

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2010050392
v.	
OAKDALE JOINT UNIFIED SCHOOL DISTRICT,	
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OAKDALE JOINT UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2010050679
v.	
PARENT ON BEHALF OF STUDENT.	

DECISION

Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings (OAH), heard this matter in Oakdale, California, on December 6-9, 2010, and January 18-20, 2011. This matter was heard telephonically on January 31, 2011.

Tamara Loughery and Justin Arnold, Attorneys at Law, appeared on behalf of Student. Justin Arnold was present on December 6-9, 2010. Carly Christopher, law clerk, was present on January 18-20, 2011. Student's mother (Parent) was present throughout the hearing.

Peter Sturges, Attorney at Law, appeared on behalf of Oakdale Unified School District (District). Larry Mendonca, Special Education Director, was present throughout the hearing on behalf of District.

Student filed his due process hearing request (complaint) on May 11, 2010, naming District. On May 19, 2010, District filed its complaint naming Student. District's motion to consolidate the matters was granted on May 27, 2010, and all timelines applicable to OAH case number 2010050392 were ordered to apply to both matters. OAH granted a continuance on June 10, 2010. At the close of the hearing on January 31, 2011, the matter was continued to February 28, 2011, for the submission of closing briefs.¹ The parties submitted their closing briefs on February 28, 2011, and the matter was submitted for decision.²

ISSUES³

STUDENT'S ISSUES

- a) Did District deny Student a free appropriate public education (FAPE) during the 2008-2009 school year because it:

¹ During the hearing on January 31, 2011, Student requested official notice of two documents, Student's Exhibits P2 and Q2. There was no evidence relating to these exhibits presented at hearing. The request is denied because there is insufficient evidence to determine the documents' validity or source, and the documents are reasonably subject to dispute and therefore not subject to judicial or official notice. (See Evid. Code § 452; Gov. Code, § 11515.)

² To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Student Exhibit F3, and District's brief has been marked as District Exhibit 60.

³ As stated in OAH's Prehearing Conference Order of December 3, 2010, the issues were further reviewed and clarified at the commencement of the due process hearing. The ALJ has reworded and renumbered the issues for clarity. No substantive changes have been made.

1. Failed to conduct an appropriate psycho-educational assessment;
 2. Failed to conduct an appropriate behavior assessment and provide behavior supports and services;
 3. Failed to implement the behavior support plan (BSP) from Student's previous school district; and
 4. Failed to conduct an appropriate assessment of Student's emotional needs and provide counseling services?
- b) Did District deny Student a FAPE during the 2009-2010 school year because it:
1. Denied Parent the opportunity to participate in the process of formulating Student's individualized education program (IEP) by predetermining his placement;
 2. Failed to comply with the Hughes Bill including, but not limited to, failing to hold required IEP team meetings; failing to provide accurate Behavior Emergency Reports (BERs); failing to timely conduct a Functional Analysis Assessment (FAA); using restraints in place of an interim behavior plan and adding behavior support; utilizing restraints in lieu of appropriate behavior services and plans; allowing untrained staff to utilize restraints; and using inappropriate and dangerous restraints which caused injuries;⁴
 3. Changed his placement based on a violation of school conduct without conducting a manifestation determination meeting, and without considering the requirements of the Hughes Bill to update or create an interim behavior plan;

⁴ In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that an LEA conduct an FAA, resulting in a behavior intervention plan (BIP), when a student develops a "serious behavior problem," and the IEP team finds that the

4. Failed to offer an appropriate placement at the January 26, 2010, IEP team meeting, and in subsequent communications;
 5. Failed to offer placement in the least restrictive environment (LRE) in its placement offer at Coleman F. Brown Elementary School (C. F. Brown);
 6. Failed to implement appropriate speech and language services provided for in Student's IEP; and
 7. Failed to provide appropriate home instruction in the area of academics and behavior?
- c) Did District deny Student a FAPE during the 2008-2009 and 2009-2010 school years when it failed to provide prior written notice to Parent regarding

DISTRICT'S ISSUES

- a) Did District provide Student a FAPE during the 2008-2009 school year because it:
1. Provided Student with appropriate equivalent services upon his arrival in District, based on prior IEPs and information from his previous school district;
 2. Was required to implement a BSP, FAA, or behavior intervention plan (BIP) for Student upon his arrival and enrollment with District;
 3. Conducted an appropriate IEP for Student after he attended District schools for 30 days, and continued to offer placement and services at the April 21, 2009, IEP team meeting;
 4. Proposed and implemented an appropriate assessment process for Student at the conclusion of the April 21, 2009, IEP team meeting;

instructional/behavioral approaches specified in the student's IEP have been ineffective.
(Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).)

5. Provided and implemented appropriate supports and responses for Student's behaviors after the April 21, 2009, IEP team meeting to the end of the 2008-2009 school year; and
 6. Was not required to implement a BSP, FAA, and BIP, for Student after the April 21, 2009, IEP team meeting to the end of the 2008-2009 school year?
- b) Did District provide Student a FAPE during the 2009-2010 school year because it:
1. Provided and implemented appropriate supports and services for Student's behaviors from the commencement of the 2009-2010 school year until the September 24, 2009 IEP;
 2. Was not required to implement a BSP, FAA, and BIP for Student from the commencement of the 2009-2010 school year until the September 24, 2009 IEP without parental consent and before the assessment process had been concluded;
 3. Timely offered an IEP team meeting to Parent with its September 13, 2009 IEP team meeting offer;
 4. Offered appropriate placement and services at the September 24, 2009 IEP team meeting, including its offer to implement the BSP and to conduct an FAA;
 5. Provided and implemented appropriate supports and services for Student's behaviors from the September 24, 2009 IEP until the November 20, 2009 IEP;
 6. Conducted an appropriate FAA process and offered an appropriate BIP to Student at the November 20, 2009 IEP team meeting;

7. Offered appropriate placement and services at the November 20, 2009 IEP team meeting, including its offer to implement the BIP;
8. Provided the IEP team a sufficient amount of time during the 2009-2010 school year to successfully implement the BIP after it was agreed to by Parent;
9. Offered appropriate placement and services at the January 26, 2010 IEP team meeting;
10. Offered an appropriate interim placement and additional independent assessment process in March 2010 and thereafter, included the behavioral plan proposed for that placement;
11. Appropriately declined to allow Parent to determine the methodology of the professionally-developed BIP; and
12. Appropriately declined to allow Parent to determine the methodology used by District's home instruction teacher?

PROPOSED REMEDIES

Student requests compensatory education, prospective services, and reimbursement for costs incurred which include an intensive behavior intervention home program; an independent FAA; a transition plan to re-integrate Student into a classroom setting; placement in a general education setting with one-to-one behavior therapist; ongoing behavior supervision services after integration into general education setting; independent psycho-educational assessment; parent training in-home positive behavioral interventions; speech services; and counseling to address all emotional needs.

District requests a finding that it offered and provided Student a FAPE for the 2008-2009 and 2009-2010 school years.

CONTENTIONS OF THE PARTIES

STUDENT'S CONTENTIONS

Student contends that District denied Student a FAPE because it failed to follow the procedural requirements under the Individuals with Disabilities Education Improvement Act (IDEA) and the Hughes Bill for students with behavior problems that have an IEP in place. Student claims that he was denied a FAPE due to District's failure to implement his IEPs and offer appropriate services and placement as well as not allowing Parent to participate in the IEP development process.

Student contends that the District should have used the BSP formulated by his former school district of residence after he transferred into District in spring 2009. Subsequently, District refused Parent's request for an FAA and did not provide written notice of the refusal.

After the school year began in August 2009, Student exhibited multiple episodes of maladaptive behavior involving pushing and striking other students and defiant acts against staff and other students. There were several incidents where Student claims he was physically restrained by the staff, and although District completed BERs, it did not schedule IEPs within two days as it was required to do.

Student claims that a BSP developed by District on September 17, 2009, was an inappropriate level of intervention. District agreed to conduct an FAA; however, it did not discuss a BIP, which was the appropriate level of intervention.

Student claims that when the District finally completed its FAA and developed a proposed BIP in November 2009, Parent disagreed with many components of the BIP, specifically what she considered to be negative, instead of positive, reinforcements, and the physical restraint policies. According to Student, on November 23, 2009, Student exhibited behaviors which prompted numerous staff members to restrain him. Student

claims that District did not complete a BER, nor did it schedule an IEP team meeting within two days as it was required to do so.

On November 25, 2009, Student claims he was again restrained by school staff members and his ankle was seriously injured and he suffered emotional distress. Student did not return to school after this incident. Parent contends the restraints were unnecessary and improper.

On January 26, 2010, District held an IEP team meeting to discuss Student's BIP and placement. District offered placement in a county-run special day class (SDC) at C. F. Brown. Parent contends this placement was predetermined without considering other placement options. Parent wanted Student placed in a general education setting with a one-to-one aide.

In March 2010, it is alleged that District offered an interim placement in a general education classroom with a one-to-one aide, where Student could be evaluated by a mutually agreeable behaviorist. However, the parties could not agree on the provisions in the BIP during the interim placement and Student remained out of school.

DISTRICT'S CONTENTIONS

District contends that Student requires placement in a structured special education classroom, not a general education classroom, in a setting with a trained special education teacher and staff, and mental health supports to provide the individual support he needs. Student also requires a strong behavioral plan to address his substantial behavioral issues. Student would benefit from a distraction free environment with appropriate services without the added stress and demands of a general education classroom. District offered this type of placement at C. F. Brown.

According to District, a one-to-one aide in a general classroom setting could not, as Parent contends, provide the level of support or learning environment that Student requires. Student's behaviors require constant redirection and prompting that would

prevent Student from accessing the general education curriculum. District contends it provided the appropriate supports and services throughout this matter based on the information known to the IEP team as events transpired, and the restraints used on Student were approved by the Special Education Local Plan Area (SELPA), as required by law, and properly implemented in accordance with required procedures and without injury to Student. District contends that Parent's demands for behavior plans without any negative consequences and placement in a general education class were completely unworkable.

FACTUAL FINDINGS

JURISDICTIONAL AND FACTUAL BACKGROUND

1. Student is an 8-year-old boy who lives with Parent within the District's geographical boundaries and would be in second grade for the 2010-2011 school year if he attended school. Student is eligible for special education services under the category of Specific Learning Disability (SLD) and the secondary category of Speech or Language Impairment (SLI). Parent removed Student from District's classroom setting on December 1, 2010.

2008-2009 SCHOOL YEAR

2. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state, the local educational agency (LEA) shall provide the child with a FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the LEA adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with the law. The LEA shall provide the interim program for a period not to exceed 30 days, by which time an IEP team meeting shall be held.

3. Student began the 2008-2009 school year in kindergarten at the Tullake Basin Unified School District (Tulllake) in the Modoc County SELPA. Student was found to be eligible for special education services under the category of SLD and had an IEP. Student attended Tulllake until approximately December 2008.

4. In January 2009, Parent relocated to a domestic violence shelter in Covelo, Mendocino County. Student was enrolled in Round Valley Unified School District (Round Valley) in Covelo in a temporary 30-day placement. Round Valley's registration form contains a handwritten notation in a designated section that Student has an IEP and behavior plan. However, Student was not in Round Valley long enough for a new IEP to be developed by that district.

5. In February 2009, Parent relocated to Oakdale and in March 2009 enrolled Student in District. Student was placed in Magnolia Elementary School (Magnolia) in a general education classroom. Cathie Swartz, a special education resource specialist, was assigned to Student to provide in-class special education supports pursuant to his IEP from Tulllake. Student had access to an aide 30-40 minutes a week. Upon enrolling at Magnolia, Student was provided with equivalent services based on the information in the Student's records that had been obtained by District.⁵ District notified Parent on

⁵ Student's records from Tulllake and Round Valley are incomplete. The records showed Student had a signed IEP during his pre-kindergarten year dated September 25, 2007, which placed Student in a general education classroom with special education services and supports consisting of 60 minutes per week of individual and small group instruction. There is an IEP Addendum dated October 28, 2008. The Addendum references an IEP dated September 16, 2008, which was not provided to District. The Addendum states there is no BSP attached and that Student's behaviors did not impede his learning. The Addendum addresses present levels of performance and a speech and language re-assessment. There is a second unsigned Addendum that refers to a

April 1, 2009, that the 30-day review IEP was scheduled on April 21, 2009. District held an IEP team meeting on April 21, 2009.

APRIL 21, 2009 IEP: INITIAL 30-DAY IEP TEAM MEETING

6. When District conducted the 30-day IEP team meeting for Student on April 21, 2009, to review his placement and services, it had Tulelake's IEP from September 27, 2007, and the two Addendums from October 28, 2008. District also had Round Valley's student registration form and Parent's consent for interim placement where Parent stated Student was in a general education class with special education supports while at Tulelake.⁶ The last signed IEP for Student was from Tulelake September 25, 2007, over a year and one-half old.

7. Student's placement at Tulelake was in general education with special education support services consisting of individual and small group instruction, 60 minutes per week. Student's initial placement at District consisted of a general education classroom at Magnolia, with access to a resource specialist to provide equivalent services.

proposed BSP. The notes state that Parent did not approve the BSP. The proposed BSP contains a substantial number of handwritten revisions and is unsigned.

⁶ After Student enrolled in District in March 2009, District requested and received Student's records from Tulelake and Round Valley. The records were incomplete. District made considerable and adequate efforts to obtain records from Tulelake and Round Valley. Round Valley told District that its records had been destroyed without explanation and declined to participate in a conference call with Tulelake and District about Student's records because Student had been enrolled in their district for less than a month.

8. At the IEP team meeting on April 21, 2009, Magnolia's staff, including Student's kindergarten teacher, reported that Student was doing well and progressing in school. He was attentive, demonstrated proper behavior, was kind and friendly, shared and got along with others. He showed minor misbehavior, which could be attributed to a typical kindergarten student, in two instances where he needed reminding or time-out. Ms. Swartz also did not see any behavior problems. Parent told the IEP team that Student told her that he did not want to come to school because he felt embarrassed and humiliated. Parent asked that something be done. Student's teacher had not observed this aspect and recommended that this be discussed with Student. District scheduled a conference on April 24, 2009, to discuss this matter with Student, but Parent did not attend due to belief that Student would not divulge his feelings to a teacher.

9. When a child's behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." This may require the IEP team to develop a BSP to address maladaptive behaviors. If a BSP is ineffective in addressing a student's maladaptive behaviors, it must be revised, and if necessary, an FAA must be conducted. An FAA is a process by which a student is observed and his behaviors are analyzed to determine what causes those behaviors. Then a BIP may be developed to address those behaviors.

10. Parent asked District use the BSP developed in Tulelake, stating that it had been approved and implemented. Parent also requested an FAA. The other IEP team members felt there were no observed behaviors that indicated a need for an FAA. The BSP was unsigned and there was no other indication it had been finalized and

implemented since it was heavily edited with handwritten notes and revisions.⁷

However, the IEP team agreed to ask District's psychologist to conduct an assessment to gather information. The IEP team also added reading goals to the new IEP. With the exception of the request for assessment and reading goals, Parent did not consent to the IEP. IEP team meeting notes reflect the discussion regarding Parent's request for an FAA and BSP.

PARENTAL PARTICIPATION

11. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. 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 regarding the IEP team's conclusions, and requests revisions in the IEP.

12. Parent felt that the IEP was difficult and she was being dictated to as though she didn't exist. Parent requested a BSP and communicated her disagreement with the other IEP team members that Student did not need one. The evidence presented at hearing established that Parent was able to express her concerns and participate at the IEP team meeting.

⁷ There was substantial testimony at hearing that revealed conflicting positions whether or not the Tulalake BSP had been implemented. Evidence at hearing, including Parent's testimony, showing that the BSP had been consented to and implemented was not persuasive. District reasonably concluded that the Tulalake BSP was incomplete. Tulalake is not a party to this due process claim. Therefore, the issue remains focused on whether District's actions following Student's enrollment in March 2009 amounted to a denial of FAPE.

13. Student spent approximately two months in kindergarten at Magnolia, completing the 2008-2009 school year without reported incidents. Student missed approximately the last three weeks of the school year when he visited his father in Oregon.

Psycho-Educational Assessment

14. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible.

15. Kent Mitchell, District psychologist, was assigned to conduct an assessment of Student pursuant to Parent's request at the IEP team meeting of April 21, 2009. Mr. Mitchell had been working with Student since March 2009, shortly after Student enrolled. Mr. Mitchell saw no behaviors that would require a BSP. Mr. Mitchell has a master's degree in counseling and a master's degree in school psychology, and is a credentialed teacher. Mr. Mitchell has been a psychologist since 1990. Mr. Mitchell

received behavior modification training as an undergraduate, in his master's program, and workshops. He received training on writing behavior plans. He has been a Behavioral Intervention Case Manager (BICM) since 1997, certified to develop behavior intervention plans, and recommend strategies and supervise interventions and revisions to intervention plans.

16. Mr. Mitchell did not attend the IEP team meeting on April 21, 2009. He received the request to do a psycho-educational assessment on Student after the meeting, but the assessment was delayed due to Parent sending Student for approximately the last three weeks of the school year prior to the summer break to visit his dad in Oregon who had a terminal medical condition. Mr. Mitchell completed the psycho-educational assessment in August 27, 2009, at the beginning of the 2009-2010 school year, which began in mid-August.

17. In conducting the assessment, Mr. Mitchell reviewed Student's file including prior assessments, observed Student in his classroom setting, interviewed Student, Parent, and school staff, and conducted a battery of standardized tests. Mr. Mitchell spent approximately three hours with Student. The assessment included the Wechsler Intelligence Test for Children (WISC-IV) with 10 subtests, the Visual Aural Digit Span test (VADS) for memory and attention, the Beery-Buktenica Developmental test (VMI) for visual-motor and perception skills, and the Behavior Assessment System for Children (BASC2) for behavioral, social, and emotional status. Parent and Student's first grade classroom teacher both filled out BASC2 questionnaires to provide scale information.⁸

⁸ The BASC2 was administered to facilitate the different diagnosis of a variety of emotional and behavioral disorders in children. Scale scores in the clinically significant range suggest a high level of maladjustment. Scores in the at-risk range may identify a significant problem that may not be severe enough to require formal treatment or may

18. Results of the assessment were presented in a report dated August 27, 2009. The evidence established that Student was of low average to average cognitive ability with relatively equal skill development in processing verbal and nonverbal information. Processing speeds involving sustained attention were very difficult. Student's aural and visual recall and sequencing skills were reduced. His visual-motor integration skills were consistent with his cognitive functioning.

19. The purpose of the assessment was to address the concerns over Student's behavioral and emotional concerns, which was not a major concern until recently. Student started school well, but recently had some behavioral incidents during unstructured time at recess and when lining up. Student had showed aggressive behavior, i.e. pushing or inappropriate language at these times. Also, when corrected, Student tended to avoid or shut down. Parent said that Student's behavior at home can change very quickly from good to violent.

20. District's assessment report recommended: 1) limiting verbal communications due to Student's recall and sequencing limitations; 2) increasing time to perform tasks to accommodate a slower processing speed; 3) using a token reward system to reinforce positive behaviors; 4) focusing on reinforcing positive behaviors (as opposed to punishing negative behaviors); and 5) school staff, Parent, and medical providers to maintain regular communication to ensure using consistent approaches.

identify a problem that needs careful monitoring. Parent viewed Student in the clinically significant range with hyperactivity, aggression, conduct, depression, atypicality, attention, adaptability, daily activities, and communication. Teacher viewed aggression and adaptability in the at-risk range.

SPEECH AND LANGUAGE ASSESSMENT

21. District conducted a speech and language assessment on September 8, 2009. Based on the assessment, District recommended speech and language therapy in the amount of weekly 30-minute sessions (120 minutes per month). This was an increase from Student's previous IEP addendum from October 2008 at Tulelake which found him not eligible for speech and language services.⁹

2009-2010 SCHOOL YEAR

22. Student began the 2009-2010 year in first grade without incident. Student began showing maladaptive behaviors warranting concern after the first few weeks of school. Student started having trouble during unstructured time such as recess and lining up, where he pushed a student on the playground, and then ran away from a teacher. Student also pushed another student into some bushes while lining up. Student used inappropriate language and gestures. The behaviors started around the time Parent went in for a surgical procedure and that the additional stress on Student may have been a contributing factor.

23. On August 13, 2009, District sent Parent notice of the next IEP team meeting scheduled on September 9, 2009. Parent was unavailable until September 24, 2009, due to a surgical procedure and her advocate's schedule.

24. When Student's maladaptive behaviors increased, school staff and psychologist began measures to address them. Student's teacher documented

⁹ Tulelake's IEP team meeting from October 2008, implausibly recommends one 30-minute speech and language session per year. However, the handwritten notes state that the team found Student ineligible for speech and language. The logical inference is that the 30-minute session referred to the assessment that was done.

behavioral incidents in a parent contact log and data collection chart, and notified Parent, the school psychologist, principal, and vice principal. Mr. Mitchell noted the behaviors in his assessment and made recommendations to staff on how to cope with these behaviors.

BEHAVIOR SUPPORT PLAN

25. On August 26, 2009, there was an incident where Student was on the playground pretending to shoot a gun with his fingers and the vice principal intervened. On September 10, 11, and 16, Student had significant behaviors that required staff intervention, including restraints and a suspension from school.

26. Based on the increasing behaviors, Mr. Mitchell prepared a BSP to address Student's behaviors. The 13-page BSP was completed on September 17, 2009, and discusses the incidents that were observed that month. The BSP identifies the frequency and intensity of the behaviors, the antecedents for the behaviors, and Student's recent personal and school history, and family background.

27 The BSP addressed Student's communicative intent as expressed by his behaviors, and provides detailed strategies for staff to respond early to prevent behaviors from escalating. The BSP provided specific reinforcement strategies to reward Student for preferred behavior such as praises, stickers, and trading cards. The plan discussed consequences when targeted behaviors occur, recommending that staff ignore small misbehaviors as much as possible, using voice inflection to calm Student, using different communication methods, and using a designated cool down space. The plan included criteria for evaluating the plan's effectiveness, including a baseline 3-week period. If maladaptive behaviors increased during this period, an IEP team meeting may result in additional supports in the form of an FAA.

28. Student contended that the BSP was too vague and staff would not be able to implement it as a stand-alone document. However, the BSP was sufficiently

detailed and clearly written so that staff members would be able to implement it. In addition, Deborah Lazzari, Board Certified Behavior Analyst (BCBA) for the Stanislaus County Office of Education, credibly established that a plan need not be stand alone to use and that staff should be trained to use it.¹⁰

29. District completed the educational assessment on August 27, 2009, and the BSP on September 17, 2009, both in time for an IEP on September 24, 2009, the first date Parent said she was available to attend.

ESCALATING BEHAVIORS ON SEPTEMBER 10, 11, 16, 21, AND 22, 2009.

30. A "behavioral emergency" is the demonstration of a serious behavior problem that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. The parent shall be notified within one school day whenever an emergency intervention is used or serious property damage occurs. After a "behavioral emergency," a BER must be completed that includes: 1) the name of the student; 2) the setting and location of the incident; 3) the name of the staff or other persons involved; 4) a description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and 5) details of any injuries sustained by anyone as a result of the incident.

31. On September 10, 2009, Student acted up in line, telling another student that he would "whoop her ass." He then evaded school staff who tried to stop and

¹⁰ Ms. Lazzari has a master's degree in special education curriculum and instruction and a post master's certificate in applied behavior analysis. She has been a BCBA for two years, and a behaviorist for eight years. Ms. Lazzari has experience as an elementary school teacher, a special education teacher, a resource specialist, a program specialist, and a university instructor.

redirect him. Hiding under a slide as staff approached, he then ran for the fence alongside the playground. On the other side of the fence was a busy street with traffic. Student attempted to jump onto and scale the 6-8 foot fence. Shauna Rico, paraprofessional at Magnolia, pulled Student off the fence and restrained him to prevent him from scaling the fence and into traffic. Ms. Rico held Student in a one-person basket hold to prevent him from running into traffic. Ms. Rico is trained in the use of restraints. Student tried to scratch, bite, and pull her hair. Mr. Mitchell was called and when he arrived he tried to deescalate the situation.

32. After the event, Ms. Rico filled out a BER, as required when a restraint was used. Student was unharmed. Parent was notified by telephone and arrived on site. Student escaped from Parent and knocked over a garbage can and chair, then eventually calmed down enough for Parent to take him home.

33. On September 11, 2009, Student disrupted the classroom by tapping another student with his pencil and crawling under the desk. When his teacher attempted to re-direct, he struck the other student again with the box of pencils. Teacher removed the other students out of concern for their safety when Student began tipping over desks, chairs, and knocking things off tables. Teacher called for help and the vice principal and Ms. Rico responded.

34. Parent had arrived to pick up her son as it was the end of the school day. When Student was picking up the items he had knocked over, he kicked out at Parent, grabbed her hair, and then let go. Student then repeated the act. Parent consented for Ms. Rico to assist. Ms. Rico helped remove Student's hands from Parent's hair, and then held Student in a one-person sitting basket hold. Parent got Student's father on her cell phone speakerphone and Student calmed down after talking to his father and Parent took him home. Ms. Rico filled out and submitted a BER as required. Student was unharmed. Parent was on scene and notified when the incident occurred.

35. On September 16, 2009, Julie Minabe, principal at Magnolia, was called to the courtyard to assist Student's teacher who was trying to break-up a physical dispute between Student and two other children. While in the lunch line, teacher saw Student on top of two other students. Another teacher blew her whistle to break it up, but Student continued to push other students. Teacher ushered the other children back into the classroom, then shut the door. Student then grabbed and pushed another first grade girl over backwards who hit her head on the cement walk. Student then ran towards the courtyard with Ms. Minabe following eight to 10 feet behind him. Student attempted to kick other students, and then kicked over three garbage cans. While attempting to kick a fourth garbage can, Ms. Minabe intervened, restraining Student with one arm while sitting on a picnic table. Student attempted to kick and bite so the principal placed both arms around Student's upper arms, then wrapped her legs around his, holding him on her lap. Ms. Minabe completed the BER as required. Ms. Minabe had received training from Ms. Rico in the use of restraints. Student was unharmed. Parent was notified by telephone. As a result of the September 16, 2009, incident, Student was suspended for three days.

36. On September 21, 2009, Student received a disciplinary notice for disrespect and willful defiance of his teacher. Student refused to comply with his teacher's verbal instructions and visual gestures to return to class from recess. His teacher also tried to talk with him but he refused to enter the room and walked away. Earlier that same day, Student refused to work with his resource aide because he was annoyed by a correction she wanted him to make. A BER was not required for this incident.

37. On September 22, 2009, Student received a notice of disciplinary action for refusing to follow his teacher's and aide's instructions about earning his reward stickers for his token reward system. Student covered his ears and turned his back on his aide.

He threw crayons and grabbed at the aide's materials disrupting the classroom. His teacher called for assistance. The vice-principal arrived and sat with Student as his teacher cleared the classroom out of concern for the other students' safety. Student became angry and escalated to knocking over desks, and he threw a chair across the room. Student was suspended for five days as a result of this incident. A BER was not required for this incident.

SEPTEMBER 24, 2009 IEP: FAA PLAN, BSP APPROVED

38. District sent their notice of an IEP team meeting on August 12, 2009, proposing a meeting on September 9, 2009. Parent was unavailable due to her surgery and unavailability of her advocates. The earliest date Parent was available was September 24, 2009. The evidence established that District made regular efforts to schedule IEP team meetings with Parent.

39. The IEP team meeting convened on September 24, 2009. Parent had four advocates. District presented its psycho-educational assessment and BSP prepared by Mr. Mitchell, District psychologist. Parent opposed the negative consequences in the proposed BSP and requested that there be no negative consequences. District established that it was not realistic to implement a behavior plan without any negative consequences.

40. Parent requested an FAA and the implementation of the Tulelake BSP, pending completion of the FAA, which she said had worked for Student in the past. District agreed to do the FAA, but felt the Tulelake BSP, apart from never having been finalized and implemented, was inadequate. The evidence established that the District's proposed BSP was an appropriate BSP since it was based on recently collected data and Student's recent behaviors. Parent signed the FAA assessment plan on September 24, 2009. The IEP team agreed to recess and reconvene two weeks later on October 9, 2009.

41. When the IEP team meeting reconvened on October 9, 2009, Parent was accompanied by two advocates. She continued to request the Tulelake BSP, asked that the BSP implemented have no negative consequences and that Student be allowed to choose his activities. District continued to offer the September 24, 2009 BSP, which was established as appropriate in Factual Finding 40.

42. At the end of the October 9, 2009 IEP team meeting, Parent took District's BSP home to review so she could provide feedback and comment. Parent subsequently provided an addendum to the BSP which District agreed to include. Parent agreed to and signed the IEP, including the BSP (with amendment), on October 14, 2009.

43. The IEP provided Student with special academic instruction at the rate of 45 minutes, four times weekly; speech and language instruction for 30 minutes, four times a month; and other related services for 30 minutes once a week. District also offered an additional classroom aide to assist Student, and Student Assistance Program (SAP) supports. The IEP team also discussed a referral for services for emotional disturbance.

44. Parent and advocates were able to express their opinions and actively engaged in the discussions at the IEP team meetings on September 24, 2009, and October 9, 2009. The evidence established that District staff listened and took Parent's concerns into account.

45. Following Student's five-day suspension on September 22, 2009, Parent removed Student from school. As an accommodation, District allowed an independent study placement from September 23 to October 14, 2009, a three-week period. District was unable to implement the BSP during this timeframe since Student was not attending school. Parent consented to the IEP, including the BSP on October 14, 2009. Student contends that after he returned to school on October 14, 2009, District should

have implemented an "interim BIP." However, there is no legal authority for the creation of an "interim BIP." District established that it had a BSP in place that Parent had just consented to and this was the least restrictive intervention. It had just started the FAA process which would be used to develop a BIP if needed.

NOVEMBER 10, 2009 INCIDENT

46. On November 10, 2009, Student received a discipline referral for disrespect, willful defiance, and unsafe behavior in the classroom. Student hit the hand of an instructor trying to help him, then stuck out his tongue. When told that this was inappropriate, he refused to apologize or take his seat. Student hit his fists in his hands and verbally disrupted the class.¹¹

47. The referral notes indicate that the teacher coached Student on how to deal with his feelings, but the evidence is unclear what specifically was done. The sticker reward system was used for the day showing positive reinforcements. A separate parent/teacher consultation form was used to document negative behaviors, which is consistent with the reinforcement provisions in the BSP. District's overall response was consistent with the BSP. Parent refused to sign the acknowledgement on November 10, but wrote a notation requesting an IEP team meeting claiming the BSP was not being followed. Parent did not witness the event.

48. District sent notice to Parent on November 12, 2009, that the next IEP team meeting would be on November 20, 2009. The purpose of the meeting was to

¹¹ Magnolia uses a form called a "Discipline Referral" to document incidents involving student discipline. The form contains the student's name, teacher, date of incident, date of referral, location, reasons for referral, and a description of the incident. Parents are asked to sign an acknowledgment. Parents, teacher and school administration receive copies.

discuss the FAA. District reasonably chose not to schedule a separate IEP team meeting for the discipline referral since the IEP team meeting for the FAA was the following week.

NOVEMBER 12, 2009 INCIDENT

49. While in his special education reading group, Student became defiant and uncooperative when he felt he lost his turn to read. Student poked other students and continued to do so after they moved away from him. Student tossed his reading materials about the classroom. Staff presented Student choices of verbal and visual consequences. Student crawled around the room.

50. Cinnamon Simpson, BCBA and Behavior Intervention Case Manager (BICM) for Stanislaus County Office of Education, was observing the class because she was preparing District's FAA. Ms. Simpson tried to deescalate and re-direct Student. The other students were removed from the class for their safety. Student began to swipe materials off of other students' desks. Student took a wooden pointer and struck Ms. Simpson's legs. Ms. Rico and Ms. Simpson placed Student in a two-person escort against the wall in the classroom. Student then attempted to kick and bite them. Ms. Rico and Ms. Simpson placed Student in a two-person sitting restraint for approximately five to eight minutes, while Student head-butted, scratched and attempted to kick and bite. When Student calmed down, he was released and complied with simple verbal instructions. Staff prepared a BER as required. Student was unharmed by the incident.

51. Ms. Simpson, Larry Mendonca, District Director of Pupil Services, and Parent discussed the incident by telephone the day of the incident. Parent appeared to understand the restraint and agreed to continue the BSP. Parent agreed that no IEP team meeting was necessary prior to November 20, 2010. Parent received a copy of the BER.

NOVEMBER 20, 2009 IEP: FAA/BIP

52. The IEP team meeting was held on November 20, 2009, to discuss the FAA and Student's recent behaviors. Parent attended with an advocate. Ms. Simpson presented her FAA and a proposed BIP. Ms. Simpson has been with the Stanislaus County Office of Education for ten years as a autism and behavior intervention specialist. Ms. Simpson has a master's degree in applied behavior analysis and, in addition to being a BICM, has been a BCBA since 2004.¹²

53. Ms. Simpson's FAA included a file review of past history, other behavioral plans and IEP documents, interviews with staff and Parent, classroom observation of Student, and direct intervention and manipulation of variable conditions. The FAA consisted of manipulating variable conditions and analyzing the results in a variety of settings in which the resulting BIP was to be implemented. The various settings included the resource support room, group and individual activities, lunch, recess, and reading class. The FAA report identifies target behaviors, antecedents, hypothesized functions, behaviors, and goals.

54. The BIP describes 26 proactive strategies to address Student's behavioral needs, including praise, simple wording, appropriate use of the word "no" or other consequences, use of instructions instead of requests, a 10-step description of a token economy system, a parent contract, a menu of reinforcers, a visual schedule, designated cool down breaks, simple step instructions, positive feedback, comprehension checks, preferred seating, standing at Student's desk, use of indirect prompts, redirection, a

¹² A BCBA is a professional certification in applied behavior analysis. A BICM is certified to develop behavior plans, and recommend strategies and supervise interventions and revisions to intervention plans. Because a BCBA has significantly more education and training, a SELPA may hire a BCBA as a BICM without additional training.

clean desk, stories, social skills practice, using a buddy or mentor, and positive interactions with staff.

55. The BIP contains a lengthy list of reactive strategies, including apologies, counting down and bonus points for appropriate responses, redirecting, use of consequence sticker system, ignoring selected behaviors, being sent to an office space to deescalate in private, minor consequences for minor aggressions, and similar discipline to other students for minor infractions. The BIP allows for the proper use of escorts and SELPA-approved restraints if needed after implementing other strategies. The BIP recommends staff training in SELPA-approved restraints, class sensitivity training, team discussion of logistics in implementing the BIP on a general education campus, reviewing the BIP, contacting the BICM in the event of atypical behavior, data collection, and an escort/containment log. The BIP provides that if anyone was subject to risk of physical harm, trauma, humiliation, or if Parent objected to implementation, it would be suspended and a meeting held to discuss the matter.

56. A number of experts at the hearing challenged the appropriateness of District's FAA and BIP. Jessie Ploeg, Executive Director of Peninsula Applied Behavior Analysis (PABA), a non-public agency that did an independent assessment of Student in August 2010, stated that her team, consisting of Kirk Chang, BCBA, and Alicia Newell, assessed Student over a four-day period (19 hours of observation), conducted curriculum assessments and Parent interviews, and a records review. The team did not interview District staff. Ms. Ploeg is finishing her master's degree and has eight years experience working in applied behavior analysis.

57. The PABA team collected data on the reinforcement schedules and interval on the token economy system to determine the length of time between reinforcers. The team recommended Student receive a 40-hour behavior program that is properly supervised by a trained behavior analyst with the program starting at home, then

moving to school with a slow integration back into a general education classroom with a place to work with Student in a quiet environment when Student is not in the general education class. The assessment was not an FAA and was done while Student was on home instruction. Ms. Ploeg observed that the District's home instructor did not attempt to address Student's non-compliant behaviors. Ms. Ploeg felt that Student worked very well with the reinforcement schedule her team used. Ms. Ploeg opined that District's FAA and BIP focused more on corrections, punishments, and reactive strategies instead of positive reinforcements and reshaping behavior.

58. Alicia Newell is a credentialed special education teacher at a non-public school. She has approximately four years of credentialed teaching status (credentialed teacher for two years, special education credentials for one year, eight months). Ms. Newell worked on the curriculum portion of the PABA assessment. Ms. Newell worked with Student for five hours and did not speak to District staff. Ms. Newell testified that she worked well with Student in the home environment.

59. Kirk Chang, BCBA, has a master's degree in applied behavior analysis and bachelor's degree in psychology. Mr. Chang has experience working in public and private school settings and non-public agencies. Mr. Chang has published research papers regarding behavior supports. Mr. Chang also believed Student could be re-integrated into general education class despite a need for high level of reinforcement based on his experience with students with similar and more severe behaviors than Student. Mr. Chang testified that Student would need reinforcement every one minute to stay on task. Mr. Chang stated District's FAA and BIP did not align function of the behavior with the corrective or positive reinforcement strategies. He expressed a concern over the lack of specificity on what was to be implemented when a targeted behavior occurred that would lead to more restraints. He felt the plan as written could not stand alone where anyone could implement it, consistent with Ms. Ploeg's opinion.

He felt the BIP could allow Student to manipulate his way into a break. Mr. Chang felt the FAA did not adequately target challenging behaviors.

60. Highly trained professionals may disagree. The fact that experts at hearing disagreed with District's FAA and BIP, does not necessarily make the FAA and BIP defective. The key issue is whether District's FAA and BIP were adequate to provide Student a FAPE. The evidence credibly established that District's FAA and BIP were prepared by a qualified expert and both are adequately detailed, with an appropriate amount of positive reinforcement strategies. The FAA and BIP are easily read and provide enough instructions to be implemented by school staff. A stand-alone plan is not necessary; one would reasonably expect staff would receive some training and guidance when implementing a behavior plan. Therefore, District's FAA and BIP are adequate.

61 During the IEP team meeting of November 20, 2009, the team discussed the FAA and IEP along with Student's recent and increasing maladaptive behaviors. With the new data, the team expressed concern that a different placement with stronger supports would be needed than what could be provided in a general education classroom. There was concern about whether the proposed BIP could be implemented in a general education classroom because of the many and frequent measures it called for.

62. In addition to the BIP, District continued to offer Student a general education placement with special education resource and speech supports, and an additional instructional aide to help implement the BIP. District staff would be trained in the BIP and data was to be collected in support of ongoing BIP implementation.

63. Parent consented to the IEP. However, Parent limited consent to implementing the BIP to December 18, 2009, which was the last day of school before the extended holiday break. Parent and advocate were able to express their opinions

and actively engaged in the discussions at the IEP team meeting. The evidence established that District staff listened to and took Parent's concerns into account.

64. After the IEP team meeting, Ms. Simpson made a series of guides for the BIP, including a "cheat sheet" explaining its main points, guides on proper escorts and containments, escort/containment log sheets, data, sheets, and a list of new school rules, based on the BIP, for Student to follow. Ms. Simpson trained the classroom aide in implementing the BIP.

November 23, 2009 Incident

65. Ms. Simpson was in Student's class to train the staff in implementing the BIP. Student refused to work with the aide, insisting on working with Ms. Simpson. Student became angry, wandering around the room and disrupting the class. Staff provided redirection, choices, and deescalation. When Student's behaviors escalated, Ms. Simpson and the aide placed Student in a two-person escort and took him to the office to deescalate in accordance with the BIP. Student attempted to kick and hit and run away. Ms. Simpson and the aide placed Student in a two-person containment for approximately 10 minutes until he calmed down. Staff did not use a basket hold. Student was unharmed.

66. The incident was recorded in the Escort/Containment log developed for the BIP. Parent was notified and provided a copy of the log. Staff did not fill out a separate BER because the incident was recorded in the Escort/Containment log. The containment log contains the date, time, duration, staff involved, method used (contain or restrain), brief description of the event.

November 25, 2009 Incident

67. Student was placed in a time out on the playground. He became angry and pulled off a branch from a tree, and using it like a switch, struck another student on

the neck raising a welt. Staff approached Student to intervene and stop further harm. Student ran into the bushes and hid. Staff became concerned that Student would run away as he had done in a prior incident on the playground.

68. Staff, including Ms. Jenkins, vice principal, managed to get Student out of the bushes and attempted to bring him to the vice principal's office to deescalate in accordance with his BIP. Student resisted and tried to kick staff. Ms. Jenkins and another staff member placed Student in a two-person escort (their hands on his wrists and arms under his upper arm) and took him to the office. Student kicked his escorts along the way.

69. In the office, after five minutes of sitting in a chair, Student got up and threw items off the desk, and knocked a clock off the wall. Student cursed at staff and made obscene gestures. He kicked and stomped staff. Staff with Ms. Rico, placed Student in a two-person side by side containment restraint against the wall. Student continued to kick out and struck a desk. The restraint lasted for 10 minutes until he calmed down. Student was then seated in a chair in the middle of the room. Student's BIP had been in place for three days.

70. Parent was called shortly after Student was taken to the office and arrived approximately one hour later. Parent was angry and upset at the staff, demanding the notes Ms. Jenkins was writing during the incident. Ms. Jenkins refused, due to the notes being rough drafts, and because they also contained personal information about other students. As the altercation between Parent and staff escalated, staff threatened to call the police.¹³ Parent was provided the typed up description of the incident from Ms.

¹³ Police logs show they were notified twice about this incident. One report was at 3:11 p.m. about a student assaulting teachers. Parent called police to report ankle injuries to Student at 6:05 p.m.

Jenkins' notes the next day. District did not complete a BER since the incident was recorded in the Escort/Containment log in accordance with his BIP.

71. Student complained his left ankle hurt after Parent arrived. Nancy Aiden, school nurse, a critical care nurse with 27 years experience, was called to examine the ankle. Nurse Aiden persuasively established her experience examining ankles for injuries. Nurse Aiden was not informed of the nature of the injury. Nurse Aiden asked Student where he was hurt and Student pointed to his left ankle. Student removed his shoes without assistance. Nurse Aiden helped him remove his socks. If the ankle was fractured, he would not have been able to remove his shoes and socks without considerable pain. Student was able to respond to Nurse Aiden's question about where it hurt, making reference to his "stinky feet."

72. Student's ankles looked equal in size indicating no swelling. Nurse Aiden saw no bruises. Student did not cry, grimace, or show signs of distress. Nurse Aiden rotated his ankle which showed an acceptable range of motion without discomfort. Nurse Aiden had no reason to believe the ankle was seriously injured and provided Student with an ice pack.

73. Parent subsequently took Student to the Oak Valley Hospital emergency room. The initial diagnosis was a fractured ankle. However, follow up examinations revealed no fracture line. Photos of the ankle taken by Parent the following day, November 26, 2009, produced at hearing showed bruises. Whether the bruises were caused during the restraint by school staff, or when Student kicked out and struck the desk, or another object is not known, and does not determine the specific issues in this case.

74. Parent pulled Student out of school after the incident on November 25, 2009. District suspended Student for two days following the November 25, 2009

incident. According to Parent, Student was afraid to go back to school due to the emotional injuries from the restraint.

RESTRAINTS

75. Student was restrained by District staff on six occasions, September 10, 11, 16, 2009; and November 12, 23, and 25, 2009. Witness testimony credibly established that the holds were conducted consistent with the Stanislaus County Office of Education, Aggressive Response Management (ARM) Manual, with frequent checks and due care used to avoid injuring Student. The holds were done in the presence of other staff. The ARM manual authorizes and describes the two-person escort, one-person and two-person seated basket hold, standing basket hold, and two-person wall containment. The ARM manual is the SELPA policy.

76. There are no training records for District staff in the use of ARM restraints. Witness testimony established that Ms. Rico is trained in the use of ARM restraints. Ms. Minabe, Ms. Jenkins, Ms. Duarte, and Ms. Simpson credibly established their familiarity with the holds in the ARM manual. Ms. Minabe did not receive any formal restraint training, but Ms. Rico had trained her how to do restraints and had observed her conducting holds

77. Ms. Ploeg opined that the use of restraints was not needed for Student, based on her review of the school records. Ms. Ploeg felt that because Student's dangerous behaviors had stopped before the restraints were used, such as when Student had struck student with a stick and hid in the bushes, there was no reason to restrain him as the imminent danger had passed.¹⁴ She stated that restraints should only

¹⁴ Kirk Chang also opined that there was no reason to restrain Student as the imminent danger had passed. He was also not present when Student was restrained and afforded less weight for the same reasons.

be used when there is imminent danger to the child or others. According to Ms. Ploeg, a small child can be easily blocked, and restraint for non-compliance is not necessary. Ms. Ploeg believes that staff should be able to tolerate bruises, bites, and scratches. This is not reasonable. Staff should not need to wait to be injured, or for others to be injured before they can take action by restraining a Student. In addition, Ms. Ploeg conducted her assessment in August 2010, nine to 11 months after the incidents at Magnolia. She was not present when Student was restrained. Accordingly, her testimony was given less weight. The evidence did not support Student's contention that District unreasonably restrained Student at the time of his extreme maladaptive behaviors in September and November 2009. District's actions were reasonable when they restrained Student.

STUDENT ON HOME AND HOSPITAL TEMPORARY DISABILITY PROGRAM

78. Parent called the school to say Student was sick following the incident on November 25, 2009. Student was also called-in sick from Tuesday, December 1 through Friday, December 11, 2009. On December 4, 2009, Parent submitted a request for Home and Hospital Temporary Disability Program (Home and Hospital) so Student could receive instruction at home. Student's physician recommended Student for a temporary disability due to "emotional instability" from November 30, 2009 until January 30, 2010. District agreed to the Home and Hospital status as an accommodation to Parent while it attempted to schedule a follow-up IEP team meeting.

79. Student's Home and Hospital placement was supposed to expire on January 30, 2010. Parent would not consent for District to discuss Student's condition with his physician. However, Student has remained out of school continuously since December 1, 2010. District kept Student's status in the Home and Hospital program, despite the fact that that the program was not intended for long-term absences.

JANUARY 26, 2010 IEP

80. District made multiple attempts to schedule a follow up IEP team meeting. Parent was unavailable. An IEP team meeting was scheduled for December 4, 2009, but Student's advocate was unavailable until December 18, 2009, the last day of school before the winter break. The parties agreed to meet on January 26, 2010.

81. The IEP team meeting was held on January 26, 2010, to discuss Student's behavioral issues and to do a program review, including the BIP and placement. Parent attended represented by counsel. District staff invited Parent's input. Parent and counsel fully participated in the meeting. Attending for District was Mr. Mendonca, Ms. Swartz, Ms. Duarte, Ms. Minabe, Donniaeu Snyder (family therapist), Ms. Simpson, district's counsel Peter Sturgis, Stanislaus County Office of Education's program manager, District's program specialist, Mr. Mitchell, and Director of Stanislaus County's Local Area SELPA.

82. The team reviewed the BIP. Parent disagreed with the BIP and requested removing negative consequences and restraints from the BIP. Parent and counsel maintained the position that the BIP contain strategies to anticipate behaviors and redirect Student, provide a means for him to deescalate and have calming-down periods during the day. The BIP did contain those provisions. The IEP team disagreed with Parent that the BIP was inappropriate. Parent withdrew her consent for the BIP. Student now had no behavior plan in place.

83. Parent expressed her frustration with Student's lack of progress and requested general education class with supports and services. The IEP team discussed Student's emotional needs and the need for a SDC placement. The IEP team also reviewed information from the teacher who had been working with Student in the home since December 2009. The teacher's report included his academic and behavioral observations.

84. A student who has been determined to be an individual with exceptional needs and who is suspected of needing mental health services may, after the Student's parent has consented, be referred to a community mental health service in accordance with Government Code section 7576. In addition, the LEA must develop an IEP required as a result of the assessment and convene an IEP team meeting no later than 60 calendar days from the date of receipt of the parent's written consent, unless the parent agrees in writing to an extension.

85. District asked Parent to consent to a Chapter 26.5 mental health assessment so that county mental health could provide Student support services and that the current SB 1895 services being provided could be extended for another two months.¹⁵ Parent declined, feeling that Student should not be labeled as emotionally disturbed, that it was not needed to get services. Parent felt that Student was sensitive and lacked self-esteem, but was not emotionally disturbed and should not be labeled unnecessarily.

86. Donnaieu Snyder, licensed marriage and family therapist for Stanislaus County Office of Education, had been providing Student with SB 1895 in-home, pre-

¹⁵ In District, SB 1895 Pre-Referral Mental Health services are provided by County Mental Health for an initial six month period after which the student undergoes a mental health assessment, commonly known as a Chapter 26.5 assessment, to determine if the student qualifies for further county services under the category of emotionally disturbed (ED) or to consider other related support services necessary to replace the temporary services. Student's SB 1895 services were scheduled to end on April 9, 2010. The parties needed to either conduct a mental health assessment (which, in October 2009, Parent did not want), in order to continue county services or meet to discuss what services would be provided after April 9, 2010.

referral services and counseling for social-emotional issues and social skills, since mid-October 2009. Ms. Snyder has a master's degree in counseling and psychology and a bachelor's degree in behavioral science. Ms. Snyder provides counseling services to schools under SB 1895 program. Parent agreed that Ms. Snyder worked well with Student. Ms. Snyder thought Student had an immense need for therapeutic supports and counseling, more than what was available in a general education setting.

87. At the January 26, 2010 IEP team meeting, a range of other placements were discussed, including his current general education placement, general placement at another school, and placement at a non-public school (Sierra Vista), which Parent would not consider. The evidence established that the team discussed the various levels of county placement options, ranging from Levels I through IV, reviewing the levels of increasing services and the restrictions at each level. Levels I, II, and III, are placements for emotionally disturbed students but non-emotionally disturbed students can also be placed at these levels.

88. After considering Student's case file, assessments, history, and team participants input, there was a concern about whether general education placement with support could be an appropriate placement. Every team member, except Parent, expressed the need for a placement with more intensive behavioral support and therapeutic services than would be available in a general education classroom. The team proposed placing Student in a county Level III placement at C. F. Brown, a public school. The placement would be in a special education special day class with low student-to-teacher ratio, several support aides, experienced and behaviorally trained staff, and a highly structured setting. Most of the students are emotionally disturbed. Student would have access to behavioral and therapeutic supports, including a mental health clinician during the school day. District offered to provide transportation to the placement, approximately 15 miles away. Parent refused the placement, reiterating her desire for a

general education placement with supports. The evidence established that District's placement offer was an offer of a FAPE.

89. District agreed as an accommodation to Parent that Student would remain at home as Parent would not bring Student to school despite the fact that his home and hospital status was about to end. District agreed to continue to provide home services while placement issues were worked out. The meeting ended.

90. Parent and advocate were able to express their opinions and actively engaged in the discussions at the IEP team meeting. The evidence established that District staff listened and took Parent's concerns into account.

PRIVATE ASSESSMENT RECOMMENDS GENERAL EDUCATION PLACEMENT

91. Rozlyn Wright is a licensed psychologist in private practice who conducts assessments and disability evaluations. Dr. Wright opined that Student should be in a general education classroom, based on her assessment of Student in August 2010.

92. Dr. Wright testified to conducting several hundred evaluations, with three or four as school district referrals, the remainder mostly private school referrals where the parents pay for the service. Dr. Wright has a doctorate in psychology. Dr. Wright is not a behaviorist or teacher. In conducting her private assessment of Student, Dr. Wright reviewed Student's academic file, school records, and IEPs. Dr. Wright administered the Woodcock-Johnson Tests of Achievement, Wechsler Intelligence Scale for Children, Wide Range Assessment of Visual Motor Abilities, Test of Memory and Learning, Gilliam Autism Rating Scale, Asperger Syndrome Diagnostic Scale, Beck Youth Inventories, BASC2 Structured Developmental History. Parent provided input through a checklist. District staff was not interviewed.

93. Student was generally cooperative and pleasant during the tests, which were done in a quiet environment, working one-on-one with Dr. Wright. However, he was difficult to verbally re-direct when off-task. Dr. Wright stated that Student was on

attention deficit hyperactivity disorder (ADHD) medication, Concerta. Dr. Wright determined that Student had high scores on assessments that rated a child's likelihood of autism, but did not meet the criteria for autism.¹⁶ Student scored in the average range for academic achievement, which was higher than his school records would indicate. Student has average intelligence, according to Dr. Wright's assessment. Dr. Wright diagnosed Student with ADHD due to problems with attention, focus, and concentration.

94. Dr. Wright opined that Student return to the general education classroom with appropriate support and if he was provided with an intensive behavior program with at least a trained one-on-one aide and appropriate supervision. Dr. Wright felt that Student would need a lot of support, but had not received the services focused on attention deficit and hyperactivity that would allow him to succeed in the general education classroom. Dr. Wright testified that Student expressed anxiety and fear about having been restrained at school with a lot of self-doubt, self-blame and emotional distress. Dr. Wright said that restraints should be a last resort to prevent imminent danger, especially if Student had been traumatized before. Dr. Wright was not aware of the conditions of Student's home life before moving to Oakdale.

95. Dr. Wright is a highly trained professional. Her testimony was credible. However, her report was conducted in August 2010, a year after Student began the 2009-2010 school year and eight months after the January 2010 IEP team meeting. The

¹⁶Student obtained an autism syndrome quotient of 123 on the Gilliam Autism Rating Scale, which is indicative of above average probability of autism.

assessment was also not done in the school environment. In the context of this case, her psychological report was accordingly given lesser weight.¹⁷

PLACEMENT OFFERS¹⁸

96. After the IEP team meeting on January 26, 2010, the parties attempted to set up what was referred to as an interim placement. In reality, the District was trying to find a mutually agreeable “temporary” placement in a less restrictive environment than Student’s current Home and Hospital placement, while the parties continued to negotiate placement for the rest of the school year.

97. District sent a letter to Parent on February 8, 2010, repeating their previous FAPE placement offer made at the January 26, 2010 IEP team meeting. District stated its disagreement that an extended Home and Hospital placement was appropriate unless determined medically necessary by Student’s treating physician. District reminded Parent that the Home and Hospital authorization had expired and District enclosed the required forms to be completed by Student’s medical provider. District informed Parent that once the completed forms were returned with the necessary information to extend his Home and Hospital services, the services would be extended. The Home and Hospital services included five hours per week of special education instruction by a credentialed teacher that he had previously been receiving. In addition, District agreed

¹⁷ Kirk Chang also opined that Student could be re-integrated into a general education setting with a high level of reinforcement, including reinforcement every one minute. His assessment was done in August 2010 and afforded less weight for the same reasons.

¹⁸ Parties referred to District’s offers of placement after the January 26, 2010 IEP team meeting as offers for “interim placement.”

to continue support services for Student, including speech and language therapy and SB 1895 counseling services. With respect to speech and language services, District would make best effort to provide services in Student's home, but could not guarantee it.

98. Parent replied on to the February 8, 2010 letter on February 11, 2010, referring to the January IEP team meeting. She reiterated her revocation of consent to the BIP and any form of restraint.¹⁹ Parent did not mention District's placement proposal, and this is considered to be a rejection of District's offer.

99. From January 2010 through May 2010, the parties made continual attempts to place Student in a classroom. In March 2010, District repeated its previous offer to Student – that Student could remain at home as an interim placement since Home and Hospital status has expired, and receive five hours per week of instructional services and one 30 minute speech and language sessions per week. District could not provide the speech and language at home, and the parties continued to try to work out a mutually agreed-upon time and place.

100. Later in March 2010, District offered to place Student in a 60-day general education placement at Fair Oaks Elementary School, with a dedicated, behaviorally trained one-to-one aide. Student would be assessed by a mutually agreed upon assessor for another FAA, who would recommend any necessary changes to the BIP. The assessor would also make recommendations for placement. A follow-up IEP team meeting would be held to discuss the assessment, placement, and BIP. District sought to have Student subject to the same disciplinary processes that other special and general education students were subject to. District also sought to have Parent agree to a FAPE waiver of claims for this interim period.

¹⁹ Mr. Mendonca testified that he did not receive Parent's response until early March.

101. The parties continued to exchange a series of communications negotiating the interim placement. District agreed to Parent requests to modify the FAPE waiver terms and provide an aide trained specifically by Ms. Snyder, who had been providing in-home counseling services to Student. Parties could not agree on the assessor, but District would allow Student's proposed assessor to observe the class and provide recommendations. District proposed using the existing BIP in the interim, and Parent continued to request removal of negative consequences and restraints from the BIP.

102. By mid-March, the parties had resolved most of the issues for the interim placement, including language for an interim BIP. Then, on April 9, 2010, Student sent District a nine-page list of revisions to the BIP. The parties were unable to reach an agreement on the interim placement.²⁰

CONTINUING HOME SERVICES

103. During the period from January 26, 2010 IEP team meeting and continuing, District has offered home instruction, speech, and SB 1895 therapeutic services.

104. Ms. Snyder provided in-home counseling services starting October 2009. Under the SB 1895 program, this was a six-month county service. District arranged with Ms. Snyder to continue after the term had expired. Ms. Snyder worked well with Student and was well-thought of by Parent as indicated by Parent's request that Ms. Snyder train the aides during the failed attempts by the parties to arrange an interim placement.

105. Ms. Snyder provided in home services until approximately June 2010. Sometime in April 2010, Ms. Snyder was in Student's home when Student had a

²⁰ These negotiations were conducted between Parent's and District's counsel. Starting with the September 24, 2009, IEP team meeting, Parent attended all IEP team meetings with advocate(s) or counsel.

behavioral episode that required Parent to restrain him. Ms. Snyder's agency determined she could no longer provide in-home service. Ms. Snyder offered to provide services to Student in a nearby community center a few blocks away, approximately five minutes travel from Student's home. Parent was initially told the reason for moving the service was lack of privacy during the summer since her other children were in the home. Parent declined to continue the service out of concern that Student might act up in the center, presenting a safety issue, and because she would need to arrange childcare for her other children. Parent also mistrusted Ms. Snyder's ability to accurately reflect what happened at the counseling sessions because of the inconsistent explanation why the sessions were no longer being provided in-home.

106. Student received in-home instruction from Mr. Sean McCarthy after he was taken out of school in December 2009. Mr. McCarthy is a multiple subject credentialed teacher at District. He has a master's degree in special education. Mr. McCarthy volunteered to provide in-home instruction to Student for the extra income. His first session was December 14, 2009.

107. In early May 2010, Mr. McCarthy had a disagreement with Parent over his teaching methods. Parent felt Mr. McCarthy should not compare Student to other students and that it was damaging his self-esteem and was too much pressure. Mr. McCarthy had previously encouraged Student to read to his sister and this would be good practice and help him become a good reader like other first grade students were doing. Mr. McCarthy felt this was appropriate. An altercation between Parent and teacher escalated and Mr. McCarthy left the home feeling uncomfortable and threatened. Parent denied trying to dictate the teaching methodology. Mr. McCarthy continued to offer in-home instruction, including through the summer. Parent was receptive and accepted and the parties communicated, trying to schedule sessions, but Student did not receive in-home instruction after this incident.

108. District continued to offer in-home instructions as late as June 4, 2010, restating the position that the teacher has the discretion to control the teaching methods. District offered and continues to offer speech sessions at a mutually agreeable time and place, but not in-home stating that those services are provided in a district facility during school hours. The evidence established that District made regular efforts to schedule IEP team meetings with Parent after the IEP team meeting on January 26, 2010.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion for the issues raised in OAH case number 2010050392 (Issues (a) through (c)). District has the burden of persuasion for the issues raised in OAH case number 2010050679 (Issues (a) and (b)).

ELEMENTS OF A FAPE

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

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require LEAs to provide special

education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts (and by extension, county mental health agencies) 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, 949-954.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141(*Adams*), 1149..)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination of whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, there must be a determination of 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. The Ninth Circuit has endorsed the "snapshot" rule, explaining that "...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, at pp. 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031 (*Fuhrman*), 1041).)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding of a FAPE denial. A procedural violation results in the denial of a 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 child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479 (*Target Range*), 1484.)

6. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. The primary vehicle for the delivery of a FAPE is an IEP. School districts create an IEP for each disabled student through a cooperative process involving student's parents and school officials, who form an "IEP team." While a parent has the absolute right to participate in the IEP process and a school district cannot engage in conduct that seriously hampers that right, a violation of IDEA does not exist simply because an IEP does not reflect or include a parent's desires or wishes. Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, at p. 208; *Student v. Corona-Norco Unified School District* (2005) Cal.Ofc.Admin.Hrngs. Case No. 2005070169.)

7. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann supra*, 993 F.2d 1031, 1036.) 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 regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, at p. 1036.)

8. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. If the school district's program was designed to address student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if student's parent preferred another program.

(*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2006010204.)

9 In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state, the LEA shall provide the child with a FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the LEA adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with the law. (20 U.S.C. §1414 (d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e) (2006); Ed. Code, § 56325, subd. (a).) California law also requires that, for a student who transfers into a district not operating under the same SELPA, the LEA shall provide the interim program “in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law.” (Ed. Code, § 56325, subd. (a)(1).)

10. A school district’s assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student’s IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining

an appropriate educational program for the student. (34 C.F.R. § 300.304 (b)(2) (2006).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).)

ADDRESSING BEHAVIORAL NEEDS AND INTERVENTIONS

11. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) As noted by the comments to the 2006 federal implementing regulations, "[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child's IEP team." (64 Fed.Reg. 12620 (2006).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.) (See *Parent v. Patterson Joint Unified School District/Patterson Joint Unified School District v. Parent* (2010) Cal.Ofc.Admin.Hrngs. Case No. 2009110397 and 2009110083 (*Patterson*).)

12. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that an LEA conduct an FAA, resulting in a BIP, when a student develops a “serious behavior problem,” and the IEP team finds that the instructional/behavioral approaches specified in the student’s IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).) A serious behavior problem means the individual’s behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil’s IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) (*Patterson, supra*)

13 A BIP is “a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual’s IEP.” (Cal. Code Regs., tit. 5, §§ 3052, subd. (a)(3), 3001, subd. (h).) A BIP shall be based upon an FAA. (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) Before the BIP can be written, an FAA must be conducted. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).) An FAA must include a systematic observation of the occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).) It must also include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(B).) An FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).) (*Patterson, supra*)

14. An FAA must include ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(D).) An FAA must include a review of records for health and medical factors that may influence behaviors. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(E).) An FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(F).) (*Patterson, supra*)

15. Following an FAA, a written report of the assessment shall be prepared, and shall include all of the following: 1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(A).); 2) a description of the targeted behavior(s) that include baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(B).); 3) a description of the rate of alternative behaviors, their antecedents and consequences (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(C).); and 4) recommendations for consideration by the IEP team which may include a proposed behavioral intervention plan. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(D).) (*Patterson, supra*)

16. Under California regulations, the following criteria apply to BIPs: 1) They must be developed by the IEP team, which must include the behavior intervention case manager; 2) They must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace

maladaptive behaviors with alternative, acceptable behavior; 3) They must be based on an FAA, be in the IEP and used in a systematic manner; 4) Emergency interventions shall not be a substitute for a BIP; 5) Behavioral interventions cannot cause pain or trauma; and 6) To the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).) (*Patterson, supra*)

17. The BIP must contain a statement of the frequency of consultation between the behavior intervention case manager and the parents and staff responsible for implementing the plan. In addition, the BIP must contain: 1) a summary of relevant and determinative information gathered from an FAA; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness, or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other non-educational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. The California Legislature intended that if behavior interventions were used for a special education student, that the behavioral interventions "ensure a pupil's right to placement in the least restrictive environment." (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (g).) (*Patterson, supra*)

18. A “behavioral emergency” is the demonstration of a serious behavior problem that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the parent shall be notified within one school day whenever an emergency intervention is used or serious property damage occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(5).) After a “behavioral emergency,” a “Behavioral Emergency Report” must be completed that includes: 1) the name of the student; 2) the setting and location of the incident; 3) the name of the staff or other persons involved; 4) a description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and 5) details of any injuries sustained by anyone as a result of the incident. (*Ibid.*) (*Patterson, supra*)

STUDENT’S ISSUES

STUDENT’S ISSUE A)1: DID DISTRICT DENY STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT FAILED TO CONDUCT AN APPROPRIATE PSYCHO-EDUCATIONAL ASSESSMENT?

19. Pursuant to Factual Findings¹⁴ through 20 and Legal Conclusions 10, District’s psycho-educational assessment met all the requirements imposed by Education Code section 56320. The assessment was conducted by a trained individual, a credentialed school psychologist. The assessment consisted of a battery of tests that addressed Student’s educational and social and emotional needs, in all areas of suspected disability. The assessment was thorough and conducted in a timely manner that took into account the information District had at the time. District’s psycho-educational assessment was adequate and appropriate.

STUDENT'S ISSUE A)2: DID DISTRICT DENY STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT FAILED TO CONDUCT AN APPROPRIATE BEHAVIOR ASSESSMENT AND PROVIDE BEHAVIOR SUPPORTS AND SERVICES?

20. Factual Findings 8 through 10, 14, and 19, and Legal Conclusion 10, establish that Student was not denied a FAPE during the 2008-2009 school year because District failed to conduct an appropriate behavior assessment and provide behavior supports and services. The information and data available to District at the time he enrolled in District showed Student was exhibiting no behavior problems. Parent expressed concerns over Student's behaviors at the 30-day IEP team meeting in April 2009. However, Student's kindergarten teacher, resource specialist, and school psychologist, did not observe any behavior problems requiring an assessment. Therefore, District did not fail to conduct an appropriate behavior assessment and provide supports and services that denied Student a FAPE.

STUDENT'S ISSUE A)3: DID DISTRICT DENY STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT FAILED TO IMPLEMENT THE BEHAVIOR SUPPORT PLAN FROM STUDENT'S PREVIOUS SCHOOL DISTRICT?

21. Pursuant to Factual Findings 1 through 10 and Legal Conclusion 9, District reasonably concluded that due to the incomplete school records from Student's previous districts and the incomplete nature of the Tulelake BIP, there was no behavior intervention plan in place when Student arrived at District. Therefore, District was not required to implement the plan and reasonably relied on the observations and input from the IEP team, including staff and Parent, to determine their own plan to address Student's needs.

STUDENT'S ISSUE A)4: DID DISTRICT DENY STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT FAILED TO CONDUCT AN APPROPRIATE ASSESSMENT OF STUDENT'S EMOTIONAL NEEDS AND PROVIDE COUNSELING SERVICES?

22. Factual Findings 1 through 20 establish that the District conducted an

appropriate assessment of Student's emotional needs and provided counseling services. Student's kindergarten teacher, resource specialist, and school psychologist did not observe any emotional problems requiring an assessment. In addition, Student spent approximately two months in kindergarten for the entire 2008-2009 school year. Arguably enough time to evaluate Student. Therefore, District did not fail to conduct an appropriate assessment of Student's emotional needs and provide counseling services.

STUDENT'S ISSUE B)1: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT DENIED PARENT THE OPPORTUNITY TO PARTICIPATE IN THE PROCESS OF FORMULATING STUDENT'S IEP BY PREDETERMINING HIS PLACEMENT?

23. Pursuant to Factual Findings 10 through 12, 28, 39 through 45, 52, 63, and 81 through 90, Parent was an active and integral participant at the IEP team meetings. The IEP team requested Parent's input which Parent vigorously provided. Parent had ample representation at the meetings and engaged in numerous correspondence, email and telephone contact with the IEP team. Evidence showed that the meetings were attended by the appropriate staff members and experts and open to discussion where a wide variety of placement and service options were discussed and considered. If anything, the evidence showed that Parent was the one who was unwilling to consider any other placement than her original demand for a general education placement. Pursuant to Legal Conclusion 7, Parent meaningfully participated in the development of Student's IEPs and there was no predetermined placement.

STUDENT'S ISSUE B)2: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT FAILED TO COMPLY WITH THE HUGHES BILL INCLUDING, BUT NOT LIMITED TO, FAILING TO HOLD REQUIRED IEP TEAM MEETINGS, FAILING TO PROVIDE ACCURATE BEHAVIOR EMERGENCY REPORTS, FAILING TO TIMELY CONDUCT AN FAA, USING RESTRAINTS IN PLACE OF AN INTERIM BEHAVIOR PLAN AND ADDING BEHAVIOR SUPPORT, UTILIZING RESTRAINTS IN LIEU OF APPROPRIATE BEHAVIOR SERVICES AND PLANS AND ALLOWING UNTRAINED STAFF TO UTILIZE RESTRAINTS AND USING INAPPROPRIATE AND DANGEROUS RESTRAINTS WHICH CAUSED INJURIES?

24. Pursuant to Factual Findings 25 through 35, District prepared a thorough and appropriate BSP to address Student's behaviors based on the information it had at the time. The BSP contained sufficiently detailed strategies to address Student behavior.

25. Pursuant to Factual Findings 30 through 37 and 40 through 64, as Student's behaviors escalated, District systematically gathered information and data relating to Student's behaviors, escalating behaviors, staff observation, and Parent input, then reviewed and discussed the information, and conducted a thorough and appropriate FAA by a highly qualified professional. Based on the FAA, District developed a BIP that contained specific strategies to address Student's behaviors. It appropriately allowed escorts and restraints consistent with SELPA policy. The BIP recommended training, logistics of implementation, and BICM follow-up.

26. District was ready to assist Student in a systematic way based on his escalating behaviors with a timely and appropriate FAA and BIP. Parent refused to allow the implementation of the BIP, delaying any ability to gauge its effectiveness. Parent's concerns for Student's reaction to corrections and restraint are well-documented and acknowledged and considered by District. However, by refusing to permit any plan that had any negative consequences or restraints regardless of the impracticality, Parent was mainly responsible for the problems implementing any sort of behavior plan that in effect prevented reasonable measures to address Student's needs.

27. In order for emergency interventions such as a physical restraint to be used, there needs to be a "behavioral emergency" demonstrating a serious behavior problem that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (c).) Looking at the restraints placed on Student, he did not have a BIP in place for all except the incidents on November 23 and November 25, 2009. Restraints were used only after District staff attempted other measures were attempted to deescalate Student.

28. For September 10, 2009, pursuant to Factual Finding 31, the behavioral emergency was to prevent Student from scaling the fence onto the adjacent street where he was in imminent danger from traffic.

29. For September 11, 2009, pursuant to Factual Findings 32 through 34, the behavioral emergency was to assist Parent when Student grabbed her hair and would not let go. Parent consented to the assist so this is not an issue.

30. For September 16, 2009, pursuant to Factual Finding 35, the behavioral emergency was to prevent Student from injuring other students. Student demonstrated his intent by trying to kick other students moments before, and kicking over garbage cans.

31. For November 12, 2009, pursuant to Factual Findings 49 through 51, the behavioral emergency was Student had struck a staff member with a stick and the threat of being struck again, along with other students.

32. For November 23, 2009, pursuant to Factual Finding 65, the escort and restraint was done pursuant to the BIP. However, Student attempted to kick and hit the staff and run away. The behavioral emergency was to prevent Student from injuring others and himself.

33. For November 25, 2009, pursuant to Factual Findings 67 through 20, the escort and restraint was done in accordance with the BIP. The behavioral emergency was to prevent Student from injuring staff and himself.

34. Pursuant to Factual Findings 73 and 75 through 77, the restraints were approved SELPA restraints and properly applied with no apparent harm to Student.

35. Pursuant to Factual Findings 30, 32, 34, 35, 50, 66, and 70, BERs were prepared for the incidents involving restraint, except the incidents on November 23 and November 25, where the similar information was entered into the Escort/Containment log. The escort and containment logs do not contain information whether there is a systematic behavior plan, nor does it contain information whether there were any injuries sustained or provision for review by a designated administrator. As such, the Escort/Containment logs by themselves are not an adequate substitute for a BER. However, for these two restraint incidents, Parent was immediately notified of the incident and provided copies of the log sheet and adequate information of the events. The appropriate District administrators were involved or aware of the incident response. Therefore, despite that the logs are not considered to be a BER, there was no denial of FAPE.

36. There is no requirement for training staff on restraints. Nevertheless, pursuant to Factual Finding 76, District staff was either trained or familiar with the restraint policies and procedures in the SELPA restraint policies.

37. Anytime a BER is written for a student without a BIP, the district must schedule an IEP within two days to review the incident. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(7).) Pursuant to Factual Findings 23 and 38, IEP team meetings were already scheduled when the emergency restraints were used. District was required to schedule IEPs within two day of the incident, the fact that the IEPs were scheduled after the two-day period is consistent with the Hughes Bill requirements. The incidents that occurred on November 23 and 25 were not required to have an IEP since Student had a BIP in place and the behaviors were not new. However, District did attempt to schedule an IEP for December 4, 2009. Parent was unavailable until the January 26, 2010.

38. Because District complied with the Hughes Bill requirements, Student was not denied a FAPE.

STUDENT'S ISSUE B)3.: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT CHANGED HIS PLACEMENT BASED ON A VIOLATION OF SCHOOL CONDUCT WITHOUT CONDUCTING A MANIFESTATION DETERMINATION MEETING AND WITHOUT CONSIDERING THE REQUIREMENTS OF THE HUGHES BILL TO UPDATE OR CREATE AN INTERIM BEHAVIOR PLAN?

39. Pursuant to Factual Findings 35, 37, 74, and 78, Student was suspended for a period of 10 days total. Manifestation determinations are required when a student's placement changes as a result of suspension that exceeds 10 days. Whenever a district removes a student from his or her current educational placement for over 10 days, subjects a student to a pattern of removals that total over 10 days, or removes a student to an interim alternative educational setting for specific conduct involving weapons, drugs, or violent acts, a student receiving special education services is entitled to specific procedural protections. The district is required to conduct a review to determine if the conduct that is subject to discipline is a manifestation of the student's disability. This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) District was not required to conduct a manifestation determination. District reviewed Student's conduct at the January 26, 2010 IEP team meeting. Parent changed Student's placement when she pulled Student from school on November 25, 2009.

40. District was not required to do an interim BIP. (Cal. Code Regs., tit. 5, § 3052, subd. (h).) Pursuant to Factual Findings 42 and 45, the parties agreed to a BSP to address Student's behaviors while the FAA was being conducted that would provide the information to develop the BIP.

STUDENT'S ISSUE B)4: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT FAILED TO OFFER AN APPROPRIATE PLACEMENT AT THE JANUARY 26, 2010, IEP AND IN SUBSEQUENT COMMUNICATIONS?

STUDENT'S ISSUE B)5: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT FAILED TO OFFER PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT IN ITS OFFER OF INTERIM PLACEMENT AND PLACEMENT AT C.F. BROWN?

41. Pursuant to Factual Findings 80 through 95, District conducted an appropriate IEP team meeting on January 26, 2010, and after evaluating Student's present levels of performance and discussing a number of various options for placement and services available to best address Student's needs, they recommended placement at a Level III special education class at C.F. Brown. The placement included a trained special education teacher, aides, small class with low teacher-to-pupil ratio, a structured environment, full time mental health clinician on site, behavioral supports, and individualized instruction. District did not deny Student a FAPE with its placement offer at C. F. Brown.

42. Pursuant to Factual Findings 96 through 102, following the IEP team meeting, District made numerous offers to Student to return him to school. It made numerous interim placement offers that included a trial placement in a general education class with one-on-one aide, behaviorally trained in accordance with Parent's terms. District offered an independent assessment, with the possibility of revising the BIP and placement. District did not deny Student a FAPE with its subsequent communications.

STUDENT'S ISSUE B)6: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT FAILED TO IMPLEMENT APPROPRIATE SPEECH AND LANGUAGE SERVICES IN STUDENT'S IEP?

43. Pursuant to Factual Findings 21, 43, 88, 89, 96, 97, 99, and 108, District provided or offered to provide Student with speech and language services in his IEP and when he was pulled out of school in December 2009, offered and continues to offer to provide the services at a mutually agreeable time and place, including any missed sessions. Therefore, District offered appropriate speech and language services and did not deny Student a FAPE.

STUDENT'S ISSUE B)7: DID DISTRICT DENY STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT FAILED TO PROVIDE APPROPRIATE HOME INSTRUCTION IN THE AREA OF ACADEMICS AND BEHAVIOR?

44. Pursuant to Factual Findings 78, 79, 89, 97, 99, and 103 through 108, District provided all services during Student's Home and Hospital period, including home instruction by a credentialed special education teacher. District continues to offer the home instruction service, despite the fact that Student's eligibility for Home and Hospital status ended in April 2009.

45. Pursuant to Factual Findings 83 through 86, 97, 101, and 103 through 105, District provided Student with in-home counseling under the SB 1895 county mental health program. Parent did not consent to the required mental health assessment to determine if county services could continue. District arranged for Student to continue receiving the service after the program's six month period had ended. The service was stopped by Parent.

46. District did not deny a FAPE because it failed to provide appropriate home instruction in the area of academics and behavior

STUDENT'S ISSUE C): DID DISTRICT DENY STUDENT A FAPE DURING THE 2008-2009 AND 2009-2010 SCHOOL YEARS WHEN IT FAILED TO PROVIDE PRIOR WRITTEN NOTICE TO PARENT REGARDING DISTRICT'S DECISIONS TO REJECT PARENT'S REQUESTS FOR AN FAA AND TO IMPLEMENT HIS BSP THAT WAS IN PLACE AT HIS PREVIOUS SCHOOL DISTRICT?

47. A school district must provide written notice to the parents of a pupil whenever the district refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. The notice must contain: 1) a description of the action refused by the agency; 2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal; 3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards; 4) sources of assistance for parents to contact; 5) a description of other options that the IEP team considered, with the reasons those options were rejected; and 6) a description of the factors relevant to the agency's refusal.

48. Failure to provide parents with prior written notice is a procedural violation. A procedural violation constitutes a denial of FAPE only if the violation: 1) impeded the child's right to a FAPE; 2) significantly impeded the parent's opportunity to participate in the decision-making process; or 3) caused a deprivation of educational benefits.

49. Pursuant to Factual Findings 8 through 10 and 39 through 42, District did not provide a separate written notice when it rejected Parent's request for an FAA and to implement the BSP from Tulelake, Student's previous district. However, District and Parent did discuss the FAA and BSP at the IEP team meetings. The discussion is reflected in the meeting notes. District communicated the reasons why an FAA and the BSP were not appropriate. The purpose of notice to parents is so they are aware of the reasons for the refusal. While technically a procedural violation, this did not constitute a denial of a FAPE. Parent was not impeded in participating in the decision-making process, nor did this impede Student's right to a FAPE or cause deprivation of educational benefits. In addition, meeting notes were provided to Parent. This is a sufficient writing to satisfy the notice requirement. (*Student v. Lake Elsinore Unified School District* (2006) Cal.Ofc.Admin.Hrngs. Case No. 2006060377).)

DISTRICT'S ISSUES

DISTRICT'S ISSUE A)1: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT PROVIDED STUDENT WITH APPROPRIATE EQUIVALENT SERVICES UPON HIS ARRIVAL AT DISTRICT BASED ON PRIOR IEPs AND INFORMATION FROM HIS PREVIOUS SCHOOL DISTRICT?

50. Pursuant to Factual Findings 5 through 12 and Legal Conclusions 19 through 22, District provided Student with appropriate equivalent services upon his arrival at District based on prior IEPs and information from his previous school district.

DISTRICT'S ISSUE A)2: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT WAS REQUIRED TO IMPLEMENT A BSP, FAA, OR BIP FOR STUDENT UPON HIS ARRIVAL AND ENROLLMENT WITH DISTRICT?

51. Pursuant to Factual Findings 5 through 12 and Legal Conclusions 19 through 22, District was not required to implement a BSP, FAA, or BIP for Student upon his arrival and enrollment with District. District used a systematic and timely process to determine the appropriateness of a BSP, FAA and BIP, and developed adequate assessments and plans as the needs were determined.

DISTRICT'S ISSUE A)3: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT CONDUCTED AN APPROPRIATE IEP FOR STUDENT AFTER HE ATTENDED DISTRICT SCHOOLS FOR 30 DAYS, AND CONTINUED TO OFFER PLACEMENT AND SERVICES AT THE APRIL 21, 2009, IEP TEAM MEETING?

52. Pursuant to Factual Findings 5 through 12 and Legal Conclusions 19 through 22, 50 and 51, District conducted an appropriate IEP for Student after he attended District schools for 30 days, and continued to offer placement and services at the April 21, 2009, IEP team meeting.

DISTRICT'S ISSUE A)4: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT PROPOSED AND IMPLEMENTED AN APPROPRIATE ASSESSMENT PROCESS FOR STUDENT AT THE CONCLUSION OF THE APRIL 21, 2009, IEP TEAM MEETING?

53. Pursuant to Factual Findings 5 through 12 and Legal Conclusions 19 through 22, District proposed and implemented an appropriate assessment process for Student at the conclusion of the April 21, 2009, IEP team meeting.

DISTRICT'S ISSUE A)5: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT PROVIDED AND IMPLEMENTED APPROPRIATE SUPPORTS AND RESPONSES FOR STUDENT'S BEHAVIORS AFTER THE APRIL 21, 2009, IEP TEAM MEETING TO THE END OF THE 2008-2009 SCHOOL YEAR?

54. Pursuant to Factual Findings 5 through 21 and Legal Conclusions 19 through 22, District provided and implemented appropriate supports and responses for Student's behaviors after the April 21, 2009, IEP team meeting to the end of the 2008-2009 school year.

DISTRICT'S ISSUE A)6: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2008-2009 SCHOOL YEAR BECAUSE IT WAS NOT REQUIRED TO IMPLEMENT A BSP, FAA, OR BIP, FOR STUDENT AFTER THE APRIL 21, 2009, IEP TEAM MEETING TO THE END OF THE 2008-2009 SCHOOL YEAR?

55. Pursuant to Factual Findings 5 through 21 and Legal Conclusions 19 through 22, District took the necessary steps to determine if a BSP, FAA, or BIP, was needed for Student after the April 21, 2009, IEP team meeting to the end of the 2008-2009 school year. District considered the information it had available to it, then did an appropriate assessment.

56. Pursuant to Legal Conclusions 19 through 22 and 50 through 55, District provided Student a FAPE during the 2008-2009 school year.

DISTRICT'S ISSUE B)1: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT PROVIDED AND IMPLEMENTED APPROPRIATE SUPPORTS AND SERVICES FOR STUDENT'S BEHAVIORS FROM THE COMMENCEMENT OF THE 2009-2010 SCHOOL YEAR UNTIL THE SEPTEMBER 24, 2009 IEP?

57. Pursuant to Factual Findings 20 through 37 and Legal Conclusions 10, 11, and 24, District took appropriate actions to collect information and develop a BSP based

on Student's increasing behaviors. District had provided Student with a special education aide. Staff documented behaviors. The psychologist reviewed the data and made recommendations to staff how to cope.

DISTRICT'S ISSUE B)2: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT WAS NOT REQUIRED TO IMPLEMENT A BSP, FAA, OR BIP FOR STUDENT FROM THE COMMENCEMENT OF THE 2009-2010 SCHOOL YEAR UNTIL THE SEPTEMBER 24, 2009, IEP WITHOUT PARENTAL CONSENT AND BEFORE THE ASSESSMENT PROCESS HAD BEEN CONCLUDED?

58. Pursuant to Factual Findings 5 through 21 and Legal Conclusions 11, and 19 through 22, District took the necessary steps to determine if a BSP, FAA, or BIP, was needed for Student after the April 21, 2009 IEP team meeting to the end of the 2008-2009 school year. District considered the information it had available to it, then did an appropriate assessment, which was completed at the start of the 2008-2009 school year. With the assessment and Student's increasing behaviors in August and September 2009, District developed a BSP to address the behaviors. Up to that point based on information the District had, an FAA and BIP were not necessary. As Student's behaviors increased, District agreed to do an FAA. When a BIP was found to be needed, District developed one.

DISTRICT'S ISSUE B)3: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT TIMELY OFFERED AN IEP TEAM MEETING TO PARENT WITH ITS SEPTEMBER 13, 2009, IEP TEAM MEETING OFFER?

59. Pursuant to Factual Finding 38, District sent their notice of an IEP team meeting on August 12, 2009. The date for the meeting was September 9, 2009. Parent was unavailable until September 24, 2009. District's offer was timely.

DISTRICT'S ISSUE B)4: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT OFFERED APPROPRIATE PLACEMENT AND SERVICES AT THE SEPTEMBER 24, 2009, IEP TEAM MEETING, INCLUDING ITS OFFER TO IMPLEMENT THE BSP AND TO CONDUCT AN FAA?

60. Pursuant to Factual Findings 22 through 45, District took the necessary steps to determine if a BSP, FAA, or BIP, was needed. With Student's increasing behaviors in August and September 2009, District developed a BSP to address the behaviors. Up to that point, based on information the District had, an FAA and BIP were not necessary. As Student's behaviors increased, District appropriately agreed at the September 24, 2009 meeting to do an FAA.

61. District offered a number of services. The IEP provided Student with special academic instruction 45 minutes, four times weekly; speech and language instruction for 30 minutes, four times a month; and other related services for 30 minutes once a week. District also offered an additional classroom aide to assist Student, and SAP supports. The IEP team also discussed a referral for services for emotional disturbance.

62. District offered appropriate placement and services at the September 24, 2009, IEP team meeting.

DISTRICT'S ISSUE B)5: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT PROVIDED AND IMPLEMENTED APPROPRIATE SUPPORTS AND RESPONSES FOR STUDENT'S BEHAVIORS FROM THE SEPTEMBER 24, 2009 IEP UNTIL THE NOVEMBER 20, 2009 IEP?

63. Pursuant to Factual Findings 38 through 45, District conducted an appropriate FAA and BSP. Parent consented to the BSP on October 14, 2009. With the

BSP in place, District staff appropriately addressed Student's behaviors according to the BSP.

DISTRICT'S ISSUE B)6: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT CONDUCTED AN APPROPRIATE FAA PROCESS AND OFFERED AN APPROPRIATE BIP TO STUDENT AT THE NOVEMBER 20, 2009 IEP TEAM MEETING?

64. Pursuant to Factual Findings 45 through 64 and Legal Conclusions 25 through 27, District conducted an appropriate FAA and BIP at the November 20, 2009 IEP team meeting.

DISTRICT'S ISSUE B)7: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT OFFERED APPROPRIATE PLACEMENT AND SERVICES AT THE NOVEMBER 20, 2009 IEP TEAM MEETING, INCLUDING ITS OFFER TO IMPLEMENT THE BIP?

65. Pursuant to Factual Findings 52 through 64, District offered appropriate placement and services at the November 20, 2009 IEP team meeting, including its offer to implement the BIP.

DISTRICT'S ISSUE B)8: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT PROVIDED THE IEP TEAM A SUFFICIENT AMOUNT OF TIME DURING THE 2009-2010 SCHOOL YEAR TO SUCCESSFULLY IMPLEMENT THE BIP AFTER IT WAS AGREED TO BY PARENT?

66. Pursuant to Factual Findings 52 through 70, and 74, District offered an appropriate BIP at the November 20, 2009 IEP team meeting. Parent consented to the BIP, but limited the implementation to December 18, 2009. Student had behavioral episodes on November 25, 2009, which precipitated Parent to remove Student from

school. The BIP had been in place for three days, which is an insufficient time to successfully implement a BIP in this case.

DISTRICT'S ISSUE B)9.: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT OFFERED APPROPRIATE PLACEMENT AND SERVICES AT THE JANUARY 26, 2010 IEP TEAM MEETING?

67. Pursuant to Factual Findings 80 through 95, District offered a Level III placement at C.F. Brown after appropriate discussion of the various options and services available to support Student. District allowed Student to remain at home and continued to provide in-home services Student had been receiving. District offered appropriate placement and services at the January 26, 2010 IEP team meeting.

DISTRICT'S ISSUE B)10: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT OFFERED AN APPROPRIATE INTERIM PLACEMENT AND ADDITIONAL INDEPENDENT ASSESSMENT PROCESS IN MARCH 2010 AND THEREAFTER, INCLUDING THE BEHAVIORAL PLAN PROPOSED FOR THAT PLACEMENT?

68. Pursuant to Factual Findings 96 through 102, District offered a range of interim placement options and an additional assessment by a qualified assessor. District agreed that the assessment could impact the proposed placement and BIP. District made a good faith effort to accommodate Student's demands. District offered an appropriate interim placement and additional independent assessment process in March 2010 and thereafter, including the behavioral plan proposed for that placement.

DISTRICT'S ISSUE B)11: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT APPROPRIATELY DECLINED TO ALLOW PARENT TO DETERMINE THE METHODOLOGY OF THE PROFESSIONALLY-DEVELOPED BIP?

DISTRICT'S ISSUE B)12: DID DISTRICT PROVIDE STUDENT A FAPE DURING THE 2009-2010 SCHOOL YEAR BECAUSE IT APPROPRIATELY DECLINED TO ALLOW PARENT TO DETERMINE THE METHODOLOGY USED BY DISTRICT'S HOME INSTRUCTION TEACHER?

69. District may choose the methodology for specific program. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. Pursuant to Factual Findings 52 through 60 and 103 through 108 and Legal Conclusion 6, District's BIP and teaching methods addressed Student's unique needs and provided some educational benefit, despite the fact that Parent disagreed with the methods.

70. Pursuant to Legal Conclusions 57 through 69, District provided Student a FAPE during the 2009-2010 school year.

ORDER

1. District provided Student a FAPE during the 2008-2009 and 2009-2010 school years.

2. All other requests for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

Dated: April 5, 2011

A handwritten signature in black ink, appearing to read "Troy K. Taira", is written over a horizontal line.

TROY K. TAIRA

Administrative Law Judge

Office of Administrative Hearings