experience working with children. Dr. Kenan opined that he would be hard pressed to accept Student's preference for Pyramid as controlling. Instead, he determined that the appropriateness of Reilly was more important than the possibility of Reilly being a new stressor for Student.

24. Dr. Patterson assessed Student in 2002 and again in 2007. He has also had the unique experience of having all of Student's education and medical records to review. Dr. Patterson observed both Reilly and Pyramid. He agreed with the other witnesses that the cause of Student's tics were unknown. "Student had a lot of stuff going on." Further, Student's situation had complicated by November 2006. "He was freaking out, melting down at the thought of Palisades." Dr. Patterson opined that as of November 2006, educational services were secondary to stabilizing Student to function again. Consequently, Mother's choice of Pyramid was reasonable and logical. Reilly, on the other hand, was more problematic. While Reilly could provide Student with services,

¹¹ Akathesia is an inner restlessness so severe one cannot stand it. Dr. Kenan referred to it as the "crawlies." Dystonia is involuntary twisting or jerking that is severe and continuing.

it did not provide Student with the same sense of familiarity or security as did Pyramid. Dr. Patterson indicated that he preferred initially placing Student at Pyramid and later transitioning him to Reilly. Dr. Patterson, however, also indicated that Reilly could have been an appropriate placement in November with a transition plan, but no written transition plan was presented with the IEP in November 2006.

25. Dr. Patterson most recently assessed Student in April 2007. While his assessment report is extensive, it has limited relevance in relation to Student's 2006 IEPs. Dr. Patterson's summary, however, appears to mirror the District's concerns. Specifically, Dr. Patterson concludes, "Student requires an educational setting where it is a small setting in terms of the number of students involved, where there are a large number of adults available, where speech and language services and occupational therapy services can be delivered on site and where there are adaptive P.E. services that can also be provided on site and where there is the availability of a nurse to monitor medication effects and where there is staff that is trained in behavioral interventions and particularly interventions designed to provide structure, consistency and reduce anxiety since Student is a highly anxious student at this time. He also requires one-on-one assistance from a person that he can relate to who has excellent behavioral management skills and Student requires modification of standard ABA and/or discrete trial work...."

NOVEMBER 17, 2006 IEP:

26. The District held the follow-up IEP meeting on November 17, 2006. The IEP team consisted of a School Psychologist, General Education teacher, Special Education teacher, School Nurse, Occupational Therapist, Speech and Language Pathologist, School Administrator, District Autism Specialist, Behavior Support Program Specialist, and Regional Center representative. Mother attended with her attorney and Dr. Miller. No one attended this IEP meeting from Reilly; however, as stated in Factual Findings 19 and 21, Mr. Thompson, the Principal at Reilly, and Ms. Fischman, the SDC teacher at

Reilly, attended the October 31, 2006 IEP meeting, and extensively reported on the Reilly program.

27. While the IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties, it requires only that the District involve those parties who have first hand knowledge of the child's needs and who are most concerned about the child be involved in the IEP creation process. In excess of 10 professionals with personal knowledge of Student attended the November 17, 2006 IEP meeting. The Reilly representatives had attended the October 31, 2006 IEP meeting and provided Mother with a full description of the Reilly program. The subsequent November 17, 2006 IEP meeting was designed to give Mother time to observe Reilly for herself, and, indeed, Mother did report on her visit to Reilly. She commented that Reilly was a good school, but she did not believe that it was a place where Student could become stabilized due to being an unfamiliar environment and large campus. Mr. Thompson had previously addressed Mother's concerns regarding the school's size, by indicating that the SDC had a separate access; therefore, Student would not need to navigate the entire campus. While the presence of the Reilly representatives might have been desirable, it was not required, and did not prevent Mother from actively participating in a meaningful IEP meeting.

28. Each side presented additional arguments at the November 17 IEP meeting. Dr. Miller opined that Student needed stabilization and a place to work on all-around functioning. While she was impressed with the Reilly program, and believed it could be appropriate for Student in the future, she saw Pyramid as being more beneficial. Dr. Miller and Mother expressed concern that Reilly was too large an environment, and unfamiliar to Student. Student's medical and psychiatric team seems to believe that Student's maladaptive behaviors run in cycles. Dr. Miller told the IEP team that Student does cycle, and he was currently in a unique place, but it was a place

she had never seen him before. Dr. Miller suggested placing him in a site, such as Pyramid, to re-establish some level of functioning. As Mother expressed, "we need to rebuild the bricks on the road to recovery and transition to a campus where he can be successful." Mother also indicated that Student had said "no" to Reilly. While the IEP team did not disagree with Mother's concerns, it was pointed out that Student would always have stressors. The key was to have a staff and program capable to deal with the stressors if they arose. Although the origins of Student's stressors remained unknown, stressors were specifically taken into consideration in selecting Reilly as the location best equipped to handle Student's behaviors.

29. While the IEP team agreed with Mother that Student's anxiety was a huge issue, no one, including Student's doctors, had a professional opinion about where his anxiety originates. The District felt Reilly could address Student's needs, and the team could focus on a smooth and successful transition. Reilly is equipped with staff who can address Student's transition needs. Mother's attorney opined that a slow transition would be a greater risk for Student. Mother indicated that placement at Pyramid would not require a transition plan; however, as the District pointed out, should Student develop the need for one, Pyramid did not have anyone to address those needs.

30. The IEP team ultimately made an offer of placement at Reilly, in Ms. Fischman's class. Student's current S/L and OT services would be provided at Reilly. The District requested that Dr. Miller provide effective criteria to measure Student's success regardless of placement. Mother declined this offer and indicated she would place Student at Pyramid and request funding from the District. Student began attending Pyramid on November 27, 2006. Further, Mother withdrew her consent to the proposed FAA.

31. Student contends that the District's failure to include a transition plan in its November 17, 2006 offer of placement represented a denial of FAPE. Upon receiving

additional information from Dr. Miller, which was requested at the November 17, 2006 IEP meeting, a transition plan was unilaterally prepared by the District, without Mother's input, in December 2006. The content of the transition plan is inconsequential. Simply put, the District did not present the transition plan with the offer of placement at the November IEP, in accordance with *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519. The failure to properly formulate a transition plan, however, may constitute a procedural violation of the IDEA only if it represents a loss of educational opportunity or a denial of a FAPE. While Mother did not have the ability to review a transition plan with the IEP, it is abundantly clear that she had no intention of placing Student at Reilly, regardless of what was presented as a transition plan. Mother had already declared her intent to place Student at Pyramid at the October 31, 2006 IEP meeting. Nonetheless, as stated in *Union*, a school district cannot escape its obligation to make a formal, written offer of placement because the student's parents have expressed unwillingness to accept the district's proposed placement. (*Id.* at p. 1526.) This failure to include a formal written transition plan, however, did not rise to the level of a denial of FAPE. The educational program offered to Student at Reilly contemplated Student's educational, medical and psychological needs. Student's unique needs included a roller coaster of stressors, however, Student's specific stressors, whether medical, psychological, or educational, had not been established and therefore could not be addressed with any specificity. Any "transition plan" would need to address stressors if and when they arose. The IEP team had provided Mother with an abundance of information regarding the skills of the Reilly staff to deal with contingent behaviors and stressors as they might arise. Additionally, given that Mother had already decided on placement at Pyramid, she did not object to the District's seeking additional information from Dr. Miller regarding transition. Further, Mother placed Student at Pyramid without a formal transition plan as well.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The Student has the burden of persuasion in this matter.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. Special education is defined as specially designed instruction provided at no cost to parents, calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

3. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f).)

4. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*W.G. v. Bd. of Trustees* (9th Cir. 1992) 960 F.2d. 1479, 1485.) Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317

F.3d. 1072, 1079.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*W.G., supra*, 960 F.2d 1479, 1485.) A parent has meaningfully participated in the development of an IEP when he/she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.) While Student contends that the proper parties were not present at the November 17, 2006 IEP meeting, Factual Findings 11, 15, and 26, indicate that Mother attended each of the IEP meeting with her attorney and Dr. Miller. Further, pursuant to Factual Finding 26, 10 professionals familiar with Student also attended the November 17, 2006 IEP meeting. While the repeat attendance of the Reilly staff would have been desirable, it was not essential. The District did not fail to have all required parties at the November 17, 2006 IEP meeting.

5. California has created behavior intervention regulations in the California Code of Regulations, title 5, section 3000 et seq., which are supplemental to the federal laws and regulations involving the IDEA. In certain instances, the law requires a district to utilize a "behavior intervention plan (BIP) developed and implemented pursuant to the requirements of Education Code section 56520 et seq., which is commonly known as the "Hughes Bill." When a district determines that the instructional and behavioral approaches contained in a student's IEP are not effective, it is required to conduct a functional analysis assessment (FAA). The purpose of the FAA is to assist in designing positive procedures which produce significant improvement in a student's behavior through skill acquisition and the reduction of problematic behavior. In order to do so, a district must conduct a functional analysis assessment (FAA). Based upon Factual Findings 4, and 5, Ms. Colburn observed Student's increasing maladaptive behaviors

beginning in April and May of 2006. Student's triennial assessment in June 2006 revealed that Student's aggressive behavior impeded his learning. As a result, the IEP team determined that an FAA would be completed upon return to school in the fall 2006. Pursuant to Factual Finding 11, in September 2006, the District completed the initial FAA based upon the targeted behaviors discussed in June. The District acted appropriately in seeking to conduct this FAA.

6. Additionally, a district must consider conducting a FAA where a serious behavioral problem is demonstrated in which the student's behavior(s) are self-injurious, assaultive, or cause serious property damage. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(7).) Where a student's behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (Ed. Code, § 56341.1, subd. (b)(1).) Pursuant to Factual Findings, 10, 11, and 12, at the October 4, 2006 IEP meeting, the District offered to conduct an additional FAA to address Student's new and more serious behaviors. While Mother consented to the FAA, she declined to provide the District with Student's complete medical and psychiatric history and refused to allow a home observation of Student. An IEP is assessed in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is a snapshot, not a retrospective. (*Id.* at p. 1149, citing *Fuhrmann, supra*, at p. 1041.) Given what little information had been provided to the District regarding Student's history, the District acted properly at the October 4, 2006 IEP meeting by offering an FAA, counseling consultation and a referral to Mental Health. Further consideration of the appropriateness of a second FAA need not be discussed, as Mother withdrew her consent to the assessment.

7. The failure to properly formulate a transition plan warrants relief only upon a showing of a loss of educational opportunity or a denial of a FAPE. (*Board of*

Education v. Ross (7th Cir. 2007) 486 F.3d 267, 276.) A transition plan that fails to address the student's unique needs or is not reasonably calculated to provide the student with an educational benefit denies the student a FAPE. Based on Factual Finding 31, the District's transition plan represented a procedural violation of the IDEA; however, pursuant to Legal Conclusion 3, it did not rise to a loss of educational opportunity or denial of FAPE. Given that the origins of Student's stressors continued to be unknown, the best transition for Student incorporated a staff trained and capable of dealing with behavioral problems, and an auxiliary staff including nurses, psychologists, and autism specialists capable of dealing with the stressors, if they occurred. The failure to have a written transition plan for Student did not impede Mother's right to participate in the IEP process or deprive Student of educational benefits.

8. In *Board of Education of 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 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.) The *Rowley* Court concluded that the standard for determining whether a local educational agency's provision of services substantively provided a FAPE involves a determination of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services were calculated to provide educational benefit to the student, and (3) whether the services conformed to the IEP. Student does not contend that the subject IEPs failed to provide Student with services which were calculated to provide him educational benefit or that the services failed to conform to Student's IEPs.

The primary issue of this case is the determination of whether the offer of placement at Reilly was designed to address Student's unique needs at the time of his meltdown. It must be reemphasized that an IEP is assessed in terms of what was objectively reasonable when it was developed. Based upon Factual Findings 4 and 5, the District observed and assessed Student for increasingly aggressive behavior. At the October 4, 2006, IEP meeting, the initial FAA had been completed, and no change in placement was contemplated. Mother did not disagree. Based upon Factual Findings 7, 10, 11 and 13, upon return to school in the fall 2006, Student's anxiety and maladaptive behaviors had increased, and Student's behavior now included sexual content. Further, Student experienced increasing tics. Based upon information available at the time, the District offered another FAA, a counseling consult, and a referral to Mental Health. All of these actions were appropriate and were designed to address Student's unique needs. Based upon Factual Findings 14 and 16, Student was hospitalized twice and thereafter continued unable to attend school. Based upon Factual Finding 15, 16, and 17, the District held an emergency IEP meeting on October 31, 2006, to discuss Student's future placement. The IEP team discussed several options including home/hospital, Reilly and Pyramid. Subsequently, on November 17, 2006, the IEP team offered Reilly as the program and placement for Student.

To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program and not on the family's preferred alternative. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or

services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) Hence, if the school district's program meets the substantive *Rowley* factors, then that district provided a FAPE, even if the child's parents preferred another program and even if her parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

While, Student's experts all express a critical concern for Student's medical and psychological stabilization, none addressed the educational aspects of Student's placement. Reilly clearly met Student's unique needs during this time. Based upon Factual Findings 19, Reilly had many advantages for Student, including a specific program for children with autistic-like behaviors and behavior problems. The class setting is small and has a high staff-to-student ratio. The placement represented a much less restrictive environment than Pyramid with mainstreaming opportunities available in the general education classrooms on campus. Based upon Factual Finding 20, the Reilly campus had auxiliary staff available to provide Student's S/L and OT services. Two registered nurses are on campus full time to handle medication and medical problems. Based upon Factual Finding 21, the proposed teacher, Ms. Fischman, has extensive experience as a special education teacher dealing primarily with children with autism and behavioral problems. The District's program at Reilly meets the substantive *Rowley* factors, and provides Student with a FAPE. The District is not required to provide Student placement in Mother's preferred program at Pyramid.

9. Federal law provides that a local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i).) Based upon the above findings of

facts and conclusions of law, the District did not fail to offer Student a FAPE. Consequently, Student is not entitled to reimbursement for his placement at Pyramid.

ORDER

The District's request for a finding that Student's October 4, 2006, October 31, 2006, and November 17, 2006 IEPs constitute FAPE is granted. The District did not fail to offer Student a FAPE.

PREVAILING PARTY

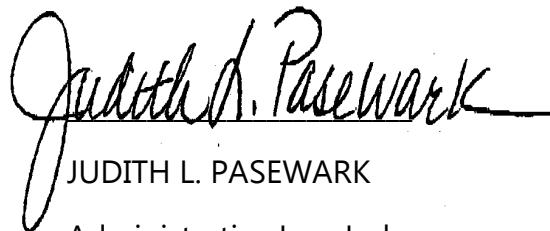
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

1. The District prevailed on issue 1.

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: April 25, 2008

A handwritten signature in black ink, reading "Judith L. Pasewark". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings

Special Education Division