

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RIVERSIDE UNIFIED SCHOOL

DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2011020676

AMENDED DECISION

The due process hearing in this matter convened on May 3, 4, and 5, 2011, in Riverside, California, before Administrative Law Judge (ALJ) Darrell L. Lepkowsky from the Office of Administrative Hearings, State of California (OAH).

Jack B. Clarke, Jr., Attorney at Law, represented the Riverside Unified School District (District). Robert Diaz, a program specialist for the District, attended each day of hearing. Tim Walker, the Director of the Riverside Special Education Local Plan Area, also attended the majority of the hearing.

Student was represented by his Mother and Father (referred to collectively as Parents), who were present for the entire hearing. Student attended the hearing on the morning of May 3.

The District filed its request for a due process hearing on February 18, 2011. OAH granted the parties' joint request for a continuance on March 14, 2011. At the close of the hearing, the ALJ granted the parties' request for a continuance in order to allow

them to file written closing briefs. The parties timely filed their briefs on May 16, 2011. At that time, the matter was submitted and the ALJ closed the record.¹

ISSUES²

1. Does the District's offer of placement and related services for Student, as outlined in the individualized education program meetings of December 16, 2010, January 5, 2011, and February 15, 2011, constitute a free appropriate public education in the least restrictive environment?

2. May the District implement its offer without parental consent if Parents want special education and related services from the District for Student?

¹ On June 1, 2011, OAH issued a written Decision in this matter. At that time, the ALJ was unaware that Student had filed a closing brief as there was no indication in Student's file that OAH had received the brief. The original Decision in this matter therefore referenced the fact that Student had elected not to file a brief. However, on or about June 12, 2011, the ALJ became aware that Student timely had filed his brief. The ALJ therefore re-opened the record and reviewed and considered the arguments made by Student in his closing brief. Upon review of Student's brief, the ALJ has determined that all arguments raised by Student in his brief were addressed by the ALJ in her original Decision. Therefore, this Amended Decision corrects only the references to the filing by Student of his closing brief. There are no other changes made to the previously issued Decision. As of the date of this Amended Decision, the matter has been re-submitted and the record re-closed.

² The ALJ has slightly re-phrased the issues for purposes of clarity but has not made any substantive changes to the issues as determined at the prehearing conference.

PROCEDURAL ISSUES

An educational advocate originally filed a notice of appearance on behalf of Student and Parents after the District served its request for due process on Parents. OAH held a telephonic prehearing conference in this matter, pursuant to a scheduling order, on April 25, 2011, before ALJ Robert Helfand. Neither Student's advocate nor Parents filed a prehearing conference statement prior to or after the prehearing conference. At the inception of the prehearing conference, ALJ Helfand was unable to locate Student's advocate at any of her telephone numbers of record. Student therefore did not participate in the prehearing conference. Based upon Student's failure to file a prehearing conference statement and failure to appear at the prehearing, ALJ Helfand's prehearing conference order limited Student's witnesses and exhibits to those listed by the District in its prehearing conference statement.

On April 27, 2011, Student's advocate untimely emailed to the District a list of witnesses and four exhibits for the hearing. On April 29, 2011, Parents personally delivered to the District's legal counsel a binder containing 16 exhibits. In response, the District filed a motion in limine on May 2, 2011, moving for the exclusion of Student's witnesses and exhibits based upon the untimely provision to the District of the information and based upon ALJ Helfand's ruling in his order following the prehearing conference. The District did not contend in its motion in limine that it had been prejudiced by the late notification of Student's witnesses and exhibits.

When the hearing began on May 3, 2011, Student and his Parents appeared without benefit of legal representation. Parents informed the ALJ that their advocate was no longer representing them and that they therefore had to proceed in pro per. They explained that they provided the District with their witness and exhibit lists as soon as they realized that they would not have legal representation and that their advocate had not timely provided the information to the District. Based upon the fact that

Parents had lost legal representation so close to the hearing, did not have legal training or experience in due process matters, and had to proceed in pro per, the ALJ denied the District's motion in limine. However, in order to address any prejudice to the District occasioned by its late receipt of Student's proposed evidence and list of witnesses, the ALJ offered to briefly continue the hearing. The District declined, indicating that it preferred to proceed with the hearing as scheduled.

Although given the opportunity to call witnesses, Parents ultimately decided not to call any to testify, including themselves. They also waived an opening statement. Mother did present an oral closing argument. Parents moved into evidence several exhibits and actively engaged in cross-examination of the District's witnesses during the hearing.

OVERVIEW OF THE CASE

In this case, the District seeks to validate the offer of placement and services it made to Student over three individualized education program (IEP) team meetings, which took place on December 16, 2010, and January 5 and February 15, 2011. The District ultimately offered to place Student at Somerset Educational Services (Somerset), a certified non-public school that serves pupils, like Student, who engage in disruptive behaviors at school that interfere with their ability to access their education. While Parents agreed to the IEP goals and some of the related services proposed by the District, they do not believe that Somerset, along with the mental health services provided there, is an appropriate placement for Student. Parents assert that Somerset cannot fully implement Student's IEP, that the proposed classroom setting does not meet Student's needs, that the teacher is not properly trained, and that the behavior interventions utilized are inappropriate. Parents believe that the District should either place Student in a less restrictive environment in a District special day class for emotionally disturbed children, or, in the alternative, should provide Student either a

home hospital program or develop an independent study program for him. The District believes that a non-public school is the least restrictive environment for Student because his maladaptive behaviors have become so extreme that he cannot adequately be educated at a public school. The District believes that Somerset, which has a social skills program embedded in the regular classroom curriculum, and which provides group and individual therapy to all students, is an appropriate placement.

During the course of the hearing, Parents stipulated that the only issue with which they disagreed concerning the District's offer to Student of a free appropriate public education (FAPE) was the offer of placement at Somerset along with any mental health services provided there. Parents stipulated that they do not disagree with, and in fact consented to, the remainder of the IEP offered by the District.

Based upon the following Factual Findings and Legal Conclusions, this Decision determines that Somerset offered a special education program that was reasonably calculated to provide Student with educational benefit in the least restrictive environment at the time of the District's offer of FAPE, between December 16, 2010, and February 15, 2011.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a nine-year-old young man who at all relevant times resided with Parents within the District. He is presently in third grade. Student was originally found eligible for special education and related services under the qualifying classification of other health impaired based upon auditory processing difficulties. Student's eligibility classification was later changed to specific learning disability in 2009. As discussed below, Student's present primary eligibility classification is emotional disturbance, with a secondary classification of specific learning disability. Neither

Student's eligibility for special education nor his eligibility classification is at issue in this case. Student presently attends school at Somerset, a non-public school, where he has been placed according to a superior court order. The circumstances of Student's placement will also be discussed below.

2. Due to long-standing emotional issues, Student has received mental health services from private providers and from the Riverside County Department of Mental Health since approximately 2006.

3. Since kindergarten, Student has demonstrated behavioral issues at school, often stemming from his lack of coping skills. He had incidents of hitting and kicking adults and other children during first grade. These incidents increased during the 2009-2010 school year, when Student was in second grade. He would often become defiant when asked to comply with specific directions from the teacher and classroom aides. The District developed a behavior support plan, dated February 10, 2010, to address Student's defiance.

4. The District convened an annual IEP team meeting for Student on April 2, 2010. Student had begun to demonstrate increased behavioral issues when interacting with his classmates, such as hitting, kicking, shoving, and pushing them. Student's IEP team developed two social/emotional goals to address Student's inappropriate behaviors with peers and to address his defiance toward adults.

5. The IEP continued Student's placement in a special day class (SDC) for non-severely handicapped children, for a total of 225 minutes per day, to address Student's learning disabilities. This represented over 80 per cent of Student's school day. Student would spend the remaining time, including lunch, recess, and physical education, with typically developing peers in a general education environment. Student's IEP also provided him with speech and language services for 30 minutes a week to address articulation deficits; neither Student's need for speech and language

services nor the extent of the services offered by the District at any time is at issue in this case.

FALL SEMESTER 2010: STUDENT'S AGGRESSIVE BEHAVIOR INTENSIFIES

6. At the beginning of the 2010-2011 school year, when Student entered third grade, his SDC program was transferred to another school. Student began his school year at the new school. His behavioral issues did not abate. Instead, Student began demonstrating new maladaptive behaviors, such as running away from adults when he was in trouble. At Parents' request, the District convened an IEP meeting on October 14, 2010, to address Student's misbehavior at school. The IEP team reviewed and revised Student's behavior support plan in order to address Student's increased misbehavior, including increasing adult supervision of Student during unstructured time at school.

7. Student continued to have behavioral issues at school. On one day in October 2010, he refused to follow instructions, ran away from a campus supervisor, threw office supplies around an office, and punched an adult several times. On other days, Student ran around the classroom, lifted up a table, and grabbed another student so hard he left a mark on the child's arm. The District suspended Student for two days after he hit a child while on the bus, spit on another child, blew the bus horn, and then later slapped his teacher and other adults. A couple of days after returning from suspension, Student was again suspended for throwing things in class, holding onto his teacher's legs, hitting and kicking adults and other children, and swearing. Parents decided that a change of school location might benefit Student. The District agreed to their request and transferred Student to an SDC at another school on November 8, 2010.

8. Student was placed in Andrea Armstrong's non-severely handicapped SDC. Ms. Armstrong has a master's degree in special education in addition to her

special education and general education teaching credentials. She has 13 years of experience teaching special education students. Both she and her classroom aide are trained and certified in Professional Assault Crisis Training (Pro-ACT), a specific methodology which uses de-escalation strategies and specific physical restraint hold methods to address assaultive and uncontrolled behaviors in students. The training specifically states that restraint is a last resort and addresses ways to minimize injuries to students if restraint is necessary to address the student's behavior.

9. The fresh start at a new school did not decrease Student's misbehaviors. On his first day at the new school, Student was defiant toward adults, threw over desks, kicked containers and bookcases, hit a child, kicked, hit, and grabbed a teacher, and tried to bite a teacher. The District suspended Student for three days because of these incidents.

10. On the day he returned from the suspension, Student hit a child with a water bottle, hit adults with the bottle, kicked and punched adults, and tried to leave the classroom. Student's teacher and classroom aide had to restrain him twice to prevent Student from leaving the classroom and assaulting the adults.

11. Based upon this second incident, the District determined that Student should again be suspended. On November 15, 2010, the District convened a manifestation determination IEP team meeting for Student. Although the team found that Student's conduct was not a manifestation of his then-identified disability, after discussion, the IEP team decided temporarily to place Student on a modified school day where he would leave school early in order to maximize his instruction time while he was there. The District also agreed to temporarily place a second aide in Student's classroom to assist with the other children when Ms. Armstrong and her permanent aide had to focus all their attention on Student. There were 14 children in Ms. Armstrong's class at the time. Her class normally had two adults to support the 14 children.

Student's behaviors required the District to increase the normal amount of adult support in the class.

DISTRICT'S SOCIAL/EMOTIONAL ASSESSMENT OF STUDENT

12. Because of the increase in Student's maladaptive behaviors since transferring to the new school, Parents requested that the District administer a supplemental assessment to him to determine if Student's special education classification should be changed to emotional disturbance. The District agreed to the assessment, which was administered by school psychologist Sandra McAllister on November 16, 17, 29, and 30, 2010. Ms. McAllister is a certified school neuropsychologist who has a master's degree in school psychology. She has been employed as a school psychologist for approximately 30 years.

13. Ms. McAllister administered a battery of assessments to Student. She had both his present teacher, Ms. Armstrong, and his former teacher fill out the teacher rating scales for the Behavior Assessment System for Children – 2 (BASC-2). Both teachers rated Student either as clinically significant or at risk in the areas of aggression, atypicality, adaptability, depression, withdrawal, conduct problems, and attention problems. On the BASC-2 parent rating scales, Parents rated Student as clinically significant in almost the same areas as had his teachers.

14. Ms. McAllister administered a rating scale to Student as well, in which he indicated that he: was unhappy most of the time, thought no one cared about him, wished he were dead, could not control his temper, had bad thoughts and bad dreams, got into too many fights, was nervous all the time, could not stop crying at times, would get so mad and not know what to do about it, would lie a lot, would do things he knew he should not, and wished he were someone else.

15. As part of her assessment, Ms. McAllister also conducted two observations of Student. She observed him on November 16, 2010. The first observation that day

was when she was called to the school office to assist in dealing with Student, who was having a behavior outburst. Ms. McAllister had an agreement with Student's teacher that Ms. McAllister would be on-call to come and address Student's behavioral issues if she was on the school campus at the time. This was one of the occasions when she was called to assist school staff members who were unable to control Student.

16. Student was standing by the wall next to the health office. He kicked and hit the wall, and growled and yelled for 20 minutes. During that time, the teacher intermittently asked Student if he was ready to calm down and take his medication. Student finally calmed down, took his medication, and went to recess.

17. A half hour after this incident, Ms. McAllister was again called to assist with Student's behavioral outbursts, this time to Student's classroom. Student was walking around the classroom, looking agitated and ignoring adult direction. He took a water bottle off the floor and hit a girl over the head with it. The teacher directed her aide to remove the other students from the classroom for their safety. The school Principal and a resource teacher were also called into the classroom for assistance. Student brandished the bottle and then hit Ms. McAllister with it several times. He tried to exit the classroom but the Principal blocked the doorway. Student then hit and kicked her, trying to get out the door. He hit the resource teacher and hit Ms. Armstrong. They responded by using a Pro-ACT restraint to bring Student to the floor. Ms. Armstrong told Student that as soon as he was calm and stopped hitting and kicking they would release them. She attempted to ask him questions about his family as a distraction. Student continued yelling and fighting to free himself, and tried to bite and scratch the teachers holding him. Student did not begin to relax and stop struggling for 15 minutes, after which the teachers released him. He lay still on the ground for five minutes. When he got up, the teachers asked him whether he needed anything to eat or drink. They directed Student to sit down. He would not. Instead, Student began

growling and moving toward the classroom door. When the teachers would not allow him to leave, Student again began hitting and kicking them. The teachers resumed a Pro-ACT restraint. They released Student after 10 minutes. Student then lay on the floor, crying for a few moments, after which he got up, accepted the snack he was offered, and took a walk around the campus with Ms. Armstrong, the resource teacher, and Ms. McAllister. After the walk, Ms. McAllister took Student to her office to start her formal assessment of him.

18. Based upon the results of her assessment, including her observations of Student, her review of his history and previous evaluations, and the rating scales completed by his parents and his teachers, Ms. McAllister found that Student showed an inability in relating to and sustaining satisfactory interpersonal relationships with peers and adults. She found Student to be physically aggressive toward people and destructive toward property, with little or no provocation. She noted that Student's aggression had escalated both in amount and degree and that he had caused bruises, with the potential for even greater harm. Ms. McAllister noted that Student demonstrated inappropriate types of behaviors and feelings under normal circumstances and that he appeared to show obsessive tendencies and had difficulty with coping strategies and behavior regulation. She further noted that Student often appeared to have a general pervasive mood of unhappiness or depression and that he had demonstrated these characteristics over a long period of time, to a marked degree, and over multiple settings. Finally, Ms. McAllister noted that Student's emotional and behavioral difficulties were hindering his ability to perform successfully in the classroom. Based upon these findings, Ms. McAllister suggested that Student would qualify as an emotionally disturbed student for purposes of special education eligibility.

19. The District convened an IEP team meeting for Student on November 30, 2010, to discuss the results of Ms. McAllister's assessment. All required team members

were present. Parents fully participated in the meeting. The team agreed that Student demonstrated characteristics that could be used as the basis for a determination that he was eligible for special education because of an emotional disturbance. Ms. Armstrong informed the team that Student's behavior had improved over the last two days, but that interactions with him were like "walking on eggshells."

20. Father requested that the IEP team maintain Student in his present SDC placement on a modified schedule for another month. Both Parents also stated that the IEP team should consider placing Student at a non-public school if his behavior did not approve. Parents did not suggest a specific school at this time.

21. Ultimately, the IEP team, including Parents, determined that Student would remain in his present placement with a modified schedule for another 13 school days, and that the extra aide support would remain in the classroom as well. Ms. McAllister offered to provide counseling services to Student to address socialization issues. The team determined that Student would be offered three 30-minute counseling sessions before the next IEP meeting convened to discuss Student's progress. The IEP team set the next meeting for December 16, 2010.

IEP TEAM MEETING OF DECEMBER 16, 2010

22. Student had two major behavioral outbursts during the approximately two weeks of school between the November 30, 2010 IEP meeting and the meeting scheduled for December 16, 2010. On December 6, Student grabbed another student's leg during recess and would not let go. His classroom aide intervened and he began to hit her. He then hit another student who tried to intervene. Student then grabbed the aide's radio from her and hit her multiple times on the head with it. He then tackled a third student. When his teacher and other school staff arrived on the scene, Student was throwing punches at his aide who was trying to back away from him. Staff had to restrain Student.

23. On December 10, 2010, Student began throwing objects at Ms. Armstrong during class. He then ran out of the classroom. Staff followed him out. He hit three staff members repeatedly, kicked the door multiple times, threw objects at the staff following him, left the classroom area without permission, and attempted to leave the school campus but was prevented from doing so by school staff.

24. Student's IEP team met as scheduled on December 16, 2010, for Student's annual IEP review. All legally required IEP team members were present.

25. The IEP team reviewed Student's progress toward his goals and worked on his present levels of performance. Ultimately, the team, including Parents, developed and agreed to implement 10 goals for Student: three to address his reading and written expression deficits, two to address his deficits in mathematics, two to address Student's behavioral issues, one goal in pragmatics to address Student's inability to interact appropriately with peers, and two goals to address Student's speech and language deficits. Parents agreed to the goals and agreed to their implementation.

26. The IEP team then reviewed and revised Student's behavior support plan. The plan noted that Student's behavior outbursts included hitting others with his fist and hand as well as with objects, and that the outbursts generally lasted from 30 minutes to an hour, and were occurring on a daily basis. The team noted that some of the triggers for Student's behavior were directions given by authority figures, comments from peers, or merely Student's inner thoughts. The team noted that the function of Student's behaviors was probably to gain attention or was due to Student's internal thoughts or events taking place internally.

27. To address and re-direct Student's behavior, the behavior support plan indicated that school staff would focus on teaching Student to communicate his frustration and learn to request a break or request a conference with a staff member. The plan required staff to use visual and verbal prompts to re-direct Student, using

"when/then" phrases (such as "when you do this, then this will happen) rather than negative phrasing such as "no," "stop," and "don't."

28. The behavior support plan contained reinforcers for Student's positive behaviors. The plan indicated that Student would be permitted a break, including running laps (outside the classroom), would be given praise, would be given computer time, would be given an opportunity for classroom jobs, and would earn classroom "money" for the classroom store.

29. To address Student's outbursts, the behavior support plan indicated that staff would remove the other students from the setting where the outburst was occurring and would reduce Student's access to objects that could be thrown. Staff would also review the replacement strategies with Student and talk with him about his choices and feelings.

30. The behavior support plan also specified a hierarchy of consequences in response to the recurrence of Student's problem behaviors. Staff would begin with verbal or non-verbal warnings. If that did not re-direct Student, he would receive a loss of privileges. If the behavior persisted, staff would send a note home to Parents and give Student a "citation" for the maladaptive behavior. Finally, the IEP team agreed that as a final step, Student would be suspended from school.

31. The IEP team then discussed a continuum of placement possibilities for Student. No one on the team, including Parents, believed that Student would be successful in a general education placement. Parents never requested that type of placement and did not assert at hearing that Student should have been offered placement in a general education classroom. Rather, the team discussion, including Parents, focused on three possible placement options for Student: continued placement in Ms. Armstrong's non-severely handicapped SDC, placement in a District special day class for emotionally disturbed children that was located at another school site, and

placement at a certified non-public school. The District IEP team members suggested Somerset, a certified non-public school that serves students whose behaviors at school interfere with the students' ability to access his or her education.

32. Parents wanted an opportunity to observe the SDC for emotionally disturbed children and to observe the classroom at Somerset before making a decision on placement for Student. The IEP team therefore agreed to re-convene after Parents had an opportunity to do so. In the interim, the team reduced Student's in-class time to three hours a day from the five hours a day he had been attending. The IEP team also agreed to provide modifications and accommodations for Student. One of the accommodations the District decided to provide at this time was an additional adult in the classroom. Although there were already three adults (Ms. Armstrong and two aides) supporting the 14 children in Student's SDC class, the District was concerned that the other children were not receiving instruction time when Ms. Armstrong had to focus on addressing Student's outbursts. The District decided to assign a substitute teacher to assist Ms. Armstrong in class so that the substitute could continue providing instruction to the other students if Ms. Armstrong had to divert her attention to Student. Therefore, by mid-December 2010, the District had doubled the normal amount of teaching and aide support in Ms. Armstrong's class of 14 students.

IEP TEAM MEETING OF JANUARY 5, 2011

33. Prior to the IEP team meeting scheduled for January 5, Parents and the District agreed that the general education teacher would be excused from attending the meeting. All other required IEP team members attended the January 5 meeting. The team members present were the school Principal, Ms. Armstrong, a speech and language therapist, Ms. McAllister, program specialist Robert Diaz, Parents, and two advocates for Parents.

34. The sole purpose of this IEP meeting was to make a final determination on placement for Student. The IEP team, including Parents, had agreed on all other aspects of Student's IEP at the previous meeting.

35. By January 5, Parents had visited the District's elementary level SDC for emotionally disturbed students. They had also toured the Somerset site although they had not observed the classroom Student would attend if placed at that school.

36. Parents informed the District IEP team members that they did not feel Somerset was appropriate for Student. They believed that his classroom would consist of students in grades kindergarten through third, which they felt was not appropriate because Student's needs as a third grade student could not be met. They did not like the size of the school or the environment.

37. Parents also did not believe that the District's SDC classroom for emotionally disturbed elementary school students was appropriate for Student. The school where the SDC was located only had a low fence surrounding it, which was easy to jump over. Parents were concerned that Student would be able easily to run away from the campus. The District IEP team members shared Parents' concerns about this SDC and agreed that it was not an appropriate placement for Student. In addition to their belief that Student would be able to run off the campus, which was located near major thoroughfares, the District team members believed that the ratio of adults to students in the SDC was too low to meet Student's unique needs because there was only one teacher and one aide in the class of 13 to 14 students. They believed that Student required a classroom with fewer students such as would be available at Somerset.

38. Parents requested that the District consider a number of alternative placements for Student. First, they suggested that the District maintain Student in his presently modified program of three hours per day of class attendance but proposed

adding five hours per week of home hospital instruction to address Student's loss of daily instruction time. In order to consider a home hospital placement, a student's IEP team must have a recommendation from the student's medical or mental health provider that states that the student has a medical or psychological condition that prevents the student from receiving special education and related services in a less restrictive environment.³ Student did not have any recommendation from his doctor or mental health provider. The District members of the IEP team discussed the purpose of a home hospital placement as temporary for children who for health reasons cannot attend school. They explained that placement in the home is one of the most restrictive placement options for a special education student because it isolates the child at home and away from other children. The District team members did not believe that the home hospital placement was appropriate for Student or a solution to addressing his behavioral challenges at school. For these reasons, they rejected Parents' request for home hospital instruction.

39. Another placement considered by Student's IEP team was a suggestion to combine Student's presently modified schedule with resource specialist support. The IEP team rejected this placement because it would also fail to address Student's behavioral needs.

40. Parents' advocates also requested that the District maintain Student in his modified program but also provide a one-on-one aide for him. The District team members discussed this possibility but ultimately rejected it. The school site staff members, in particular Student's teacher Ms. Armstrong, believed that even a one-on-one aide in the non-severely handicapped class would not be able to address the extreme nature of Student's behavioral issues. Ms. Armstrong pointed out that even

³ California Code of Regulations, title 5, section 3051.4, subdivision (d).

with the additional two adults in her classroom who often worked one-on-one with Student his behavioral outbursts had not decreased. Since returning from winter break, Student continued to test limits. Although he had "good" days, his behaviors were unpredictable and often unprovoked with no concrete triggers that could be identified. Sometimes his behaviors would be a series of escalations and at other times his behaviors amounted to a sudden, unpredictable outburst.

41. Ms. Armstrong explained to the IEP team and to Parents and their advocates in particular, that she had concerns for her personal safety, for that of the aides in her class, and that of the other students. She had been hit by Student and her aide and the other children had been hit with objects by him. She also was very concerned that Student was missing substantial amounts of instruction because his behavior prevented him from learning. She had diligently attempted to implement Student's behavior support plan, but his behavioral outbursts had continued unabated.

42. During Ms. Armstrong's testimony at hearing, it was evident how difficult it was for her to describe Student's conduct in her class. It was apparent that she felt helpless by her inability to bring Student's conduct under control and that she was concerned for Student as well as for the other children in her class who could potentially be harmed by his assaultive behavior. Student had hit other children in the past and would sometimes pretend to hit them to frighten them. Ms. Armstrong's testimony was all the more difficult because Parents elected to have Student attend the hearing during her testimony and it was evident that she felt uncomfortable describing in front of Student the litany of incidents in which he had lost control.

43. Parents also requested that the District consider placing Student at a private school. However, they did not specify to the other team members which private school they wished the team to consider and were not able to describe the characteristics of the type of school they wanted Student to attend. The only criteria

Mother could describe at this meeting was that she wanted the school to have fewer combination classes than did Somerset and wanted a school more focused on California educational standards. Parents informed the team that they would research the issue of other possible private schools for a future IEP meeting.

44. Based upon Student's continued maladaptive behaviors at school which had not decreased in spite of the addition of two adults in his classroom and because they believed Somerset would offer Student an appropriate academic education with mental health supports, the District made a formal offer to Student of full-time placement at Somerset with speech and language as a related service. Parents rejected the offer.

THE HONIG INJUNCTION

45. On January 11, 2011, Student had another behavioral crisis. He refused to follow Ms. Armstrong's simple instructions to do the class assignment. Student became disruptive and physically began interfering with Ms. Armstrong's attempts to instruct the other children in the class. She called the school Principal to come to the classroom and assist her. When the Principal arrived, Student was refusing to return to his seat, do his work, or otherwise follow instructions. She then observed him hitting the keys of a computer. When the Principal explained to Student that he would damage the computer and that he had to either type correctly or remove himself from the computer center, Student got up and tried to bolt for the door. The Principal physically blocked the door to prevent Student from leaving the classroom. Ms. Armstrong then suggested taking Student for a walk, one of the deescalating strategies identified in Student's behavior plan. Instead, Student succeeding in running past the two women out the classroom door. Ms. Armstrong followed him and asked him to return to the class. Student then turned around and punched Ms. Armstrong in the arm. He continued to punch and kick her. Ms. Armstrong informed Student that she would have to restrain

him if he continued kicking and punching her. Student began growling and then started kicking Ms. Armstrong's aide, who had come out to assist her with Student.

46. Ms. Armstrong and the aide attempted to escort Student to the school office, but he resisted their efforts and continued to hit and kick them. In order to stop Student's assaultive behavior, prevent him from continuing his attacks on them, and to prevent possible injury to others who were nearby, Ms. Armstrong and her aide, who is also trained in Pro-ACT, were required to restrain Student. He continued to fight back and began to yell profanities at them.

47. Student eventually relaxed. Ms. Armstrong and the aide allowed him to sit up in a chair but Student attempted to leave again. When Ms. Armstrong told Student he could either sit in the chair or lay on the floor, he started to push her and tried to punch her in the face as she backed away. Ms. Armstrong informed Student that they would have to restrain him again if he continued to hit. When Student did not stop hitting, Ms. Armstrong and the aide performed a floor restraint on him. Student growled, screamed, and shouted profanities. At that point, Father arrived and took Student home. Ms. Armstrong filed a police report relating to this incident.

48. Student's behavior that day endangered the health and safety of himself, his teachers and aides, other staff, and nearby students. As a result of the incident, Ms. Armstrong had back pain and swelling, pain, and bruising on her left arm. Student would have punched her in the face with a closed fist had she not backed away in time. The instructional aide who assisted her was so upset by the incident that she left school for the day. Ms. Armstrong was afraid for her own continued safety as well as that of her aides and, most importantly, the other students in her class.

49. After Student left school with Father, Ms. McAllister was asked to speak with Student's classmates about their feelings regarding Student's behaviors earlier in the day. The other students had witnessed Student hitting, punching, and kicking their

teacher and aide. They expressed fear to Ms. McAllister that Student would hit them, particularly since one student was accidentally hit in the arm while Student was having his crisis that day. Student had hit classmates in the past as well. They told Ms. McAllister that they were afraid of Student when he pretended to hit them, tipped over desks, or swung around his backpack or books. The students also expressed fear that Student would continue to attack Ms. Armstrong and the classroom aides. They were concerned because the aide had left school. They wondered where she was and why she had left. They told Ms. McAllister that they did not feel safe and were afraid for themselves and for their teachers.

50. On January 14, 2011, the District held a manifestation determination IEP meeting based on Student's behavioral outburst that occurred on January 11. The team determined that Student's conduct was a manifestation of his disability. The team determined that the District would proceed with conducting a functional analysis assessment of Student and would refer Student to the county department of mental health for assessment as well. The District IEP team members continued to recommend that Student be placed at Somerset. Parents agreed to the assessments but rejected the District's renewed recommendation to place Student at Somerset.

51. By the time of this incident, Student had already been suspended for a number of days and had reached the limit of suspension days permissible for students who have an IEP. Additionally, because the IEP team determined that Student's conduct on January 11 was a manifestation of his emotional disturbance, the District could not expel Student or otherwise immediately change his placement to another location.

52. The District, however, was afraid that staff would suffer more injuries and that other children might be harmed by Student's continued aggression. The District therefore decided to file pleadings in state superior court to attempt to obtain an injunction that would prohibit Student from continuing to attend his public school and

that would require Student instead to attend school at Somerset. This is commonly known as a *Honig* injunction after the case of *Honig v. Doe* (1988) 484 U.S. 305, 327-328 [108 S.Ct. 592, 98 L.Ed.2d 686]. There, the United States Supreme Court stated that school officials are entitled to seek injunctive relief in appropriate cases to change a disabled child's current educational placement if they can demonstrate that maintaining the child in his or her current placement is substantially likely to result in injury either to him or herself, or to others.

53. The District filed its application for a temporary restraining order against Student on January 14, 2011, after the manifestation determination IEP meeting at which Parents again declined the offer of placement at Somerset. The application was supported by declarations from 10 District staff members, including teacher Andrea Armstrong, school psychologist Sandra McAllister, program specialist Robert Diaz, and the school Principal.

54. The Superior Court for the County of Riverside granted the District's request for a temporary restraining order on January 18, 2011. The order prohibited Student from returning to his public school and mandated that he attend school at Somerset until either: 1) Parents and the District agreed on a school placement through the IEP process; 2) an ALJ issued an order regarding placement in a due process proceeding; or 3) the court ruled on the District's request for a preliminary injunction. The court set a hearing for the preliminary injunction on February 7, 2011.

55. The District informed the Somerset administrative staff that Student might be enrolling there about the time the District filed for the temporary restraining order on January 14. On January 18 or 19, the District confirmed that Student would indeed begin school there based on the court's order. Student began attending Somerset on or about January 19, 2011. On February 7, 2011, the court granted the District's motion for preliminary injunction on the same terms as it had granted the motion for temporary

restraining order. As of the hearing in this matter, Student was still enrolled at Somerset.

STUDENT'S PLACEMENT AT SOMERSET

56. Several people testified at the hearing about the Somerset program and why it was appropriate for Student. District program specialist Robert Diaz has a master's degree in counseling. He was previously a school psychologist. He has visited Somerset several times a year since being promoted to his present position as a program specialist in 2002. He was a careful and thoughtful witness who tried to give considered insight into the reasons why the District believed that Somerset was an appropriate placement for Student.

57. The District also presented four witnesses who are employed at Somerset: Catherine Miranda, who is the Dean of Students; James Scott, who is the site administrator for the Somerset elementary school program; Mary Salem, the Director of Student Services; and Sabrina Jernegan, the Somerset third grade teacher. Student is presently in Ms. Jernegan's class. The four staff members from Somerset were enthusiastic about its program and structure. All agreed that it was an appropriate placement for Student and that, if given the opportunity to fully implement the program with Student, they would be able to address and help decrease the explosive nature of his behavioral outbursts.

58. Somerset is a non-public school certified by the California Department of Education. It primarily serves children who have severe behavioral needs. All are placed through the IEP process. While some of the children have a special education disability classification of emotional disturbance, others just have behavioral challenges that cannot be addressed in a public school setting. Somerset serves children from kindergarten to grade 12. There is presently a total of 175 children enrolled at the school, 48 of whom are in the elementary program.

59. The school itself consists of one, two-story building which is divided into three sections. The front part of the first floor contains the high school classrooms. The back part of that floor contains the junior high school classrooms. The elementary school classrooms are on the second floor. In addition to the classrooms, each floor has small study rooms where students can go and work independently if they are not able to regulate their behavior in the classroom.

60. There is an inside hallway on each floor of the school into which each classroom empties. A staff person who is trained in Pro-ACT monitors each hallway. If a student manages to elope from the classroom into the hallway, the hall monitor would prevent the student from exiting the building, or, in the case of the elementary school students, from leaving the second floor. The school has a small playground that is basically a blacktop with a basketball hoop. Physical education classes are held there. The school does not have a sandbox, swings, or climbing structures for play. There is also a small cafeteria where the children can eat meals and snacks.

61. Although Parents chose not to testify at hearing, based upon discussion during the hearing and questions they asked of District witnesses, it is apparent that one of the reasons they rejected Somerset was because they believed that Student would be in a class with students in grades kindergarten through third grade. Parents were mistaken as to the composition of the class. The classroom itself has children in grades kindergarten through third grade, but they are broken into two separate groups which each occupy a separate half of the classroom. A U-shaped table separates the two groups of students. Each group has one credentialed special education teacher and one aide. One group contains students in grades kindergarten through second grade. Student's class is composed of all third grade students like himself. There are seven children in Student's third grade class; the ratio of adults to students is therefore one adult for each three and one half children.

62. All of the instructional aides, including the hall monitors, are trained in Pro-ACT. All of the teachers at Somerset have special education credentials. Ms. Jernegan, who is presently Student's teacher, obtained a master's degree in teaching from California Baptist University in 2008. She completed her student teaching in the fall of 2010, and was hired as a full-time teacher by Somerset in January 2011, just before Student began attending school there. Teaching is Ms. Jernegan's second career. Prior to returning to school to become a teacher, she was a deputy sheriff. Through their questioning of District witnesses Parents appeared to express concern about Ms. Jernegan's ability to teach Student because of her inexperience as a teacher. However, it was apparent by her demeanor and answers to questions during her testimony that Ms. Jernegan is a competent and capable teacher. Whatever inexperience she may have as a teacher is compensated by her educational background, her professionalism, her background as a sheriff's deputy working with a variety of people, her knowledge of teaching in general, and her thorough knowledge of Student and his needs.

63. Although Ms. Jernegan is not presently trained in Pro-ACT, she will receive the training this summer. Because she has not yet received the training, Ms. Jernegan does not presently use restraints with the students. If needed, her aide, the hallway monitors, or Somerset administrative staff members, all of whom are Pro-ACT trained, are available if a student needs to be restrained to prevent injury to himself or others.

64. In her classroom, Ms. Jernegan addresses all of the California state standards for third grade students. She is aware that Student only reads at a second grade level and has prepared reading lessons at his level. The third grade educational standards are posted in her classroom, as is the class schedule along with daily objectives, a consequence and behavior chart, and various other colorful posters. Ms. Jernegan was given a copy of Student's IEP as soon as he began school at Somerset.

She was familiar with Student's IEP goals during her testimony and is implementing them in the classroom.

65. Ms. Jernegan presents instruction to her seven students both in groups and in a one-on-one format when they need individualized attention. She has given Student one-on-one instruction on a regular basis since he entered her class. If Student is distracted by the noise in the classroom and cannot focus on his assignment, Ms. Jernegan provides him with earplugs or earphones to muffle the noise or to listen to music, which he enjoys.

66. When a student cannot concentrate in class or when a student cannot regulate his or her behavior in the classroom, Ms. Jernegan or her aide attempt to re-direct and/or re-focus the student's attention. If the student cannot be re-directed or cannot calm down, the student can walk around the school hallway for a while. Student has been offered this alternative a number of times and it has been successful in calming him.

67. Another option available at Somerset for students who are not calm or focused in the class is to work independently in one of the study rooms located down the hall from the classroom. Ms. Jernegan gives the assignment to the student and the aide accompanies the student to the study room and ensures that the student is working. The aide leaves if the student appears focused; hall monitors are outside to prevent the student from leaving the room or leaving the school. If the student needs to remain in the study room or chooses to remain there for more than a short period of time, Ms. Jernegan will go check on him or her. She also will go and explain an assignment if the aide is unable to do so. While in the study room, the student will work on the same assignment the other children are doing in the classroom. The student is asked periodically if he or she is ready to return to class. If the student returns but de-regulates again, the student is taken back to the study room. Since Student has been at

Somerset, he has utilized the study room a number of times. He has often chosen to stay there for a few hours. On a few occasions, Ms. Jernegan required Student to stay in a study room over a number of class periods because he could not control his behavior in class.

68. Ms. Jernegan has implemented Student's behavior support plan in her class by giving him verbal and non-verbal prompts and warnings, by removing privileges from him, and by sending incident reports home to Parents. Parents expressed concern at hearing that Somerset has never suspended Student from school after he had a significant behavioral outburst. Suspension is the last consequence listed in the hierarchy of behavior consequences in Student's behavior support plan. Ms. Miranda, Somerset's Dean of Students, explained that Somerset does not suspend children for engaging in the exact types of behavior that were the basis for their placement at school. Rather, Somerset addresses the behaviors through the mental health and social skills programs which are an integral part of the global curriculum provided at the school. The type of behaviors that resulted in the suspension of Somerset students when they were enrolled in public school is considered typical rather than extraordinary behavior at Somerset. Generally, Somerset will only suspend a child if the child brings drugs or a weapon to school. The purpose of Somerset's program is to help its students learn to control their behaviors so that they can return to the public school setting. For this reason, although Student has engaged in behavior outbursts similar to the ones that resulted in his suspension while at his public school, he has not been suspended from Somerset.

69. Ms. Jernegan also implements the positive reinforcement aspect of Student's behavior support plan. She helps him to communicate his frustrations, offers him a break if needed, and offers him a choice of locations for the break. She gives him praise and positive reinforcements such as computer time and classroom jobs as

privileges for good behavior. She also allows him to run or walk in the hallway if he needs it, which has proven successful in calming Student down.

70. To address the mental health needs of its students, Somerset employs a staff of licensed marriage and family therapists (MFT's) who work under the direction of a doctor of psychology. There is also a clinical psychologist and a licensed psychiatrist on staff. The MFT's provide a social skills program in each classroom in conjunction with the classroom teacher. The social skills program is embedded in the classroom curriculum; it is not a separate class or program that students leave class to attend. The MFT's also provide individual and group therapy to the students on a pull-out basis.

71. When he enrolled at Somerset in January 2011, the school offered Student the individual and group therapy sessions which the school believes are an integral part of its curriculum. Parents declined the services because Student already receives mental health services from either the county or private providers. However, Mr. Scott, Ms. Miranda, and Ms. Salem all emphatically testified that Student was not obtaining the full benefit of placement at Somerset since he did not receive the counseling services. Mr. Scott explained that Somerset provides a therapeutic program of which the counseling services are an integral part. The group therapy sessions are especially important since the groups, which consist of two to five students, are comprised of classmates. Since Student's behaviors occur in class, it is vital that he be able to discuss his issues with those classmates who witness his behaviors and are sometimes the target of it. Additionally, the therapy sessions serve to establish a bond between the students and the therapist. When a student does have a behavior issue, the therapist most involved with the student can intervene and assist to a greater degree than can staff who have no mental health experience with the student. Also, when a bond is established, the student will often respond more positively to the therapist's intervention. Somerset staff members who testified were in agreement that Student's behaviors have not decreased

as they should have because he has not been receiving the counseling services available to him at the school.

72. Parents believed the mental health services offered to Student by Somerset would duplicate his outside services and perhaps interfere with them. However, Parents provided no evidence that such would be the case. None of the witnesses from Somerset concurred with Parents that Student's participation in counseling at the school was contraindicated because of his outside services.

73. Parents also expressed concern at the hearing because Student's IEP indicated that he was to have 300 minutes a day of special education instruction at Somerset, five days a week. Somerset has a minimum day once a week during which Student is receiving about 150 minutes less of instruction. The school makes up the loss of minutes by providing study time with the classroom teacher for a half hour before school starts, as well as by providing trained personnel on the school bus for social skills purposes. Additionally, it appears that Student's special education minutes per day were increased only when the District offered a non-public school placement that could not provide any general education interaction time for Student. His previous IEP was based upon 225 minutes a day in special education; the other 75 minutes were for lunch, recess, and physical education, all of which occurred in a general education setting. The increase to 300 minutes was an acknowledgement that all of Student's day, including time on the bus, lunch time, recess, and physical education, would be spent in a special education setting. Therefore, Student is actually receiving more special education time in the classroom at Somerset than he was receiving while in his public school placement, even given the one minimum day per week at Somerset.

IEP TEAM MEETING OF FEBRUARY 15, 2011 IEP

74. The District convened an IEP team meeting for Student on February 15, 2011, at the request of Parents and in order to discuss the mental health assessment

that the Riverside County Department of Mental Health (CMH) had conducted after receiving a referral to assess Student from the District. All required team members participated in this IEP meeting. Although an assessment report was not available for the meeting, the assessment had been completed the previous day. CMH recommended that Student participate in 12 sessions of a social skills class at its location. CMH also offered a parenting skills class to Parents. CMH did not state at this meeting that the social skills class it recommended would duplicate or interfere with any counseling services that Somerset was offering to Student. The CMH representative, who participated in the IEP meeting by phone after agreement from Parents, was excused from the meeting after discussing the CMH service recommendations.

75. The IEP team then addressed placement alternatives for Student. Although Parents had previously stated that they did not believe the District's SDC for emotionally disturbed children was appropriate for Student, they changed their mind at this meeting and requested that he be placed there instead of at Somerset. Parents were concerned about the type of behavior interventions used at Somerset and they had concerns that the Somerset staff did not have proper credentials. It is unclear upon what information Parents based their concern about credentialing at Somerset. The credible evidence presented by witnesses from Somerset was that all teachers had special education credentials and all therapists were licensed as marriage and family therapists. Additionally, as stated above, Somerset has licensed psychologists and a licensed psychiatrist on staff as well. Parents presented no evidence to the contrary. Their fears about the lack of credentialed and/or licensed staff at Somerset were unfounded.

76. There was a long discussion at the meeting about Student's behaviors since he began attending Somerset. Parents were concerned that Student's maladaptive behaviors were continuing. In the month since his enrollment, Student had some six

behavioral incidents at school. These incidents included fighting with another male student, hitting and punching his teacher and other staff, having tantrums such as one that involved screaming, yelling profanities, and standing on the desk, running out of his classroom, throwing objects in the classroom and in the independent study room, and shoving other students. In each instance, Somerset staff intervened and, if necessary, restrained Student using Pro-ACT restraint methods.

77. The Somerset staff present at the IEP meeting opined that they believed Student's behaviors were not decreasing because Student was not participating in the mental health services offered at the school. He was therefore not receiving the majority of the benefits of the therapeutic counseling that was an integral part of Somerset's program. Somerset staff also had concerns about Student's ability to remain safe in a less restrictive environment because of his tendency to elope from the classroom. They also believed that Student's continued explosive outbursts were contraindicated of readiness for an environment that did not have the safety features offered by Somerset.

78. District staff from Student's previous public school placement, including school psychologist Sandra McAllister, also attended this IEP meeting. They concurred with Somerset staff that Student would not be safe on a comprehensive school campus and that his behaviors could not be addressed there, even in the District's SDC class for emotionally disturbed students.

79. Prior to the IEP meeting, Mr. Diaz had discussed with Parents other possible placements for Student. Parents had cancelled their observations at the other sites. At the meeting, the District IEP team members suggested other possible non-public placements for Student but Parents did not want to consider any non-public placement. Instead, they requested that the District put Student on an independent

study contract for two weeks whereby he would do all his school work at home under the direction of his parents, who are educators.⁴

80. IEP team members from the District and from Somerset all disagreed that either home independent study or a home hospital program was appropriate for Student. Neither program would address his behavioral needs or offer any social skills or therapeutic intervention to address his explosive outbursts. Rather than confronting Student's issues, a home-based program would only serve to mask them and postpone confronting whatever was the reason Student could not control his anger and frustration.

81. The District therefore continued to recommend placement at a non-public school for Student. At this IEP meeting, District staff offered Parents observations at other non-public schools. The District also agreed to reconvene an IEP meeting to discuss other schools if Parents found any that they wished the District to consider.⁵

⁴ Parents did not testify at hearing. There is no evidence in the record regarding their educational background other than a brief reference in the IEP documents to their status as educators and their brief comments at hearing stating the same. There is no evidence as to what education they have or to what type of educators they are.

⁵ At some point after this meeting, Parents suggested placement for Student at a school called Big Springs. District staff informed them that Big Springs does not enroll students with significant behavioral issues like Student's. Parents also suggested two other schools. At hearing, Mr. Diaz indicated that he knew one of them, like Big Springs, did not accept students with Student's type of behavioral challenges. He was not familiar with the other school.

LEGAL CONCLUSIONS

BURDEN OF PERSUASION

1. The sole issue in this matter is whether the District offered Student a FAPE in the least restrictive environment in the series of IEP's dated December 16, 2010, January 5, 2011, and February 15, 2011. The District contends that its offer to Student of placement at Somerset Educational Services, with corresponding mental health services and speech and language therapy, constituted a free appropriate public education in the least restrictive environment for Student both procedurally and substantively. The District contends that Student required placement at a therapeutic non-public school that offered mental health services embedded in its program. The District asserts that because of Student's explosive behaviors and tendency to attempt to run away from the classroom it is not able to keep him safe at a comprehensive public school site, even in a classroom dedicated to serving students with an emotional disturbance. The District maintains that Student is only able to obtain meaningful educational benefit from placement at a non-public school such as Somerset. The District believes Somerset can provide Student with meaningful educational benefit and that Parents have not proposed any suitable alternative placement.

2. Although Student did not present an opening statement at hearing, did not put on any witnesses to testify, and did not submit a written closing brief, Student's Mother gave an oral closing statement at the end of the hearing which presented Student's position regarding his objections to placement at Somerset. Additionally, Student's position regarding his placement was articulated by Parents during the IEP meetings. Student believes that Somerset cannot implement his IEP properly. He also believes that he cannot obtain meaningful educational benefit there because he is not receiving enough hours of educational instruction and because he has no opportunity for mainstreaming with typically developing peers. Student believes that the District

should have either placed Student at its SDC for emotionally disturbed students, placed him on independent study or home hospital study, or placed him at a different non-public school. Student believes any of these alternatives would serve his unique needs better. Student did not present any evidence in support of his contentions.

3. As the petitioning party, the District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ELEMENTS OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

4. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction that meet the state's educational standards and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of a child with a disability and permits him or her to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include transportation, and developmental, corrective, and supportive services, such as mental health counseling services, that may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

5. Local educational agencies such as school districts are not required to provide special education students with the best education available or to provide instruction or services that maximize or optimize a student's abilities. The seminal case explaining this principle is *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), in which the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA.

The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit. The Court also stated school districts are only required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. (Id. at pp. 198-201.) The Ninth Circuit has referred to the "some educational benefit" standard of Rowley simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (Adams); *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, 949-951.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with educational benefit in the least restrictive environment. (*Ibid.*; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455

F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

7. There are two parts to the legal analysis of whether a local educational agency (LEA), such as a school district, offered a student a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Id.* at p. 207.)

8. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).)

PREDETERMINATION OF OFFERS

9. Predetermination in the development of an IEP occurs when "(A) school district. . . independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*).

Predetermination also occurs when an educational agency enters an IEP meeting with a "take it or leave it" position. (*Target Range, supra*, 960 F.2d at p. 1084.)

PARENT PARTICIPATION IN THE IEP PROCESS

10. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).)

In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a)(2006);⁶ Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is also considered “(A)mong the most important procedural safeguards.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

11. Under these guidelines, an educational agency must permit a child’s parents “meaningful participation” in the IEP process. (*Vashon Island School, supra*, 337 F.3d at pp. 1131-1132.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 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 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*, 993 F.2d at p. 1036.) Parents have an adequate opportunity to participate in the IEP process when they are “present” at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) An adequate opportunity to participate can occur when parents engage in a discussion of the goals

⁶ All references to the Code of Federal Regulations are to the 2006 version.

contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y 2010) 682 F.Supp.2d 387, 394.)

THE IEP

12. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

13. Federal and State special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial assessment or most recent assessment of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

14. Whether a student was denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed rather than in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann, supra*, 993 F.2d at p. 1041; *JG v. Douglas*

County School Dist. (9th Cir. 2008) 552 F.3d 786, 801; *Tracy N. v. Department of Educ., Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) Under this “snapshot rule,” the only issue in the instant case is whether the District’s IEP’s were appropriate based on information known to it at the time the IEP team developed the IEP’s. Therefore, evidence of events that occurred after the last IEP meeting held on February 15, 2011, is largely irrelevant in evaluating the appropriateness of the IEP’s at issue in this case.

LEAST RESTRICTIVE ENVIRONMENT

15. The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56342.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A child with a disability should not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).) In determining the program placement of the student, a school district is charged with ensuring that the placement decisions are made in accordance with federal requirements regarding placing the child in the least restrictive environment in which the child can meaningfully benefit from his or her education. (Ed. Code, § 56342, subd.(b).)

16. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)). The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services;

special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

17. To determine whether a special education student can be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect [the student] had on the teacher and children in the regular class; and 4) the costs of mainstreaming [the student]. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R.*, *supra*, 874 F.2d 1036 at pp. 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome]; *Vashon Island School*, *supra*, 337 F.3d at pp. 1136-1138 [applying the *Rachel H.* factors to determine that an interim placement of a child with Down's Syndrome in a special day class with some opportunities for mainstreaming outside of class time "as appropriate" offered the student a FAPE].)

DETERMINATION OF ISSUE

THE DISTRICT'S DECEMBER 16, 2010, JANUARY 5, 2011, AND FEBRUARY 15, 2011 IEP'S OFFERED STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT AND MAY BE IMPLEMENTED WITHOUT PARENTAL CONSENT IF PARENTS WISH STUDENT TO CONTINUE TO RECEIVE SPECIAL EDUCATION AND RELATED SERVICES⁷

Procedural Requirements

18. In the instant case, the District has met its burden of demonstrating that its offer of placement and services in the three IEP's at issue procedurally offered Student a FAPE in the LRE.

19. The District met all procedural requirements in formulating Student's IEP. All necessary IEP team members were present at the meetings except where both the District and Parents had excused the team member's presence. For example, Parents and the District excused the general education teacher from attending the January 5, 2011 IEP team meeting. (Factual Finding 33.) The team discussed Student's present levels of performance and used those present levels of performance to develop goals that were measurable, concrete, and which addressed all of Student's deficits at all meetings where goals were at issue. The team reviewed Student's past and present assessments and determined that his primary academic deficits were in reading, writing, and math. The IEP team developed goals to address those areas. Based upon Student's new designation as an emotionally disturbed child who required mental health intervention, the IEP team developed appropriate goals to address Student's social and emotional deficits. There is no evidence that these goals were not based upon

⁷ Parents have the right to revoke consent to the receipt of special education and related services for their child upon written notification to the school district. (34 C.F.R. § 300.300(b)(4)(i)-(iv)(amended December 1, 2008).)

appropriate baselines, that they were not measurable or that they failed to address Student's needs. Nor is there any evidence that Student had deficits that the District failed to address in the 10 goals it developed in the series of IEP's at issue. (Factual Findings 19-21, 24-30, 33, and 74; Legal Conclusions 3, 7-10, 13, 18, and 19.)

20. The evidence also demonstrates that the District did not predetermine Student's placement or fail to permit Parents to otherwise participate in the IEP process. The IEP teams spent considerable time at each IEP meeting reviewing a continuum of placements. At no time did Parents suggest Student attend a general education classroom on a full-time basis. However, the IEP teams at each meeting discussed almost every other alternative placement on the continuum, including each suggestion that Parents made. The team discussed continued placement in the non-severely handicapped SDC that Student attended until placed at Somerset through the Honig injunction, but all members, including Parents, agreed that Student was not being served there. The team thoroughly discussed the alternatives proposed by Parents: independent study at home or home hospital. Additionally, the District IEP team members were amenable to discussing placement of Student at another non-public school if Parents had suggested one in particular or had provided the characteristics of the type of school at which they wanted Student placed. However, Parents did not propose any specific alternatives during the three IEP team meetings at issue in this case.

21. As stated above, a school district is not required to make a placement offer according to the wishes of a parent for the offer to be appropriate or to avoid a finding that it did not permit the parent to participate in the IEP process. A review of the IEP meeting notes in this case, as well as the testimony of District's witnesses at hearing, supports a finding that the District did not predetermine placement at Somerset, that it was open to discussing all alternative placements, and that Parents

were an integral part of the IEP meeting process, even if, ultimately, the District offered the placement it initially proposed. There was no violation of Parents' procedural rights. (Factual Findings 19-21, 24-43, and 74-81; Legal Conclusions 3, 6-11, 18, 20, and 21.)

Substantive Requirements: Ability to Implement IEP

22. Student first contends that Somerset is not an appropriate placement for Student because it cannot implement his IEP. Parents seemed to suggest that staff at Somerset is not properly trained. However, the evidence at hearing demonstrates otherwise. Somerset teachers all have special education credentials. The counselors are all licensed marriage and family therapists who are supervised by a professional who has a doctorate in psychology. All support staff, such as the hall monitors and in-class instructional aides are trained in Pro-ACT; Student's teacher will soon be trained as well. Student presented no evidence in support of his contention that Somerset staff members are not trained to address both his academic needs as well as his social/emotional needs. The District has met its burden of proof that staff at Somerset is adequately trained to address Student's needs. (Factual Findings 31, 56-73; Legal Conclusions 3-6, 12, and 22.)

23. Student also contends that Somerset cannot implement his IEP. At hearing, he appeared to raise the question of whether he would receive his full complement of 300 minutes per day of instructional time and whether his behavior support plan could be implemented properly.

24. As discussed above, it is true that Somerset has a minimum school day once a week during which Student receives only about 150 minutes of instruction. However, the increase of time on Student's IEP from 225 minutes per day to 300 minutes per day was made to reflect the fact that he was going to attend school outside of a general education environment for his entire day. The 75 minutes difference per day are a reflection of the recess, lunch and physical education time that Student was

spending in the general education environment at his comprehensive public school placement. Additionally, Somerset provides for before-school educational opportunities with each student's teacher, and provides for a therapeutic environment during bus transportation to and from school. Therefore, Somerset does provide for an approximate total of 1500 minutes per week of time for Student in the special education environment as provided in his proposed IEP's.

25. Student's contention that his behavior support plan could not be implemented at Somerset is also unpersuasive. He contends that Somerset cannot provide him with the ability to run laps around the school yard. While it is true that Somerset does not have a playground big enough to run laps, the school has addressed this issue by permitting Student to run in the hallways if he needs to regulate his mood. Student provided no evidence that this adaptation has not or cannot address his needs. Student also contends that Somerset does not give "citations" for behavior as required by his behavior support plan which inform Parents of Student's misbehavior during the school day. However, Somerset provides daily progress reports to Parents which indicate whether Student had any behavioral issues during the school day. These progress reports serve the same purpose as would a citation.

26. Finally, Student contends that his behavior support plan cannot be properly implemented because Somerset does not suspend students. It is difficult to discern exactly why Student makes this argument. The discussion presented on this issue at hearing by Parents was highly contradictory. At one point, Parents suggested that the District had violated Student's rights because it had suspended him for too many days, in violation of the requirement that, as a special needs child, Student could only be suspended for a maximum aggregate of 10 days a year. Parents subsequently posited that Somerset could not implement Student's IEP because it did not suspend students for misbehavior, arguing apparently that Student should have been suspended

for any misbehavior which would have resulted in a suspension at a District public school.

27. Suspension is available at Somerset. The difference is that it uses different criteria for suspending students than do public schools because Somerset is uniquely designed to serve students with emotional disturbances and other significant behavior challenges. It serves no purpose for Student to be constantly suspended. The purpose of the placement at Somerset was to attempt to address and decrease Student's aggression and behavioral outbursts. The fact that he would not be suspended each time he misbehaved does not mean that his behavior support plan was not being implemented. Rather, Somerset used all other avenues available to it, through its own methods and through those specifically identified on Student's behavior support plan, to address Student's behavioral issues

28. The District met its burden of persuasion that Somerset can and has implemented Student's IEP. Student has failed to prove otherwise. (Factual Findings 31 and 56-73; Legal Conclusions 3-7 and 23-28.)

Substantive Requirements: Placement in the Least Restrictive Environment

29. The crux of this case is whether Somerset is the least restrictive environment for Student. As stated above, a school district is required to offer a student placement in the least restrictive environment in which he or she can be educated appropriately. Parents offered contradictory approaches to this issue both during the IEP meetings and during the hearing in this matter. At the IEP meeting held December 16, 2010, the IEP team discussed a number of placement alternatives for Student. No one on the team, including Parents, suggested that Student be placed in a general education classroom, even with supports. Neither did any team believe that Student's present placement in a District non-severely handicapped SDC was still appropriate for

him. The two placements under the most consideration were Somerset and the District's SDC for emotionally disturbed children.

30. By the time the IEP team reconvened on January 5, 2011, Parents had observed the SDC for emotionally disturbed children. They informed the team they believed it was not suitable for Student because there was only a very low fence surrounding the school and Student, who had developed a pattern of running away from class, would be able to run from the classroom and directly out to the street. Therefore, Student's safety would be compromised. District IEP team members concurred that the SDC was not appropriate for Student for those same reasons.

31. However, at the February 15 IEP meeting, and at hearing, Parents changed their minds and began advocating for the SDC for emotionally disturbed children as an appropriate placement for Student. They provided no specific reasoning, except their dislike of Somerset, for this about-face in their position. Importantly, they provided no evidence that the SDC was now appropriate for Student based upon a change in his behaviors. The records from Somerset indicate that Student continued to attempt to run from his classroom when distressed or, at times, without provocation. Fortunately, Somerset has several levels of deterrents to prevent children from running away from the school. Student's classroom is on the second floor of a two-story building. The classrooms empty into a hallway (or corridor). The hallway is patrolled by support staff trained in Pro-ACT restraint methods. Student would have to get through his classroom teacher and aide, out into a corridor, past a hall monitor, down the stairs, out the building, and off the campus, before he could access the street. As of the hearing, Student had not been able to get past all these deterrents.

32. Additionally, Student required a small classroom with a high adult to student ratio, which the SDC for emotionally disturbed children does not provide. The third grade class at Somerset provides two adults for seven children by placing both a

credentialed teacher and an instructional aide in each class. Even discounting the availability of additional staff monitoring the hallways, this ratio at Somerset is twice as high as the ratio of approximately two adults to 14 children in the District's SDC classes.

33. It is apparent that Student required a restrictive therapeutic program that the District was unable to provide at a comprehensive public school. Student continued committing acts of aggression on students and staff by kicking, hitting, punching, and fighting them and was disruptive in the classroom and on the campus during lunch and recess. Student continued to engage in conduct that disrupted his class, resulted in injury to students, staff, and property, and created an environment of fear for his classmates. The District tried a variety of interventions, including adding another teacher and another aide to Student's classroom (at what must have been a significant cost to it), modifying Student's behavior support plan, as well as providing counseling sessions with a school psychologist. None of these interventions were successful.

34. While Parents advocated for placement at the SDC for emotionally disturbed children because they considered, at one point, a non-public school to be inappropriate for Student because of its lack of mainstreaming possibilities, Parents later suggested either placing Student on independent study at home or in a home hospital placement. Parents presented no evidence in support of either of these placements. They did not have a recommendation from a health care provider for a home hospital placement, and did not present any reasons why Student needed to be totally isolated from other Students. Both placements they proposed, since Student would have no interaction at school with peers, were significantly more restrictive than placement at a non-public school. While placement at Somerset admittedly did not provide any mainstream opportunities, the placement still is a school environment where Student can interact with his peers, be educated with them, and socialize with them, as well as

participate in group therapy sessions that would assist him in addressing the root of his behavioral issues.

35. Applying the four criteria detailed by the Ninth Circuit in the case of *Rachel H.*, the evidence demonstrates that placement at a non-public school that offers a therapeutic counseling program is the least restrictive environment for Student. While it cannot be gainsaid that there are some benefits to being on a comprehensive public school with typically developing children, at present, Student cannot derive educational benefit from such a placement. His behaviors cannot presently be controlled. He is disruptive during class and during unstructured times such as recess. His behaviors have resulted in his removal from school a significant amount of time such that he did not derive any academic benefit from being on a public school campus. His behavior created an atmosphere of fear in his classroom because the children and adults in the class were afraid of him because of the damage he could do to them and others. The District doubled the amount of adult supervision in Student's class at what must have been considerable cost to it but was still unable to address Student's behaviors.

36 Student needed to be placed in a self-contained, structured and therapeutic environment with appropriately trained staff. Although Parents may sincerely believe that Somerset is not appropriate for Student, the District has met its burden of proof in demonstrating that its offer of placement at Somerset provided Student with a free appropriate public education in the least restrictive environment. (Factual Findings 1-81; Legal Conclusions 1-36.)

ORDER

1. The District's December 16, 2010, January 5, 2011, and February 15, 2011 IEP's offered Student a free appropriate public education in the least restrictive environment.

2. The District may implement its IEP offer without parental permission if Parents wish Student to receive special education and related services.

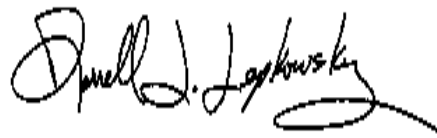
PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

DATED: June 16, 2011

A handwritten signature in black ink, appearing to read "Darrell L. Lepkowsky", with a stylized flourish at the end.

DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings