

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT

OAH CASE NO. 2011120292

DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings (OAH), State of California, heard this matter in Long Beach, California, on June 11-14, 2012.

Attorney Vanessa Jarvis represented Student. Advocate Jim Campbell was also present and assisted Student's attorney at the hearing. Father was present at the hearing at all times. Neither Mother nor Student attended the hearing.

Attorney Nancy Finch-Heuerman represented the Long Beach Unified School District (District). Angela Suttles, J.D., Special Education Administrator for District was present for the entire hearing on behalf of District.

On November 29, 2011, Student filed a Request for Due Process Hearing (complaint). OAH granted a continuance for good cause on January 13, 2012.

At the hearing, oral and documentary evidence was received. The case was continued to June 29, 2012, at the parties' request, to permit them to file closing written arguments. Closing arguments were timely filed and the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1. Whether District denied Student a free appropriate public education (FAPE) at the March 2011 individualized educational program (IEP) by:
  - a) Failing to make a formal written offer of a FAPE;
  - b) Failing to offer related services and transportation; and
  - c) Failing to review Student's present levels of performance (PLOS) and goals.
2. Whether District denied Student a FAPE at the November 2011 IEP by:
  - a) Failing to make a formal written offer of a FAPE;
  - b) Failing to conduct a central auditory processing assessment within 60 days of parental consent;
  - c) Including District's counsel at the IEP meeting;
  - d) Predetermining Student's placement;
  - e) Failing to offer group counseling;
  - f) Failing to offer Los Angeles County Department of Mental Health (DMH) services for individual counseling, family counseling, and consultation as recommended by DMH ;
  - g) Failing to include keyboard services;
  - h) Failing to include a behavior support plan;<sup>2</sup> and

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<sup>1</sup> The Issues were revised at the commencement of the due process hearing from those stated in the May 30, 2012 Order Following Prehearing Conference (PHC) with the concurrence of the District and the ALJ. The issues were modified, reordered, and renumbered by the ALJ for clarity of this decision. No substantive changes were made.

- i) Failing to offer placement in a Residential Treatment Center (RTC) as recommended by DMH in its ERMHS (Educationally Related Mental Health Services) reassessment and presented at the November 8, 2012 addendum IEP.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student was a 16 year and 11 month-old young man as of the date of the hearing. He resided with his adoptive parents within the jurisdictional boundaries of the District during all time periods relevant to this case. He has been eligible for special education services since October 3, 2002 and is currently eligible for special education services under the disability category of emotional disturbance (ED). As of the time of hearing, he had been in custody at Los Padrinos Juvenile Hall (Los Padrinos) in Los Angeles County since approximately March or April 2012.

2. Student tested positive at birth for methamphetamine and alcohol. He was taken from his biological mother and placed in foster care with his foster parents, who later became his adoptive parents<sup>3</sup> at 18 months of age.

3. Student became a client at Harbor Regional Center<sup>4</sup> prior to one year of age. He began receiving therapeutic services as a Regional Center client

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<sup>2</sup> The term Positive Behavior Intervention Plan of PBIP will be used in place of Behavior Support Plan to conform to the evidence in this decision.

<sup>3</sup> All references to Mother, Father, or Parent(s) in this decision refer to Student's adoptive parents.

at two years of age at the Guidance Center in Long Beach, California. He was diagnosed as having autism pervasive development disorder not otherwise specified (PDDNOS), Attention Deficit Hyperactivity Disorder (ADHD) and oppositional defiance disorder (ODD), for which he received in-home behavioral services. The Guidance Center services included medication management, case management, and therapy by several different therapists over the years up through 10th grade. He has been eligible for educationally related mental health services (ERMHS) since eight years of age. He also attended Ability First, an after school program for disabled pupils. He was prescribed medication to treat symptoms associated with ADHD, ODD, and mood disorder. He had one psychiatric hospitalization at Del Amo Hospital during the summer of the seventh grade after he attacked his mother and punched her in the stomach.

4. Student's records established he had a long history of social, emotional and behavioral problems which impeded his academic performance from elementary school through high school. He attended several different preschools due to behavior problems including biting, kicking, hitting, and spitting at others. His behavior problems continued from first to the sixth grades. During the second grade he was made eligible for resource support services and school counseling. At that time, Student displayed problems with attention, concentration and distractibility. He had problems following playground rules,

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<sup>4</sup> Harbor Regional Center is one of 21 private, non-profit organizations under contract with the California Department of Developmental Services (DDS) to coordinate and provide community-based services to persons with developmental disabilities (consumers), as well as providing Early Start services for infants and toddlers with certain delays and established risk conditions.

could not interact with his peers, engaged in acts of aggression, and did not accept responsibility for his actions.

5. During the sixth through eighth grades, Student was homeschooled through the California Virtual Academy with his mother as his primary teacher. He also received home hospital instruction sometime during the period between the sixth and eighth grade. Father reported that Student did well academically while he was homeschooled. In September of 2009, he entered the ninth grade at Millikan High School (Millikan) in the district.

6. By the time he entered high school, Student was taking the following prescription medications: Stratera for ADHD, and Trileptal and Abilify for mood disorder. He also took Benadryl as a nighttime sleep aide. Except for Trileptal, which was administered at school and in the after school program at Ability First, Student was not always compliant with taking his medications.

7. Student's behavior and academic performance worsened after enrolling at Millikan. He engaged in smoking marijuana, did not regularly attend classes, and received failing grades in all of his classes. He was removed from Millikan under a zero tolerance policy after bringing a knife to school. Student then transferred to Jordan High School (Jordan) where he was placed in a special day class program (SDC) in the fall semester of the 2009-2010 year.

8. District convened Student's triennial review IEP meeting on April 1, 2010 at Jordan. The IEP team reviewed PLOPS in academics; behavioral/social emotional; communication; self-help/prevocational; medical/health; and gross/fine motor. The IEP noted that Student demonstrated ability to complete reading and writing assignments at grade level and beyond. His fluency in reading was at the 99.9th percentile and was grade equivalent. His writing abilities were also grade equivalent. His mathematical abilities were below grade

level. His behavior was described as off-task in class. He would become disruptive and refuse to complete work and at times talked back to the teachers and/or defied their instructions. Student also often avoided attending class and would wander around the school campus. Student's communications and language development was age-appropriate and within normal limits. He was able to care for his basic self-help needs. In addition to his diagnoses of ADHD, PDD-NOS, and ODD, Student was diagnosed with Obsessive Compulsive Disorder (OCD). He received weekly therapy and took medication daily to manage the symptoms associated with his diagnoses.

9. The IEP team developed new goals in math, specifically in algebraic awareness and Language Arts in reading comprehension and writing. A District Psychoeducational evaluation found Student required a higher level of adult supervision, individual and small group instruction, and the support and structure of a more restrictive educational setting provided in a non-public school (NPS) setting to meet his educational needs. Based upon the evaluation, the IEP offered (1) related services in individual counseling which was ongoing at the Guidance Center three times per week for an hour each session; (2) transportation to the Ability First after school program for disabled youth; (3) a behavior support plan (BSP); (4) an individual transition plan (ITP); (5) placement in a NPS in a special education program with accommodations and supports; and (6) extended school year (ESY) for summer 2010. Parents consented to the IEP.

#### NPS PLACEMENT

10. District recommended and Parents agreed to place Student at Rossier Park High School (Rossier), a NPS designed to provide programs and services for pupils with behavioral disorders.

11. Student enrolled at Rossier on April 22, 2010, in the ninth grade. He was placed in a small classroom setting with a modified curriculum. Approximately 60 to 70 percent of the student body was ED. Others enrolled had eligibilities of autism, intellectual disability, other health impairment, or specific learning disability. The students presented with attention problems, lower academic scores, behavior problems, or other issues that could not be addressed in the public school setting. Approximately 150 students attended Rossier. The classes at Rossier had no more than 12 students per class.

12. On April 26, 2010, within four days of his enrollment at Rossier, Student was involved in three behavioral incidents with his peers. In the first incident, Rossier staff reported that Student engaged in sexual harassment, because he called another student a "faggot." In the second incident, Student engaged in horseplay with three other students, and did not stop until the behavior team was summoned. In the third incident, Rossier staff reported that Student engaged in the destruction of property by pouring ink from a broken pen onto a peer's desk. Rossier staff used verbal redirection for each of the incidents to address and correct Student's behavior.

13. The spring semester ended on June 18, 2010. Student received modified grades of A in Algebra, Physical Education (P.E.), Biology, and Art, and an A- in Algebra 9 and Careers. The teacher's remarks on the report card indicated that Student was generally cooperative in the classroom.

14. While he attended ESY classes at Rossier in the summer of 2010, Student became involved in additional behavior incidents. Specifically, on July 10, 2010, Student physically assaulted a peer during the lunch period by punching him in the back. On July 29, 2010, Student pulled a peer's seat belt too tight while riding in the school van causing the peer to hit him in retaliation.

15. By September 2010, Student was no longer attending the Guidance Center because the funding was no longer available due to cuts in mental health services under AB3632<sup>5</sup>. In addition, according to the report of Student's therapist, Dr. Katie Manetta, who had treated him at the Guidance Center, Student had also achieved his therapeutic goals. However, Student still required ongoing mental health services, so Student continued to see Dr. Manetta on a private pay basis. He was also seen by Dr. Najeeb, a private psychiatrist, for medication and case management.

16. Beginning in the fall semester of the 2010-2011 school year, when Student entered the 10th grade, he was cited for four more behavioral incidents. Specifically, on October 14, 2010, Student threw food at a peer during lunch. Student refused to stop when asked by his peer to do so, which provoked the peer to physically assault him. On January 12, 2011, Student was engaged in mutual combat during transition from his PE class. On January 13, 2011, Student physically assaulted a student by slapping him in the face. This resulted in school staff directing Student to the Behavior Specialist's office, where he was escorted to the Learning Center. On February 28, 2011, Student was cited for throwing food on the floor during the lunch period in his classroom and refusing to pick it up.

#### MARCH 23, 2011 ANNUAL REVIEW IEP

17. An IEP team meeting was held on March 23, 2011. Student and Parents attended the meeting. Special Education Teacher Sarah Lazar; Program

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<sup>5</sup> As will be discussed in detail below AB3632 was a state legislative mandate requiring County mental health agencies to assess and provide mental health services to qualifying special education students.



Administrator Jennifer Bergeron; Vocational Education Coordinator Heather Manning; School Therapist Renee Stokman; and IEP Administrator Shirley Sanders attended as District IEP team members. The IEP confirmed Student's ED eligibility because he demonstrated inappropriate behaviors under normal circumstances and an inability to build and maintain satisfactory interpersonal relationships with his peers. The IEP team reviewed Student's PLOPS in Reading, Mathematics and Written Language; Behavioral and Social Emotional; Communications and Language Development; Prevocational and Vocational; Medical; and Gross/Fine Motor Skills.

18. Ms. Lazar stated that Student met the reading, writing, and math goals, and was doing a really good job academically. Student received modified grades for the spring semester of ninth grade of A in Algebra 1, PE, Biology, and Art, and A- in English 9 and Careers. Student's letter word identification skills were above average. He received similar grades in the fall semester of 10th grade. Student's reading comprehension was significantly lower. He was functioning between the eighth and ninth grade level in Math; and he was functioning at grade level overall in class. His strength was in writing.

19. The IEP noted that the April 1, 2010 Triennial IEP had not established Behavioral and Social Emotional goals. Ms. Stokman reviewed his past goals and stated that Student was reluctant to attend counseling sessions with her. She described Student as respectful to adults and sociable with his peers, but reluctant to reach out for help.

20. The IEP team developed extensive PLOPS in Reading, Math, Written Language, Pre-Vocational, and Social/Adaptive. The IEP document noted the team considered program options of RSP, SDC and NPS and selected an NPS program. Page 13 of the IEP contained a box numbered Roman numeral IX

entitled "Special Education Services Recommended". The boxes entitled "related services" and "other" were checked. Based upon box number IX, the IEP's offer of placement and services for the 2011-2012 school year was NPS placement in a special education classroom with a modified curriculum, as well as related services of individual counseling once per week for 60 minutes. The IEP also provided for curb to curb transportation.

21. Page 13 also included a box numbered Roman numeral X entitled "Extended School Year (ESY) Consideration". The box next to the words ESY was not checked and contained an incomplete sentence that seemed to imply that ESY was not needed. The next section under box IX on ESY contained a clear statement that the IEP recommended "specialized academic instruction for the summer from 6/27/2011-8/5/2011 at the NPS 1x daily for 240 minutes". The next line contained a checked box next to the word "Transportation" with the words "for ESY if not at school of residence. Type: curb to curb provided by NPS". The next line under box number X included a note that "all other services remain the same". The IEP also offered an Individual Transition Plan (ITP) and provided accommodations for the Standardized Testing and Reporting (STAR) and the California High School Exit Exam (CAHSEE).

22. Parents and Student were present and fully participated in the IEP team discussions. The offer was sufficiently clear and addressed all of Parents' concerns so that they could make intelligent decisions regarding the offer. Parents consented to the IEP offer.

23. Father participated in the IEP team meeting. He had attended between 20-30 IEPs for Student over the years. At hearing, he acknowledged that the PLOPS and goals were in fact reviewed. However, he disputed that the review was as thorough as it should have been. He stated the IEP lasted for "less than

two hours” and was rushed. He also stated that he had not been receiving Student’s scores or grade reports and saw no homework from Student. He believed Student’s grades were not a true indication of his performance. He further asserted that Student’s grades did not reflect Student’s actual skill level and that his modified grades were overstated or inflated. He was concerned that he did not have sufficient and accurate information to support the District IEP team members’ representations that Student had met his goals, and believed he did not get enough information about Student’s academic performance. He also testified that he was confused by the IEP offer because it was not contained in one specific location on the IEP document.

24. Jennifer Bergeron testified that she was the program administrator at Rossier and has been employed at Rossier for approximately 16 years. Her job duties included chairing IEP meetings. She attended and participated in the March 23, 2011 IEP meeting. She confirmed that the team, including Parents and their advocate, thoroughly reviewed the PLOPS, goals, and Student’s progress on the goals. The additional PLOPS written by Student’s school therapist, Renee Stokman, were developed from information and observations by Rossier staff and Ms. Lazar, Student’s special education teacher. Ms. Lazar wrote academic PLOPS and goals for the annual review. The information used to develop and write the PLOPS and goals came from testing results, assessments, curriculum-based measurements and classroom observations. Ms. Bergeron stated that teachers routinely discussed PLOPS and goals at IEP meetings and it was part of a script used for IEPs. Related services were offered for individual counseling, and transportation, and District offered continued NPS placement and ESY for summer 2011. The entire offer was contained in the IEP document and presented to Parents at the meeting.

25. Ms. Stokman testified she was Student's therapist at Rossier. She began providing counseling services to him in the spring semester of the 2010-2011 school year. She developed three social /adaptive PLOPS and goals in internal dynamics, peer relations, and adult relations to address Student's negative behaviors. She discussed and thoroughly reviewed them with the IEP team at the March 23, 2011 meeting. The IEP offered related services of counseling and transportation. The IEP FAPE offer included all of the services and placement at a NPS. Parents raised no questions or concerns about the IEP offer and Parents voluntarily consented to the offer.

26. Student took the STAR test in the spring semester of 2010-2011 school year. The STAR measures a child's progress in meeting the State's academic content standards, which describe what all children should know and be able to perform at each grade level. He received a score of 241 in English Language Arts, which fell into the far below basic range; 253 in Geometry, which fell in the below basic range; 197 in World History, which fell in the far below basic range; and 294 in Life Science, which fell in the below basic range.

#### AB3632 REFERRAL AND ASSESSMENT

27. Following the annual review IEP meeting, Rossier reported Student's continued involvement in a number of behavioral incidents. Specifically, on March 25, 2011, Student physically assaulted a peer while transitioning from PE class by slapping him in the face. On March 30, 2011, while riding on the school van, a peer opened Student's vest, and exposed a substance that looked and smelled like marijuana. Student threw the bag containing the substance from the van after school staff asked him to hand the bag over. Student then eloped from the transport van and was later picked up by school staff. On April 8, 2011, Student and peer fought during PE and had to be separated. During the

transition from PE to class, Student physically assaulted a peer, resulting in staff restraining Student by placing him in a prone containment lasting for one minute. On May 11, 2011, Student had a cell phone during a passing period. When staff asked for Student's phone pursuant to school policy, Student refused, and began pacing and using profanity. He flipped over a desk that almost hit staff. Staff moved to physically restrain Student by placing him in a prone containment. Student physically assaulted a behavioral team staff member. Staff succeeded in placing Student in a prone containment lasting three minutes. On May 16, 2011, while returning Student home from school, Student eloped from the van. He was considered to be absent from the bus without leave or permission (AWOL). On May 24, 2011, Student was directed to quiet down during direct classroom instruction. He became upset when staff penalized him for his conduct under the school point system. He stated that he disagreed with the staff's actions and walked away from class cursing and slamming the door behind him. On May 27, 2011, while riding in the school van, Student appeared agitated and engaged in innocent joking which escalated to bickering and threats by Student to assault a peer and a staff member over traded items.

28. As of the fourth quarter of the spring semester between April 8, 2011 and June 17, 2011, Student's grades had declined from all A grades to A in PE and Drama; C in English 10; B in Geometry and World History; and C+ in Physical Science.

29. On June 3, 2011, District convened an addendum IEP team meeting at Parents' request. Parents attended the meeting. Ms. Stokman, a school psychologist, and Shirley Sanders, a District administrator, also attended the meeting. Parents reported their concerns to the IEP team that Student was stealing money, electronics, and jewelry from home, and fencing or selling the

stolen items at school to pay off gambling debts. They did not believe he was using drugs at that time, but they believed that he was easily influenced by his peers at school. Parents were also concerned with Student's escalating assaultive conduct at home and at school, and the pattern of AWOLs from the van and from his classes. Ms. Stokman presented a District Private Counseling Summary Form dated June 3, 2011. Ms. Stokman's summary noted that Student's behavioral performance had declined because of disruptive defiant behavior with staff and peers, impulsive behaviors, physically assaultive behavior, and his AWOLs. The summary also noted that Student had been resistant to counseling for approximately nine months, but had more recently begun participating in counseling. The summary indicated that counseling had a limited effect. Parents requested a referral for an AB 3632 mental health evaluation.

30. On June 3, 2011, because of Student's escalating emotional and behavioral problems cited in District's Private Counseling Summary Form, District made a referral to the DMH to assess whether Student required more intensive therapeutic counseling as part of his IEP.<sup>6</sup>

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<sup>6</sup> The initial Assessment and services recommended by DMH will be referred to in this decision as "AB 3632" services because the report was entitled the same by DMH. "AB3632" was the name of the assembly bill that, until recently, mandated DMH provide these services for implementation in IEP's. On June 30, 2011, California Governor Jerry Brown signed into law a new Budget Bill (SB 87) for the 2011-2012 fiscal year, and a trailer bill affecting educational funding (AB 114). Together the two bills did not repeal Chapter 26.5 of the Government Code in its entirety, but made substantial changes that involved repealing significant portions of it and related laws, particularly with respect to mental health services. Sections repealed were suspended effective July 1, 2011,

31. DMH completed its AB 3632 assessment of Student and issued a Mental Health Assessment Report by Dr. Trudy Washington, dated August 2, 2011. Dr. Washington has been employed by DMH as a Licensed Clinical Psychologist for more than 27 years. She works in the AB 3632 Program. Her duties consist of assessing special education students and making eligibility determinations and recommendations for mental health services. She has conducted more than 60 assessments a year for approximately 25 years, equaling approximately 1,500 assessments.

32. Dr. Washington reviewed Student's educational records, medical and psychiatric records from his private psychologist Dr. Katie Manetta and psychiatrist Rubina Najeeb, M.D., and interviewed Student and Parents. The report noted that Student presented with multiple and serious areas of impairment that interfered with his functioning in school, at home, and in social settings. The problems described in Student's records included impulsive behaviors; short attention span and high distractibility; disruptive and defiant behaviors; disconnection between behavior and consequences; anger management problems resulting in incidents of threatening and physically assaultive behaviors with peers and adults; and oppositional and defiant behaviors, mood disorder, lying and minimizing, as reported by Parents.

33. The assessment findings suggested that several significant psychosocial factors contributed to Student's past and present pattern of maladaptive behaviors and impaired social-emotional functioning, including exposure to substances in utero; changes in caregivers at an early age; history of

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and were repealed by operation of law on January 1, 2012, unless otherwise amended. There has been no amendment.

symptoms of a pervasive developmental disorder; and symptoms of executive functioning deficits manifested by impaired ability to resist his impulses, attention deficits, poor emotional control and difficulty with organization. His impulsive response style, and proclivity for action, seemed to interfere with all areas of functioning and precluded the use of good judgment. His behaviors had been disruptive to others and had impeded his own academic achievement in the educational environment.

34. DMH found that Student was eligible for AB3632 mental health services. DMH recommended outpatient mental health services consisting of individual therapy once per week for 60 minutes per session; family therapy 30-60 minutes per week, and medication support at a frequency deemed medically necessary by the treating psychiatrist; and case management for 15 minutes per week. DMH established general treatment goals and objectives to improve Student's coping skills and increase his ability to self-regulate. DMH requested that Student's therapist of record maintain contact with District to coordinate the treatment plan.

35. District scheduled an addendum IEP meeting for August 4, 2011 to review and implement the DMH assessment report and recommendations. The meeting did not take place because Parents postponed the meeting. As a result, DMH's outpatient mental health services were not implemented.

36. Instead, on August 18, 2011, Student retained an attorney and requested District conduct comprehensive assessments in all areas of suspected disability including Psychoeducational, behavioral/functional analysis assessment (FAA), speech and language, assistive technology, and central auditory processing. Parents cited Student's behaviors at home and in school, as well as his poor performance on the STAR, as the basis for their request.



37. District prepared an Assessment Plan dated September 16, 2011 in response to Parents' request. The Assessment plan proposed to assess Student in Academic/Pre-academic Achievement; Speech and Language; Intellectual Development; Social/Emotional/Adaptive Behavior; Perceptual/ Processing; Career/Vocational; Assistive Technology; and Central Auditory Processing/Audiology(CAPD). Parents consented to the Assessment Plan on or about September 23, 2011.

#### DMH ERHMS REASSESSMENT REPORT AND RECOMMENDATION

38. On August 24, 2011, Student's attorney made a written request to District for a reassessment by DMH. The request was based on Student's school records and Parents' reports indicating that Student's behavior had deteriorated over time in both school and at home. Parents wanted a second evaluation to determine if a more restrictive placement was required. The behaviors of concern included recent drug use, including marijuana, grand theft of Parents' jewelry and a sibling's electronics, eloping, assault, threatening others, gambling for high-stakes, possession of weapons at school, and overall impulsive and out of control responses to others when provoked. As a further basis for the request, Parents believed; despite the Rossier grade reports, that Student's behaviors impeded his access to an education because of his failing to achieve grade level academic standards on the STAR. Parents also requested that the reassessment include the opinions and recommendations of Student's longtime psychiatrist and his private therapist.

39. Dr. Trudy Washington conducted an ERMHS Reassessment in September 2011 and issued her report on September 29, 2011. The reassessment was for the purpose of determining whether Student's present behaviors and emotional responses were so severe that they significantly interfered with his

academic performance and educational progress sufficiently to warrant a change of recommendation from outpatient mental health services to residential placement.

40. Dr. Washington reviewed additional records provided by Rossier and District. In addition to the interviews of Student and Parents done in the initial assessment, she interviewed Rubina Najeeb, M.D., Student's private psychiatrist. She also re-interviewed Dr. Katie Manetta, his private psychologist, as well as interviewed Tom Sopp, a District Psychologist. Dr. Washington did not observe Student in the classroom setting at Rossier.

41. Dr. Najeeb reported to Dr. Washington that she had seen Student off and on for the past three years, first at the Guidance Center and now in private practice. Student had met his therapy goals at the Guidance Center and was less aggressive and impulsive. Student was respectful and cooperative when in her office, but she observed his anger and irritability toward his parents. Parents reported to her that Student displayed extreme aggression, anger, and destructive behaviors outside the therapeutic setting. They also reported that he was impulsive and self-destructive. Parents expressed their concern that Student was not remorseful and did not make the connection between his behaviors and the consequences. Dr. Najeeb described symptoms consisting of pressured speech, grandiosity, hyper-verbal, irritability, and anger, and gave a diagnosis of severe mood disorder. Dr. Najeeb stated that she had seen an increase in Student's risky and impulsive behaviors. Dr. Najeeb did not directly recommend residential placement, but indicated that Student could not be supervised 24 hours a day, seven days a week (24/7) in the home. Student required more structure than he was presently receiving in both at school and home settings, and needed a setting where he could receive more therapeutic intervention.

42. Dr. Manetta reported that she last saw Student in May 2011. She described Student as naïve and easily influenced, and believed that his peers at Rossier victimized and negatively influenced him. He did not have a pattern of gambling, trading items, or fighting prior to placement at Rossier. Since his enrollment there, he had become less manageable. She believed Student should be placed in a different school setting rather than in a residential program.

43. Dr. Washington interviewed Tom Sopp, who provided her with additional educational records and the behavioral incident reports involving Student from the 2009-2010 and 2010-2011 school years. These reports had not been included in District's referral packet to DMH for the initial assessment. Further, a student discipline profile of behaviors from Millikan and Jordan was reviewed, which had not been provided to DMH for the initial assessment. The student discipline profile from Millikan and Jordan documented episodes of defiance, disrespect, use of vulgar language, and disruption. The profile showed that one serious incident occurred in February 2010, when staff found Student in possession of a three and one-half inch self-locking knife. Another serious incident occurred on March 10, 2010, when Student, without provocation, punched a student in the nose, causing bleeding and bruising.

44. After reviewing the additional records provided by District and Rossier, as well as the reports from Dr. Najeeb and Dr. Manetta, Dr. Washington determined that Student exhibited symptoms of severe mood disorder. She further found that while the most extreme episodes of anger outbursts, destructive behaviors and stealing appear to have occurred in the home environment, some of Student's impulsive, high risk behaviors at school and in the community had been escalating. The report summary noted that the behaviors described in the school incident reports demonstrated social and

emotional immaturity; very poor judgment; impulsive and high-risk behaviors; defiance; ongoing classroom disruptions; and verbal and physical aggression to a degree requiring physical restraint. Dr. Washington concluded that Student needed to be placed in a more structured environment where he could receive intensive therapeutic interventions, and noted that it was not feasible to monitor Student on a 24/7 basis in the home.

45. Based upon the reassessment findings, DMH recommended placement in a 24/7 highly supervised and intensive therapeutic residential treatment program. The recommended program would provide individual therapy at least 60 minutes per session and up to 180 minutes per week; family therapy for at least 120 minutes per week and up to 240 minutes per month; group therapy for up to 300 minutes per week; and medication support and case management services as needed. The plan would remain in effect for six months. DMH also recommended the treatment goals and objectives developed in the initial DMH assessment.

46. Rossier staff reported four additional behavioral incidents involving Student occurring between July 29, 2011 and October 19, 2011. Specifically, on July 29, 2011, Student threatened to assault a peer while returning from a field trip. Student had drunk the peer's juice, which upset the peer, who used profanity at Student. Student in turn threw his food at the peer, which resulted in threatening gestures to fight. The staff had to intervene. On October 6, 2011, Student physically assaulted a student by pushing him while walking from the boys' bathroom, which caused a confrontation and argument. On October 14, 2011, while Student ate lunch in his classroom, he threw carrots across in the classroom. His teacher ordered him to stop. Another student became involved and an argument ensued between the two. The other student pushed Student off

of his chair onto the ground. Student tried to kick his attacker when the teacher intervened. Both students began shouting racial epithets at one another. Each student was taken out of the classroom. Student was taken to the Learning Center. On October 19, 2011, an incidental contact led to a scuffle between Student and a peer during a PE class, which turned into a fight. Staff intervened and asked Student to walk away. Student continued to pursue his peer, requiring staff to place Student in a prone containment, and then escort him to the behavior office.

47. District conducted the speech and language, and AT assessments on October 27, 2011 and November 3-4, 2011, respectively. Both found Student ineligible for speech and language therapy or AT.

#### DISTRICT'S FAA AND PROPOSED POSITIVE BEHAVIOR INTERVENTION PLAN (PBIP)

48. Mr. Sopp, who at the time of the assessments was a school psychologist with District, conducted the FAA and Psychoeducational assessments. Mr. Sopp testified that he had been employed as school psychologist with District for 11 years. Since December 1, 2011, he has been employed as the Director of Psychological Services for the Southwest Special Education Local Plan Area (SELPA). His testimony concerning his conduct of the FAA and the proposed PBIP was consistent with his findings and recommendations in the FAA.

49. Mr. Sopp conducted the FAA over a period from September 26, 2011 to October 27, 2011, and issued his report on October 31, 2011. The purpose of the evaluation was to address parental concerns about Student's episodes of physical aggression, eloping from class and the school van, and his newly reported behaviors of borrowing, lending, and trading items. The

evaluation was completed to answer the following questions: (1) What was the primary cause of Student's escalation patterns; (2) What subtle warning signs could indicate that Student was escalating; and (3) What proactive and reactive interventions could be helpful to get Student off of the escalation path?

50 The assessment procedure consisted of a record review, Student observations, therapist interview, teacher interview, Ability First program supervisor interview, Student interview, Parent interview, and the use of the Reinforcement Inventory for Children.

51. To answer the questions posed in the evaluation, the assessment first summarized the numerous incidents since Student's enrollment at Rossier, specifically his physical aggression. The report noted that Student had a total of 10 incidents of physical assault ranging from mild to persistent mutual fighting resulting in mild injury; eight incidents of physical assault during the 10th grade school year including ESY, in which two led to prone containments by staff; two during the fall semester of 11th grade in which one led to prone containment. The assessment identified the antecedents to these behaviors as enforcement of limits on contraband; disagreements with peers; horseplay; and activities associated with PE. The assessment noted that only three incidents of physical aggression were considered serious behavior, because they involved aggression with persistence, which led to prone containment interventions. The assessment included past acts of serious physical aggression reported by Parents of destruction of property, and one act of physical assault on his mother. Parents also reported incidents where Student punched holes in the walls of their home when he became angry. Father reported that on those occasions when Student was confronted regarding something he was not supposed to do, Student's face flushed, his speech became pressured, he paced rapidly, and yelled. Father also

reported that the last episode of escalation within the last 30 days resulted in Father calling a crisis intervention team. Student had calmed down by the time the team arrived at the home. Later that evening, Student took a household safety pin and pierced his right eyebrow.

52. Based upon the Student, teacher, and Parent interviews, as well as the review of records, the assessment identified the escalation cycle for Student's physical aggression, and concluded that Student's maladaptive behaviors were driven by a need to protest an event, when his peers threatened or challenged him, when he was in a brooding mood, when involved in less structured activities such as passing period, lunch or during transport, and when student interaction increased. The report noted that, overall, Student was a social student, but had difficulty knowing when his behavior had gone too far, or when to seek staff assistance instead of escalating to physical aggression.

53. The assessment also identified positive replacement behaviors and proposed a comprehensive PBIP and an Emergency Behavior Plan. As part of the emergency plan, the assessment noted that although Student's past incidents of physical containment had been brief. If after physical containment he continued to demonstrate that he was not in control of his behavior and/or continued to have difficulty following instructions in order to be released from containment, staff was to continue the containment. The staff was further instructed to consider contacting local law enforcement or the crisis intervention team if Student's behavior remained escalated. The PBIP was to be continued until Student had 90 days without an incident of significant physical assault.

54. The assessment suggestions and recommendations to the IEP team included: (1) a weekly contract with Student allowing him to earn at least two privileges for implementing a coping skill; (2) providing more structure during

transition times, such as assigning a chore or duty to help the teacher and frequent check-ins before leaving the PE field; and (3) the IEP team accepting and implementing the PBIP in whole or in part.

#### DISTRICT'S PSYCHOEDUCATIONAL ASSESSMENT

55. Mr. Sopp conducted the Psychoeducational assessment on various dates between September 26, 2011 and October 31, 2011, and issued the Psychoeducational Assessment Report on November 1, 2011. The purpose of the assessment was to determine Student's current level of academic functioning; cognitive functioning; whether and how Student's autistic and ADHD symptoms impacted his classroom performance; Student's ability to recall verbal/visual information; auditory processing skills; and Student's post-secondary school career interests.

56. The Mr. Sopp used the following test instruments: Differential Ability Scales, Second Edition (DAS2); Weschsler Individual Achievement Test, Third Edition (WIAT3); Behavior Assessment System for Children, Second Edition (BASC2)-Student; Wide Range Assessment of Memory and Learning, Second Edition (WRAML2); Behavior Assessment System for Children, Second Edition (BASC2)-Teacher and Parent Interview. Mr. Sopp also interviewed a counselor, a teacher, Parent and Student, reviewed records, and conducted a Student observation.

57. The assessment found, with respect to his current level of academic functioning, Student appeared to have proficient academic skills according to his performance on the WIAT3. In reading comprehension, his literal reading comprehension skills appeared better developed than his inferential reading comprehension skills. Student's general cognitive ability appeared to be in the emergent to proficient range as measured by the DAS2, yet his verbal reasoning



was in the proficient to highly proficient range, indicating verbal reasoning could be Student's strength. Student did not exhibit classic behaviors associated with autism. However, the results of the BASC2 teacher and parent interview showed Student was easily distracted by his peers, needed one-to-two prompts to start tasks, and exhibited ADHD symptoms to a far greater degree at home than at school. Finally, with respect to his ability to recall verbal and visual information, his ability to immediately recall abstract and concrete visual information was low, but he had good skills in sight word reading and memorization of math facts. Student reported math was difficult because he had difficulty recalling sequential procedures to solve multi-step math problems. Further, according to the results of the pseudoword decoding subtest, listening comprehension subtest, observation and teacher report, Student appeared to function at an adequate level with verbal information. With respect to his post-high school career interests, Student reported he wanted to be a fashion designer.

58. The assessment suggestions and recommendations to the IEP team included a finding that Student remained eligible for special education services under the ED category. The assessment recommended Student should be given directions and instructions one step at a time, and that Student required a small structured environment in order to meet his IEP goals.

59. Mr. Sopp's testimony concerning his conduct of the Psychoeducational assessment was consistent with his findings and recommendations in the assessment report.

#### NOVEMBER 7-8, 2012 ADDENDUM IEP

60. District convened an addendum IEP team meeting on November 7, 2011 to review the assessments conducted as agreed in the September 16, 2011 assessment plan. Father, Advocate Jim Campbell, and Attorney Jennifer Campbell

attended on behalf of Student. The District IEP team members included IEP Administrator Jennifer Bergeron, Special Education Teacher Heather Manning, Mr. Sopp, Ms. Stokman, and Nancy Finch-Heuerman, District's Attorney. District Assistive Technology Specialist Shari King appeared by telephone. Mr. Sopp facilitated the IEP meeting.

61. The IEP team reviewed and discussed the results of the speech and language assessment and determined Student did not qualify for school-based speech and language. Ms. King presented the assistive technology results and recommended no assistive technology services, but recommended accommodations in the form of graphic organizers, computer access, continued instruction in reading comprehension skills, and keyboarding skills.

62. Mr. Sopp reviewed the results of the Psychoeducational assessment and the FAA. The IEP team discussed the Psychoeducational assessment results and focused on Student's performance in his current modified curriculum, and determined that Student performed best in a highly structured environment. Mr. Sopp reviewed the FAA and discussed the serious behaviors of physical aggression, predictors of serious behaviors and the perceived functions of the behaviors. He reiterated that Student was a social student but may have difficulty knowing when his behavior has gone too far or when to seek staff assistance instead of escalating to physical aggression. The IEP team discussed interventions currently being implemented, identified positive replacement behaviors, and the proposed PBIP. The final PBIP was not presented at the IEP meeting; however, Mr. Sopp discussed how it could address Student's behavioral needs, how it should encourage him to learn positive replacement behaviors, and prevent escalation of behavior. He presented suggestions and recommendations for the PBIP based

upon the FAA, but the IEP team agreed to postpone the discussion until after the review and discussion of the DMH assessment scheduled for November 8, 2011.

63. The CAPD Assessment was not presented at the IEP team meeting. The November 7, 2011 IEP meeting summary noted that District was contracting with Dr. Martinez, an audiologist, to perform the evaluation. Consequently the testing could not been performed and completed by the time of the IEP meeting. The assessment was conducted on December 1, 2011. District received the results of the assessment on December 9, 2011. The assessment report was provided to Parents, and an IEP meeting was scheduled for December 12, 2011 to review the assessment results. The results indicated that Student's hearing sensitivity, middle ear function, and inner ear integrity in both ears were normal. Parents cancelled the IEP meeting, citing inconvenience. District notified Parents that due to the winter break, the next available date for an IEP meeting to review the assessment would be in January 2012.

64. The November 7, 2011 Addendum IEP meeting summary, also noted that Ms. Stokman told the IEP team of Student's improvement over the past six months during his therapy sessions. She also stated that Student could report the consequences, but did not seem to have insight, or show guilt or remorse when an incident occurred. Ms. Stokman reported that Student expressed anxiety about a possible placement in a RTC, but he felt that it would be in his best interest to be placed in a residential setting. The IEP team discussed the termination of Student's therapeutic services through the Guidance Center due to funding cuts, and his current receipt of services through Harbor Regional Center, as well as through private counseling obtained by Parents. The determination of program, services and placement was deferred to the following day, November 8, 2012.

65. The IEP team meeting reconvened on November 8, 2011 to review the DMH mental health assessment, and to discuss Student's progress, program and placement. Father, Jim Campbell, Attorney Jennifer Campbell, and Dr. Manetta attended on Student's behalf. Ms. Stokman, Ms. Bergeron, Mr. Sopp, Special Education Teacher Fernando Cervantes, and Attorney Finch-Heuerman attended for District. Dr. Washington, accompanied by a representative of the DMH Placement Unit, attended to present the ERMHS Reassessment Report and Recommendations.

66. The IEP meeting summary noted Dr. Manetta's discussion of Student's difficulties at home. She also stated that Student's behavior had not changed and expressed her concern for Student if he remained at Rossier. She spoke of how Student continued to struggle with the concept of trading, selling or stealing. She, along with Parents, school therapist, and school staff had spoken to him and warned him not to engage in these activities. The IEP meeting summary notes indicated that as of the date of the IEP meeting, Student had three incidents of trading or borrowing on campus. The team discussed writing a stop/think behavior goal to address the behavior. However, Dr. Manetta expressed doubts about his ability to use the skills required to meet the goal. She stated Student told her he did not want residential placement, but she opined that Student would continue to engage in behaviors that might warrant such a placement.

67. Ms. Stokman also discussed the importance of Student refraining from his current on-campus conduct. The IEP team reviewed and discussed Student's progress towards his goals. He met his goals in Reading, Social Adaptive Peer Relations and Adult Relations; he was progressing toward his goals in Social Adaptive Internal Relations and Prevocational; and he had not met his

Mathematics goal. The IEP team discussed their concern that Student had poor impulse control. Ms. Stokman wrote new goals pertaining to the on-campus conduct of trading, selling and stealing, resulting in two behavior goals in peer relations and internal dynamics to be evaluated in the next annual review IEP.

68. The IEP team discussed the need for additional accommodations and services. Mr. Campbell asked for additional time for Student on the STAR. He requested extra time for Student to work on keyboarding skills, including daily keyboarding skills sessions. Mr. Cervantes stated that Student would have time once per week in the computer lab to work on the typing program. The IEP team discussed and agreed that Student could sign up for an elective keyboarding class in the spring 2012 semester with conditions. The IEP team discussed and considered the feasibility of providing additional daily keyboarding time to Student, and ultimately determined that Student's assignment to a keyboarding schedule would interfere with his academic class schedule. The IEP team also informed Parent he would need to consent to a modification of Student's class schedule to allow additional keyboarding instruction. The IEP team agreed to the recommended accommodations of the Assistive Technology Specialist presented at the November 7, 2012 meeting. The IEP team confirmed that the only counseling in Student's current program was for 60 minutes of individual counseling once weekly with the school therapist. Dr. Manetta and Mr. Campbell suggested that Student would benefit from group counseling; however, the District IEP team confirmed that group counseling was not currently offered and was not available to Student at Rossier.

69. Dr. Washington presented the ERMHS Reassessment Report and her recommendation for residential placement, treatment services, and treatment goals and objectives. The IEP team discussed placement and the DMH

recommendation. The representative from the DMH residential placement unit discussed placement options and the importance of finding the right fit for Student. The team discussed the services that could be provided in the interim, pending Student's placement at a residential facility. Dr. Washington offered the outpatient services recommended in the initial DMH assessment, and that had not been implemented, pending placement in a residential facility. District rejected DMH's recommendation for RTC placement, as Mr. Sopp indicated that Student's needs could be met in the NPS setting. DMH then offered to provide the outpatient therapy services for Student to at least provide the needed mental health services he had not been receiving at Rossier.

70. The details of the IEP offer were contained on page 2 of the final offer made at the November 8, 2011 Addendum IEP meeting. The program and services offered here were in addition to the March 23, 2011 IEP. Page 2 contained a box numbered Roman numeral IX entitled "Special Education Services Recommended". The boxes entitled "related services" and "other" were checked. Based upon box number IX, the IEP offer of FAPE for the 2011-2012 school year was continued NPS placement in a special education classroom with a modified curriculum. The IEP offered additional related services of individual and family counseling, and case management by a DMH provider. The Addendum IEP which, supplemented the March 23, 2011 annual IEP, offered (1) continued placement at a NPS; (2) mental health services provided by DMH in the form of individual therapy once per week for 60 minutes, family therapy once per week for 60 minutes, and case management on a consultation basis for 15 minutes per week; (3) classroom accommodations for untimed instruction and tests in a small group setting; and (4) other supplementary aides and services in graphic organizers, keyboarding skills, computer access, and continued

instruction in reading comprehension skills. Father disagreed with the entire IEP offer, and did not consent to the IEP.

71. Father considered the District attorney's presence at the November 7-8, 2011 Addendum IEP team meetings as inappropriate, because to him it created an adversarial atmosphere that previously had not been present in Student's meetings with District IEP team members. Father considered Ms. Finch-Heureman's behavior at the IEP meeting as rude, specifically to Student's representatives. In Father's view, Ms. Finch-Heureman refused to let District IEP team members speak or share their thoughts on the main issues in the IEP. Ms. Finch-Heureman had opened the meeting stating that she was present as a member of the District IEP team, and Father's belief is that she dominated the meeting. Father also believed that District had predetermined that Student's placement offer would be a NPS and not an RTC, because at the first day of the meeting held on November 7, 2011; District IEP team members appeared to be favorable in their discussions of a possible RTC placement for Student. However, in his view, District team members suddenly took a different position the next day when DMH presented the ERMHS reassessment and recommended RTC. Although Father's perceptions may have been sincere, they were not corroborated by other credible evidence at hearing.

72. Ms. Stokman, Ms. Bergeron, and Mr. Sopp, who attended both days of the IEP Addendum meeting, confirmed Ms. Finch-Heuerman was in attendance on behalf of District, because Student's attorney and advocate were present both days of the meeting. They credibly testified that they did not recall Ms. Heuerman being rude, interrupting, talking over any of the attendees at the meeting, or dictating District's offer. They further credibly testified that they did not meet prior to the November Addendum IEP meeting to discuss or to predetermine

Student's placement offer. Only at the November 7 and 8 IEP meetings did they discuss and consider all options to placement before offering NPS placement. They testified that NPS placement was most appropriate because Student had made academic and social progress in his current placement, and Rossier could provide the services and interventions needed for Student to receive educational benefit.

73. Mr. Sopp further testified that the subject of RTC placement for Student was raised during his interview with Dr. Washington. He expressed his concerns to Dr. Washington as to whether RTC was appropriate for Student, because he believed Student was making progress at Rossier. However, he did not make a determination whether or which placement would be most appropriate, as this was the responsibility of the IEP team. He stated that he did not mention or consider the expense that District might incur for an RTC placement, because it would be unethical to do so. He also stated that following his interview with Dr. Washington, and in anticipation of the IEP meeting that would be scheduled to review the DMH assessment, he concluded that it would be important to have a representative present at the IEP meeting from the DMH placement unit to provide information and to answer Parents' questions in the event District accepted DMH recommendation and offered RTC placement. He subsequently contacted DMH and requested they send a representative to the IEP meeting to review the DMH assessment scheduled for November 8, 2011.

74. Dr. Washington recalled that during the interview for the ERMHS assessment, Mr. Sopp mentioned the concern for the expenses District would incur if Student needed residential placement. Even if Mr. Sopp made the statements attributed to him by Dr. Washington, the evidence showed it was an expression of his opinion. There is no evidence that Mr. Sopp met with the



District members of the IEP team and decided Student's placement in advance of the November IEP team meeting.

75. District provided Student with a proposed PBIP on December 6, 2011 and scheduled an IEP meeting to be held on December 12, 2011 to review and finalize the PBIP and to review the results of the Central Auditory Processing assessment, which was to be completed by December 9, 2011. Student's Parent and his attorney cancelled the meeting citing inconvenience as the reason. Because of the upcoming winter break at the time, District proposed to reschedule the meeting to a date in January 2012. There is no evidence that Student agreed to or proposed a new meeting date.

#### STUDENT'S EXPERT WITNESS TESTIMONY

76. Dr. Washington's assessments of Student, reports, and testimony are entitled to great weight. She persuasively testified that based upon the two evaluations she conducted of Student, his ongoing history since the ninth grade of physical aggression, severe mood disorder, his inability to accept responsibility for causing confrontations with peers, and the escalation of serious behaviors, she believed that residential placement was appropriate. She explained the RTC was appropriate and necessary because of Student's explosive outbursts, his disregard for the consequences of his actions and the impact on others, his high risk conduct, poor impulse control, and absence of self-regulation. She described the services available in a RTC setting to include group, individual, and family therapy, as well as medical and case management. She further testified that even though there was not a consensus of opinion between her and Student's long-time psychiatrist and psychologist about the appropriate type of placement, based upon her discussions with Drs. Najeeb and Manetta, there was consensus that Student required more structure and 24/7 supervision than could be

provided at Rossier or by Parents at home. She persuasively opined that despite Rossier's program and the staff's insistence that Student had progressed academically, the evidence pointed to a contrary conclusion. Specifically, Student had not improved socially and emotionally, and required a more intensive therapeutic program and medical management available only in a RTC.

77. More importantly, Dr. Washington emphasized that District had withheld critical documentation from her when she conducted the AB3632 assessment in August 2011. She persuasively opined that after reviewing the incident reports and the Student's incident profiles that predated his transfer to Rossier, a different picture of Student emerged that warranted more intensive mental health treatment and services than she recommended in the initial assessment in August 2011.

#### DISTRICT'S WITNESS TESTIMONY

78. Fernando Cervantes was Student's current teacher since the fall semester of the 2011-2012 school year. He testified that he taught based upon the California Standards curriculum. He explained the behavioral interventions and methods used at Rossier to address behavior in the classroom and on campus. He described the use of the point and level behavior systems used to reward and/or penalize a student for violating the school values. The school staff additionally used a method ranging from verbal redirection to address student behavior to physical restraint to address more severe behavior. He stated that he taught a special day class with 12 students. Student had good attendance, cooperated in class, completed his work, and responded appropriately to verbal redirection. Mr. Cervantes described Student's classroom behavior as positive and improving. He had not seen Student go AWOL from class or on school transportation and he was not aware of any deterioration in Student's overall

behavior. He states that while Student did have three episodes of anger in his classroom prior to the November addendum IEP that Student returned to the classroom after a short break where he was able to calm himself sufficient to return to class and continue his class assignments. He also states Student exhibited no problems or disturbances during transitions to other classes and was responsive to redirection in and outside the classroom. He explained that Student made academic progress in his class.

79. Ms. Bergeron similarly testified that Student's incidents of physical aggression had lessened over time and were more pronounced in the 2010-2011 school year than currently. She saw no deterioration in Student's behaviors at school at the time of the November 2011 Addendum IEP and stated that the reported incidents of gambling, AWOL, theft, and physical aggression reported by Parents at home were not observed at Rossier. Regarding the incident reports, Ms. Bergeron stated that Student's behaviors there were typical of peers at Rossier and could be addressed in the NPS setting. She believed that placement at Rossier was appropriate because Student was making academic progress and receiving educational benefit.

80. Ms. Stokman also testified that Student was making progress in his counseling goals and had shown improvement prior to the November Addendum IEP. She believed that RTC placement was not appropriate for the reasons stated by Ms. Bergeron and Mr. Cervantes. Ms. Stokman also testified that the outpatient therapeutic goals recommended in the ERMHS reassessment report could be implemented and met in the NPS program at Rossier.

81. The testimony of Mr. Cervantes, Ms. Bergeron, and Ms. Stokman on the appropriateness of RTC placement was not credible. They participated as members of the IEP team at the November IEP meeting, they acknowledged

Student's history of lack of impulse control, physical assaults on staff and peers, and other ongoing negative and problem behaviors reported by Parents. The IEP team also discussed the need to effectively address the problem behaviors in the form of a more structured program and more effective behavior intervention that heretofore had not been offered or implemented at Rossier.

82. The expert testimony of Mr. Sopp, who opined that Rossier was an appropriate placement because Student had improved academically and had shown some progress emotionally, was equally unpersuasive. Mr. Sopp's recommendations in the Psychoeducational assessment and the FAA corroborate Dr. Washington's opinions and observations, and support a finding that Student's behaviors could not be properly addressed or abated at Rossier, and Student required a more structured and therapeutic environment with intensive interventions that could only be provided in a RTC.

#### PARENT TESTIMONY

83. Father testified that Student did well academically when he was homeschooled from the sixth to the eighth grades. He performed well on state standardized tests during his homeschooling. Since his enrollment in high school, he had not made progress emotionally or socially. Father further testified that after Student's enrollment at Rossier, he had less information about his academic performance, as he was not kept informed of Student's classroom work. Student never brought homework home. He stated that Student's behavior began to further deteriorate after his enrollment at Rossier. Student began to steal valuable items from the household and sell them to pay off gambling debts. He believed Student was negatively influenced by his peers at Rossier. Father further stated that he repeatedly communicated with Rossier staff and the administration about his observations that Student was secreting items onto the Rossier campus by

concealing them in his anal cavity. He became more concerned about Student's lack of academic progress when he received the results of the STAR. Student also had been caught with marijuana and Father was concerned about possible drug use.

84. Father believed RTC placement was most appropriate for Student because his behaviors were getting out of control at home and at school. He stated that following the November 7-8, 2011 IEP meeting, Student had a violent episode which resulted in his hospitalization at College Park Hospital where he was held for psychiatric observation for five days. Student eloped or went AWOL after he was returned home from the hospital. Father credibly testified that he was most concerned because Student was not getting the proper mental health services, and had been advised by Dr. Washington that Student was at risk for involvement with law enforcement. Father testified that Student was arrested in April 2012 on charges of residential burglary and is currently detained at Los Padrinos.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student 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].)

### ISSUE I: DENIAL OF FAPE IN THE MARCH 23, 2011 IEP

2. Student contends that District's failure to provide a clear written IEP offer deprived Parents of meaningful participation in the IEP process and denied Student a FAPE (Issue I (a)); the March 23, 2011 IEP did not offer related services and transportation which denied Student a FAPE (Issue I(b)); and the March 23,

2011 IEP did not provide a review of Student's PLOPS and goals (Issue I(c)). Student asserts that the IEP form lacked a place or section where District could list all of the elements of District's FAPE offer. Instead the IEP placement offer was located in one section of the IEP, and related services in another section, with boxes pertaining to related services that were unmarked or unchecked, making it unclear what services were being offered. Student argues that the failure to provide a coherent written offer in the IEP document caused Father to be confused about the content of District's offer, and whether all agreed-upon related services would be offered. Student further asserts that the failure to provide a review of all PLOPS and goals constituted a denial of FAPE.

3. District contends the March 23, 2011 IEP provided a clear written offer of placement and services in the least restrictive environment. District asserts that Student's PLOPS and goals were written into the IEP, reviewed, discussed, and presented to the IEP team members at the IEP meeting, which included Student and Parents. District contends that it provided a FAPE.

4. As discussed below, Student has not met his burden of proof that District failed to provide a FAPE in the March 23, 2011 IEP.

#### APPLICABLE LAW

5. A pupil with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) IDEA, consisting of special education and related services. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's

academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

6. The term “related services” (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).)

7. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district’s provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student’s unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean

that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley*, supra, at p. 200.) School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Rowley*, supra, at p. 201.)

8. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) A procedural violation does not constitute a substantive denial of FAPE unless the procedural inadequacy (a) impeded the child’s right to a FAPE; (b) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, supra, 960 F.2d at pp.1483-1484.)

9. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District’s proposed program. (*Gregory K.v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley*, at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s potential. (*Rowley*, supra, 458 U.S. at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the



student. (*Id.*, at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program, and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K.*, *supra*, 811 F.2d at p. 1314.)

10. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

11. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (Ed. Code, § 56340.)

12. An annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement

of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications; and, if 16 years or older, measurable post-secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345, subd. (a).) After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (20 USC § 1414(d)(3)(D) & (F); 34 C.F.R. § 300.324(4) &(6)(2006); Ed. Code, § 56380.1.)

13. The development of an IEP is a collaborative activity accomplished by an IEP team convened by the school district. A parent is an integral and required member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.321(a)(1)(2006); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education. (20 U.S.C. § 1414(d)(3)(A)(ii); Ed. Code, § 56341.1, subd. (a)(2).) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan [the IEP]." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882; editorial added.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

14. There is no requirement that the entirety of the FAPE offer be in a specific portion of the IEP as long as the offer is sufficiently clear so that the parents can understand it and make intelligent decisions regarding the offer.

(*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) A District is required to make a "formal, specific offer" of placement and services in writing, even if the District believes that a child's parents have no intention of accepting that offer. (*Union, supra*, 15 F.3d at 1519; see also *Glendale Unified School District v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107-1108). In *Union*, the court described the reasons for requiring a formal, specific offer in writing: "The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in 'presenting complaints with respect to any matter relating to the...educational placement of the child.'" (*Union, supra*, at p. 1526.) A failure to make a formal written FAPE offer has been held to be harmless error where parents were aware of the District's offer as they fully participated in the IEP process. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 460-461 (*Fresno*).)

#### Analysis of Issue - I (a) Clear Written Offer of FAPE

15. As set forth in Legal Conclusion 8, a denial of FAPE may only be shown if the procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. Here, the evidence established that District made a clear written offer in the March 23, 2011 IEP, and, as explained in more detail below, Student's claim fails.

16. As set forth above in Factual Finding number 21, the March 23, 2011 IEP offer provided (1) continued placement in a NPS program, with a

modified curriculum and accommodations, for the 2011-2012 school year; (2) ESY; (3) an ITP; (4) related services of individual counseling once per week for 60 minutes, and (5) curb-to-curb transportation including ESY.

17. The evidence showed that the details of the IEP offer were contained on page 13 of the IEP. Specifically, page 13 contained a box numbered Roman numeral IX entitled "Special Education Services Recommended". The boxes entitled "related services" and "other" were checked. Based upon box number IX, the IEP offer of FAPE for the 2011-2012 school year was NPS placement in a special education classroom with a modified curriculum. The IEP also recommended related services of individual counseling once per week for 60 minutes and curb to curb transportation. Page 13 also included a box numbered Roman numeral X entitled "Extended School Year (ESY) Consideration". The box next to the words ESY was not checked and contained an incomplete sentence that seemed to imply that ESY was not needed, which, taken in isolation, could have been confusing to Parents. But the next section under box IX on ESY contained a clear statement that the IEP recommended "specialized academic instruction for the summer from 6/27/2011-8/5/2011 at the NPS 1x daily for 240 minutes". The next line contained a checked box next to the word "Transportation" with the words "for ESY if not at school of residence. Type: curb to curb provided by NPS". The next line under box number X included a note that "all other services remain the same" which referred to the prior Triennial IEP of April 1, 2010, which offered the same related services. The IEP also offered an ITP and provided accommodations for the STAR California Standards Test and the CAHSEE. The offer was sufficiently clear so that Parents could understand it and make intelligent decisions regarding the offer, which resulted in Parents' consent to the offer, after their full participation in the IEP team discussions.

18. Father's testimony at hearing, that he was confused by the IEP offer because it was not contained all on the same page or section of the IEP, is disingenuous and not supported by the evidence. First, Father testified to attending between 20-30 IEPs for Student over the years in the District since elementary school. This would indicate Father had ample exposure to the IEP process through the years and was capable of understanding this particular IEP document when read in its entirety. Second, the March 23, 2011 IEP provided a clear and coherent offer which Parents understood in making their decision to accept the offer. Applying the standard in Union, there is no requirement that the entirety of the FAPE offer be in a specific portion of the IEP as long as the offer is sufficiently clear so that the parents can understand it and make intelligent decisions regarding the offer.

19. In sum, Student presented no evidence that the March 23, 2011 IEP offer was unclear and incoherent and that it impeded his right to FAPE, significantly impeded his parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused him a deprivation of educational benefits. Based upon the foregoing, Student has failed to prove by a preponderance of the evidence that District committed a procedural violation which denied him a FAPE. (Factual Findings 1 through 25 and Legal Conclusions 1 and 4 through 19.)

Analysis of Issue I (b) - IEP offer of related services and transportation

20. Similarly to Issue I(a), as set forth in Legal Conclusion 8, and 20- 21, the evidence established that the March 23, 2011 IEP clearly included an offer of related services and transportation. Because Student failed to prove that District committed a procedural violation resulting in a substantive denial of FAPE, there

is no need to further address the matter set forth in Issue I(b). (See *Amanda J., supra*, 267 F.3d at pp. 877, 895.) Student failed to demonstrate he was denied a FAPE on this ground. (Factual Findings 1 through 25 and Legal Conclusions 1, and 4 through 20 .)

#### Analysis of Issue I(c) - Review of PLOPS and goals

21. Student's contention that the March 23, 2011 IEP did not contain a review of his PLOPS and goals also fails. The evidence showed that the IEP team reviewed Student's present levels of academic and functional performance in the areas of Reading, Mathematics and Written Language; Behavioral and Social Emotional; Communications and Language Development; Prevocational and Vocational; Medical; and Gross/Fine Motor Skills, and from that, confirmed Student's ED eligibility. Specifically, the team determined from reviewing the PLOPS that Student demonstrated inappropriate behaviors under normal circumstances and an inability to build and maintain satisfactory interpersonal relationships with his peers. The evidence also showed that the IEP team developed goals in the areas of in Reading, Math, Written Language, Pre-Vocational, and Social/Adaptive functioning, designed to meet Student's unique needs.

22. Specifically, according to the credible testimony of Jennifer Bergeron and Renee Stokman, they reviewed and wrote appropriate PLOPS and goals in these areas, and attended and participated in the March 23, 2011 IEP meeting. Ms. Bergeron confirmed that PLOPS, goals, and Student's progress against goals were thoroughly reviewed with Parents by Student's special education teacher, and that it was District's practice that teachers discuss PLOPS and goals at the IEP meetings as part of a District script used specifically for IEP team meetings. Similarly, the testimony of Ms. Stokman, who provided

counseling services to Student in the spring semester of the 2010-2011 school year, established that she developed three social /adaptive PLOPS and goals in internal dynamics, peer relations, and adult relations to address his negative behaviors, which she thoroughly reviewed and discussed with the IEP team at the March 23, 2011 meeting. Ms. Stokman also credibly testified that Parents posed no questions or concerns about the IEP offer, or the PLOPS and goals, and that Parents voluntarily consented to the offer.

23. In addition, Father admitted at hearing that the PLOPS and goals were reviewed and discussed at the IEP meeting. Although Father believed the review was insufficient and he questioned their validity because he had not received regular progress reports on Student's classroom work and because he never saw Student doing homework, the evidence showed, through the testimony of Ms. Bergeron and Ms. Stokman, that Parents were engaged in a thorough discussion of the Student's PLOPS and progress against goals. Further, additional academic and social/emotional PLOPS and goals were developed based upon assessments and observations of Student at Rossier, and Parents' input concerning Student's social/emotional problems. Given these factors, the evidence established that Student's right to a FAPE was not impeded, nor was he deprived of educational benefit in the process of developing his PLOPS and goals in the March 23, 2011 IEP. Moreover, given their extensive participation in the meeting, Parents were not deprived of meaningful participation in the development of Student's PLOPS and goals.

24. As such, Student failed to meet his burden of proof by a preponderance of the evidence that District committed a procedural violation and was denied a FAPE in the March 23, 2011 IEP. (Factual Findings 1 through 25 and Legal Conclusions 1 and 4 through 24.)

## ISSUE II: DENIAL OF A FAPE IN THE NOVEMBER 2011 ADDENDUM IEP

25. Student contends that District violated his procedural right to a FAPE in the November 2011 IEP by failing to: make a formal written offer of FAPE (Issue II(a)); conduct a central auditory processing assessment within 60 days of parental consent (Issue II(b)); Student also contends he was denied a FAPE because District's counsel attended the IEP meeting (Issue II(c)); and District predetermined Student's placement (Issue II(d)). Student further contends District committed substantive deprivations of a FAPE by failing to: offer group counseling (Issue II(e); offer DMH services of individual and family counseling, and medical consultation as recommended by DMH (Issue II(f)); include keyboard services (Issue II(g)); include a behavior support plan (Issue II(h)); and failing to offer placement in a RTC as recommended by DMH in its ERMHS reassessment and presented at the November 8, 2012 addendum IEP (Issue II(i))

26. District contends that it did not violate Student's procedural rights nor deny Student a substantive FAPE in the November 2011, Addendum IEP. District further argues that Student was making academic and social progress in his NPS placement and that the November 2011 IEP offer of continued placement in a NPS was the appropriate placement in the least restrictive environment. As discussed below, Student did not meet his burden of persuasion as to Issue 2(a) through (h); however, Student met his burden of demonstrating by a preponderance of the evidence that District violated Student's right to a FAPE by not offering placement in a RTC as recommended in the ERMHS reassessment by DMH.



## ANALYSIS OF ISSUE II(A) - CLEAR WRITTEN FAPE OFFER

27. Student contends that he was denied a FAPE because the Addendum IEP dated November 7-8, 2011, did not contain a clear written offer. Here, the evidence established that District made a clear written offer, thus, as discussed in more detail below, Student did not show a deprivation of a FAPE on this ground.

28. Legal Conclusions 4 through 14, above, are incorporated by reference.

29. As set forth in Legal Conclusion 8, a denial of FAPE may only be shown if the procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits.

30. As set forth in Factual Finding number 70, the November 7-8, 2011 Addendum IEP offered (1) continued placement at a NPS; (2) ESY; (3) mental health services provided by DMH in the form of individual therapy once per week for 60 minutes, family therapy once per week for 60 minutes, and case management on a consultation basis for 15 minutes per week; (4) classroom accommodations for untimed instruction and tests in a small group setting; (5) other supplementary aides and services in graphic organizers, keyboarding skills, computer access, and continued instruction in reading comprehension skills; and (6) an ITP. Parents disagreed with the entire IEP offer and did not consent to the IEP.

31. The evidence showed that the details of the IEP offer were contained on page 2 of the final offer made at the November 8, 2011 Addendum IEP meeting. The program and services offered here were in addition to the March 23, 2011 IEP. Page 2 contained a box numbered Roman numeral IX

entitled "Special Education Services Recommended". The boxes entitled "related services" and "other" were checked. Based upon box number IX, the IEP offer of FAPE for the 2011-2012 school year was continued NPS placement in a special education classroom with a modified curriculum. The IEP offered additional related services of individual and family counseling, and case management by a DMH provider. Father was present along with Student's attorney, advocate and private therapist and fully participated in the IEP team discussions. Father disagreed with the offer because it did not include RTC placement. Father did not consent to the IEP offer.

32. Father's testimony at hearing was that the offer was unclear and ambiguous and required reading at various places and different pages in the IEP document. For the reasons discussed in Legal Conclusion 14 and 18, above, Father's testimony is not credible. In addition, the evidence showed that Father, his advocate, and his attorney were all present at the IEP meetings on both days. The IEP summary notes reflected that the advocate was fully engaged and participated in discussions of the offer, the program, the services and he made several suggestions, requests and recommendations concerning the IEP offer. The November 8, 2011 IEP provided a clear and coherent offer that was sufficiently clear so that Father understood it and was able to make intelligent decisions regarding the offer, and ultimately, rejected it.

33. In sum, Student presented no evidence that the IEP offer was unclear, such that it impeded his right to FAPE, significantly impeded his parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused him a deprivation of educational benefits. Based upon the foregoing, Student has failed to prove by a preponderance of the evidence that

District committed a procedural violation which denied him a FAPE. (Factual Findings 1 through 26 and Legal Conclusions 1, and 4 through 33.)

#### ANALYSIS OF ISSUE II (B) - TIMELINESS OF CAPD ASSESSMENT

34. In Issue II(b), Student contends he was denied a FAPE because District failed to timely conduct a CAPD assessment. Specifically, Student contends that the CAPD assessment set out in the assessment plan signed by Parents on September 23, 2011, should have been discussed at the November 7-8, 2011 Addendum IEP meeting. District disagrees, and contends that Student was not denied a FAPE because although slightly delayed, the assessment was conducted and results provided to Student by December 9, 2011. As discussed below, Student did not demonstrate that he was denied a FAPE on this ground.

35. Legal Conclusions 4 through 14 are incorporated by reference.

36. A child must be assessed by a school district in all areas related to the suspected disability. (20 U.S.C. § 1414(A)(2), (3); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56330(f).) A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five school days of receipt of the referral, unless otherwise agreed upon. (Ed. Code, § 56043, subd. (a).) In case of school vacation, the 15-day time recommences on the date that the regular school days reconvene. (Ed. Code § 56321, subd. (a).) An IEP meeting must be held within 60 days of receiving parental consent to the assessment plan, exclusive of school vacations in excess of five schooldays and other specified days. (Ed. Code, §§ 56043, subds. (b), (c), 56344, subd. (a).)

37. The failure to perform an assessment when it is warranted may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.)

38. Here, the evidence showed that Parents consented to an assessment plan on September 23, 2011. The assessment plan included numerous assessments, including for CAPD. All but the CAPD assessment were conducted and timely presented at the November 7-8, 2011 Addendum IEP meeting. Under the 60 day timeline for completion of assessments and conduct of an IEP team meeting, the CAPD assessment should have been reviewed at an IEP team meeting no later than November 22, 2011. The evidence showed that District advised Student at the Addendum IEP meeting of the difficulties in scheduling the assessment and that it had contracted with an evaluator to administer and complete the assessment. The assessment was administered on December 1, 2011 and a report was issued by the evaluator on December 7, 2011. District provided Student with the CAPD assessment on December 9, 2011, and scheduled an IEP team meeting for December 12, 2011 to review the CAPD assessment results. On December 10, 2011, Parent cancelled the meeting. District could not schedule another IEP meeting to January 2012 because of the upcoming winter break.

39. District's failure to complete the CAPD assessment and hold an IEP team meeting within 60 days of September 23, 2011, was a technical violation of IDEA procedures. However, not every procedural violation results in a substantive denial of FAPE, and Student had the burden of demonstrating that the approximate three week delay in completing the assessment and scheduling an IEP team meeting interfered with Parent's right to participate in the decision making process, impeded the provision of a FAPE, or resulted in a deprivation of

educational benefit to Student. Here, while the assessment was not timely, the results established that Student's hearing sensitivity, middle ear function, and inner ear integrity in both ears were normal. As such, the results demonstrated that Student did not have a central auditory processing deficit that would impact his access to an education. Student presented no evidence that the brief delay in performing the CAPD assessment, which yielded a result showing that Student's inner ear function was normal, impeded his right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits.

40. In sum, Student failed to prove by a preponderance of the evidence that District denied Student a FAPE by failing to timely conduct a CAPD assessment and present the assessment in the November 7-8, 2011 Addendum IEP. (Factual Findings 1 through 16; 36 through 37; 60 through 63 ; Legal Conclusions 1, and 4 through 40 .)

#### ANALYSIS OF ISSUE II (C) - ATTENDANCE OF DISTRICT'S ATTORNEY AT IEP MEETING

41. In Issue II(c), Student contends that District improperly included District's attorney at the IEP team meetings of November 7-8, 2011. Specifically, Student asserts that the attorney's presence deprived Parents of meaningful participation in the IEP decision-making process, which amounted to a procedural violation, and a denial of FAPE. District contends the IDEA does not prohibit District from having its attorney present at IEP meetings, and the attorney's attendance did not deny Student a FAPE.

42. Legal Conclusions 4 through 14 are incorporated by reference.

43. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child

is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of the assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

44. 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 with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

45. Student's claim on this ground fails for a number of reasons. First, federal and state law mandates that an IEP team can include individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. Thus, District had an absolute right to include its attorney as a member of the IEP team. Second, at the November 7-8, 2011 IEP meetings, Student had his own special education attorney present, accompanied by her assistant, who represents that he is a special education advocate. It is not plausible that Student's parents were somehow prevented from participating by the presence of the District's attorney, when Student's parents had brought a legal "team" to assist them in their participation. Third, the evidence unequivocally showed that Parent and his representatives fully and meaningfully participated in the IEP process, as

evidenced by their opportunity to express disagreement about certain components of the IEP, especially placement. According to the credible testimony of Ms. Begeron, Ms. Stokman, and Mr. Sopp, Parents fully discussed the proposed IEP, their concerns over Student's behavior, and they requested additional services in the IEP.

46. Parent's testimony concerning Ms. Finch-Heureman's conduct and tone at the meeting is not supported by the evidence. Ms. Bergeron, Ms. Stokman and Mr. Sopp all testified that they had no recollection of Ms. Finch-Heureman acting or speaking rudely to any of the IEP participants or interfering with the District IEP team members' discussions of the matters of concern in the IEP. In sum, no persuasive evidence was presented that the attendance of District's attorney at the November 7-8, 2011 IEP team meeting denied him a FAPE. (Factual Findings 1 through 16, and 60 through 72; Legal Conclusions 1, and 4 through 46.)

#### ANALYSIS OF ISSUE II (D) - PREDETERMINATION OF STUDENT'S PLACEMENT

47. In Issue II (d), Student contends that he was denied a FAPE at the November 7-8, 2011 IEP team meeting because District predetermined that Student's placement would be an NPS, rather than an RTC. District contends it did not predetermine Student's placement and thus, did not deny Student a FAPE. As discussed below, the evidence at hearing did not support a denial of a FAPE on this ground.

48. Legal Conclusions 4 through 14 are incorporated by reference.

49. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not

arrive at an IEP meeting with a “take it or leave it” offer. (*JG v. Douglas County SchoolDist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs., supra*, 315 F.3d at p. 693, fn. 3.)

50. Student’s claim that District predetermined its offer of placement at the November 7-8, 2011 IEP fails. The credible testimony of Ms. Bergeron and Ms. Stokman established that none of the District IEP team members met in advance of the November IEP meeting to discuss Student’s placement. Instead, the IEP meeting summary of the November IEP meeting demonstrated that the subject of placement came up in Ms. Stokman’s discussion with Student about his fears of possible placement in a RTC. The only time placement was discussed by a District IEP team member was in the DMH reassessment interview of Mr. Sopp by Dr. Washington. There, Mr. Sopp only expressed his personal concerns about the appropriateness of an RTC placement for Student in response to the interview. There is no evidence that he, or other District IEP team members, individually or collectively, predetermined the placement offer in the November 7-8, 2011 IEP. Similarly, there is no evidence that District came to the IEP with a “take it or leave it” position on placement. Instead, to the contrary, the evidence showed that the District members of the IEP team engaged in extensive discussion about the assessments that had been completed, and the placement options available for Student that could provide him with a FAPE.

51. Given the above facts, Student failed to prove by a preponderance of the evidence that District predetermined his placement and denied him a FAPE. (Factual Findings 1 through 16 and 60 through 74; Legal Conclusions 1, and 4 through 51.)



## ANALYSIS OF ISSUES II (E) & (F) - FAILURE TO OFFER GROUP COUNSELING AND DMH MENTAL HEALTH SERVICES

52. In Issue II (e), Student contends that District denied him a FAPE when it failed to offer additional services of group counseling in the November 7-8, 2011 IEP. In a related issue, Student contends in Issue II(h) that the same IEP denied him a FAPE because it did not offer mental health services provided by DMH. District contends that Rossier's program provided individual therapy and not group therapy. District further contends that the November IEP offer included an additional offer for services by DMH, and offered a FAPE. Because these issues are related, they will be addressed together. Student did not meet his burden of proof on either claim.

53. Legal Conclusions 4 through 14 are incorporated by reference.

54. As discussed in Legal Conclusion 7, above, under *Rowley, supra*, District has provided a FAPE if a program and services are designed to meet the student's unique needs; the services are reasonably designed to provide some educational benefit; the services must conform to the IEP as written; and the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

55. As to Issue II (e), regarding group counseling, the evidence established that Parent requested group counseling as a related service at the November 2011 IEP meeting. However, District and Rossier noted that group counseling was not part of the NPS program at that time. Specifically, Ms. Stokman, who provided one-to-one individual counseling to Student, credibly testified that she thought group counseling might be a positive addition to Student's program as it would allow him to discuss issues he had in common with his peers, but that no such program was available at Rossier. However, the IEP

team discussed group counseling at the November IEP meeting and proposed to explore and develop a program for Student. The evidence establishes that in November following the IEP meeting, District developed a group counseling program and made the program available to Student. Accordingly, although not offered to Student expressly in the IEP, a group counseling program was ultimately made available to Student within weeks of the IEP team meeting. Student presented no facts at hearing to show that this program would not have met Student's needs that were discussed at the IEP team meeting, and would not have provided some educational benefit. Under these facts, Student was ultimately offered the service within weeks of the IEP team meeting, which Parents rejected. Student has failed to prove that he was not offered group counseling services and that he was not denied a FAPE. (Factual Findings 1 through 16 and 60 through 70; Legal Conclusions 1, and 4 through 55.)

56. As to Issue II (f), the offer mental health services to be provided by DMH, the evidence showed that the November 7-8 Addendum IEP specifically offered individual and family counseling services and case management to be provided by a DMH service provider. Parent did not consent to the IEP and rejected the provision of those services. The evidence further established that following District's disagreement with the ERMHS assessment placement recommendations, Dr. Washington also offered outpatient mental health services with treatment goals to Student that had been recommended in the initial AB3632 assessment. Parent rejected that offer as well. Again, the evidence established that the offered services were designed to meet Student's unique mental health needs and were calculated to provide Student some educational benefit. Contrary to Student's contention, the evidence showed that District offered additional DMH mental health services in the November IEP that were

reasonably calculated to meet Student's unique needs. Accordingly, Student failed to establish that District denied him a FAPE on this ground. (Factual Findings 1 through 16 and 60 through 70; Legal Conclusions 1, and 4 through 55.)

## ANALYSIS OF ISSUE II (G) - KEYBOARDING SERVICES

57. Here, Student contends that District failed to offer daily keyboarding services that Student needed to improve his typing to facilitate his use of the classroom computers, which denied him a FAPE. District contends that Student was provided a FAPE because the IEP offer included an accommodation to work on his keyboarding skills. As discussed below, Student did not meet his burden on this issue.

58. Legal Conclusions 4 through 14 are incorporated by reference.

59. The evidence showed that keyboarding was offered as an elective course in Rossier's curriculum. Student requested an accommodation to improve his typing skills, but the evidence showed that Student was already getting keyboarding time on the computers in his classroom. Although the IEP team discussed and considered the feasibility of providing additional daily keyboarding time to Student, it ultimately determined that Student's assignment to a keyboarding class schedule would interfere with his academic class schedule, which was more important. The IEP team also informed Father that he would need to consent to a modification of Student's class schedule to allow additional keyboarding instruction. Ms. Bergeron testified that the IEP team discussed and agreed that Student could sign up for an elective keyboarding class in the spring 2012 semester. The evidence further showed that in the IEP offer at the November 7-8, 2011 Addendum IEP meeting, District offered keyboarding and computer access as an accommodation. Nothing in the evidence presented at

hearing can be construed as demonstrated that more intensive keyboarding instruction was necessary as a related service to help Student access the curriculum. Thus, given the balance between interfering with Student's academic schedule, and that Student did not necessarily require keyboarding to access the curriculum, District's offer was reasonably calculated to provide some educational benefit at the time and provided Student a FAPE. Student has failed to prove by a preponderance of the evidence that District failed to offer keyboarding services in the November IEP and denied a FAPE. (Factual Findings 1 through 16 and 60 through 70; Legal Conclusions 1, and 4 through 59.)

#### ANALYSIS OF ISSUE II (H) - BEHAVIOR INTERVENTION PLAN

60. In Issue II (g), Student contends that District failed to provide a PBIP at the November 7-8, 2011 Addendum IEP, which denied him a FAPE. District contends it offered a PBIP, which provided a FAPE. As discussed below, Student failed to demonstrate that he was deprived of a FAPE on this ground.

61. Legal Conclusions 4 through 14 are incorporated by reference.

62. A BIP is "a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, §§ 3052, subd. (a)(3), 3001, subd. (h).) A BIP shall be based upon an FAA. (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) Before the BIP can be written, an FAA must be conducted. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).) An FAA must include a systematic observation of the occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).) It must also include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052,

subd. (b)(1)(B).) An FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).)

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

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

include a proposed behavioral intervention plan (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(D)).

65. The evidence showed that District psychologist, Mr. Sopp, conducted an FAA as agreed upon in the September 26, 2012 assessment plan and presented the results at the November 7-8 Addendum IEP meeting. The FAA included a proposed PBIP for consideration by the IEP team. Mr. Sopp suggested to the team to adopt his PBIP in whole or in part or develop a plan based upon the FAA findings. The IEP team, including Parents, discussed the proposed plan and agreed that the IEP team would review the proposed PBIP and develop a final plan at a later date following the November Addendum IEP meeting. As such, given this agreement by Parents to discuss the BIP later, as well as Parents' full participation in the process, it would be objectively unreasonable to conclude that District's failure to agree upon and/or finalize a PBIP at the November 7-8 Addendum IEP denied a FAPE. Moreover, District submitted a proposed PBIP to Parents within three weeks following the November IEP meeting and scheduled a date for an IEP meeting to implement the plan. Parents cancelled the meeting and no other meeting could have been scheduled until the following spring semester.

66. More importantly, the evidence at hearing showed the BIP was sufficient to address Student's unique behavior needs, and thus offered a FAPE because the BIP addressed Student's maladaptive and impulsive behaviors; it provided recommendations for implementation of coping skills; called for more structure in Student's school routine; established a reward system for Student's positive responses to events; and established behavior interventions and an emergency behavior plan for Student and school staff. Given the information at

the time, the BIP was reasonably calculated to provide some educational benefit to Student.

67. In sum, Student has failed to prove by a preponderance of evidence that District failed to provide a FAPE because the BIP was not appropriate. (Factual Findings 1 through 16; 48 through 54; and 60 through 75; Legal Conclusions 1, and 4 through 66.)

#### ANALYSIS OF ISSUE II (I) - DENIAL OF RTC PLACEMENT

68. Finally, in Issue II (i), Student contends that District denied Student a FAPE by not offering an RTC placement as recommended in the DMH ERMHS Reassessment Report. District contends that it did not deny Student a FAPE, in that Student had received educational benefit and had made academic progress in the NPS, and the NPS was the LRE for Student. District also asserts that Student had more emotional/social problems in the home and not school. Consequently, District asserts that contrary to the DMH ERMHS Report, Student did not require placement in a RTC. Although District argues that its placement offer is the LRE. The evidence shows that Student required a more restrictive environment. As will be discussed below, Student has met his burden of proof that that an RTC was required in order to provide Student a FAPE.

69. Legal Conclusions 4 through 14 are incorporated by reference.

70. Federal and state laws require LEA's to provide a program in the least restrictive environment to each special education pupil. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.)<sup>7</sup> A special education pupil must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary

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<sup>7</sup> All references are to the 2006 edition,

aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education pupil could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has required several factors to be evaluated. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.) However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.)

71. A school district must ensure that a continuum of programs is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a) (2006); Ed. Code, § 56360.) This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. § 300.115(b)(1) (2006); see also Ed. Code, §§ 56360, 56361.) Indeed, the continuum of program options ranges from the least restrictive to the most restrictive, from general education settings to institutional settings. (Ed. Code, § 56361.) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104 (2006).)

72. "Mental health services" means mental health assessments and, when delineated on an IEP, individual or group psychotherapy, collateral services,



medication monitoring, intensive day treatment, day rehabilitation, and case management. (Cal. Code Regs., tit. 2, § 60020, subd. (i).) Psychotherapy means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive. (Bus. & Prof. Code, § 2903.)

73. Prior to July 1, 2011, mental health services related to a student's education were statutorily provided by a local county mental health agency that was jointly responsible with the school district pursuant to Chapter 26.5 of the Government Code. (See Gov. Code §7570, et seq., often referred to by its Assembly Bill name, Chapter 26.5; Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 2, § 60040, subd. (a); *Cal. Sch. Bds. Ass'n v. Edmund G. Brown Jr., Gov.* (2011) 192 Cal.App.4th 1507, 1519.)

74. On June 30, 2011, California's Governor signed into law a new Budget Bill (SB 87) for the 2011-2012 fiscal year, and a trailer bill affecting educational funding (AB 114). Together the two bills did not repeal Chapter 26.5 of the Government Code in its entirety, but made substantial changes that involved repealing significant portions of it and related laws, particularly with respect to mental health services. Sections repealed were suspended effective July 1, 2011, and were repealed by operation of law on January 1, 2012, unless otherwise amended. There has been no amendment. The following sections of Chapter 26.5 of the Government Code were suspended and subsequently repealed: §§ 7572 (c), 7572.5, 7572.55, 7576, 7576.2, 7576.3, 7576.5, 7586.5, 7586.6, 7586.7, and 7588. Of those sections, § 7576 designated the State Department of Mental Health or a community mental health service as the agency responsible for the provision of mental health services if required in a

pupil's IEP, and imposed an obligation on county mental health agencies to receive referrals for AB 3632 assessments, assess, report, add a member to an IEP team, assume case management responsibilities, or make residential placements.

75. In essence, effective July 1, 2011, the obligations of the State Department of Mental Health, and its county designees, such as DMH, to assess and provide related mental health services to special education students, were suspended and repealed, and the statutory responsibilities were transferred to the LEA's. (See Gov. Code, § 7573.) As of July 1, 2011, the LEA's, including District in this case, had the sole responsibility to provide mental health care services to its qualifying special education students through contracts with agencies like DMH or with private providers if they chose to do so.

76. AB 114 directed the California Department of Education (CDE) and California Health and Human Services Agency (CHHS) to modify or repeal regulations no longer supported by statute. No action has been taken to date. The State regulations adopted to implement AB 3632 (Cal. Code Regs., tit. 2, §§ 60000, et seq.) have not been expressly repealed. In particular, at the time of the IEP meeting and through the date of hearing, the regulations provide that the county mental health assessor's recommendation for mental health services was required to be reviewed and discussed by the pupil's IEP team, including the parents, following which, the recommendation of the county mental health assessor was required to become the recommendation of the IEP team. (Gov. Code, § 7587; Cal. Code Regs., tit. 2, § 60045, subds. (f), and (f)(2).)

77. As to this issue, the evidence at hearing showed that District failed to offer Student a FAPE when it did not offer him a RTC placement pursuant to the recommendation made by DMH at the November 7-8, 2011 Addendum IEP team meeting.

78. First, the evidence established that Student was not a candidate for a full-time general education program, and required a more restrictive environment. Overall, a determination of whether a district has placed a pupil in the least restrictive environment involves the analysis of four factors: (1) the educational benefits to the child of placement full time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. (See *Rachel H.*, *supra*, 14 F.3d at p. 1404.) Regarding the first factor, the evidence clearly established that Student required specialized teaching methods and small group instruction to address his needs, particularly in the area of behavior, such that a general education placement would have limited educational benefit, at best. As to the second and third factors, although there might be some limited social benefit to general education attendance, Student's behaviors were quite significant (i.e., fighting, stealing, assaulting staff and peers, AWOL from class and school transportation, impulsive behaviors, acting without regard to the consequences and its impact on others, lack of remorse or feelings of guilt for his actions, drug use, and exhibiting signs of severe mood disorder) and would have negatively impacted the other students. As to the fourth *Rachel H.* factor, neither party introduced any evidence about cost. Weighing the above factors, shows that general education was not appropriate.

79. The evidence further showed that as of November 7-8, 2011, given the continuum of placement options, Student required an RTC to receive a FAPE. Specifically, Student's history showed emotional and behavioral problems that impeded his academic performance to such a degree that he was homeschooled from the sixth to the eighth grade. Student attended one full semester in a

District public high school in the ninth grade before being placed at Rossier in the spring semester of the ninth grade school year. District offered Rossier because of serious incidents of violence committed at Milikan and Jordan. The evidence showed, through the credible testimony of Dr. Washington that Student's acts of violence escalated while he was at Rossier, up through the 11th grade. Specifically, Student had engaged in at least 10 reported acts of physical assault, including physical assault of teachers. He was disruptive in the classroom, was cited for destruction of property, and engaged in AWOL activity on the school campus and on District transportation off campus. While Rossier provided interventions in the form of physical restraint to abate the Student's assaultive behavior and 60 minutes a week of individual counseling, according to the credible testimony of Father, Student's behavior continued to worsen, requiring Parents to provide Student with received ongoing private therapy with Dr. Manetta, and psychiatric treatment with medical monitoring with Dr. Najeeb.

80. In addition, Dr. Washington's reports and testimony conclusively established that Student required placement in a RTC. Specifically, Dr, Washington, who had the experience and training to assess Student and make recommendations for a placement and services that would provide a FAPE, was credible and persuasive in all respects. Contrary to District's assertion in its closing argument that the ERMHS reassessment was flawed because it did not include classroom observation of Student, Dr. Washington had in-person contact with Student in assessing his needs, knew his medical and academic history, and had evaluated him twice within a period of two months. She had assessed Student in August 2011 and found he was eligible for AB 3632 outpatient mental health services at that time. However, when she reassessed him in September 2011, and her review included Student's full behavioral records, she credibly

concluded that given Student's ongoing history since the ninth grade of physical aggression, severe mood disorder, his inability to accept responsibility for causing confrontations with peers, and the escalation of serious behaviors, Student required a RTC placement. She credibly explained the RTC was appropriate and necessary because of Student's explosive outbursts, his disregard for the consequences of his actions and the impact on others, his high risk conduct, poor impulse control, and absence of self-regulation. She also established that the services available in a RTC setting would appropriately address Student's needs, such as group, individual, and family therapy, as well as medical coordination and case management. She further testified that even though there was not a consensus of opinion between her and Student's long-time psychiatrist and psychologist about the appropriate type of placement, based upon her discussions with Drs. Najeeb and Manetta, there was consensus that Student required more structure and 24/7 supervision than could be provided at Rossier or by Parents at home.

81. Furthermore, District's own behavior and Psychoeducational assessments support Dr. Washington's finding. Specifically, the District's FAA concluded that based upon the Student, teacher, and Parent interviews, as well as the review of records, Student's maladaptive behaviors were driven by a need to protest an event, when his peers threatened or challenged him, when he was in a brooding mood, and when involved in less structured activities such as passing period, lunch or during transport, when student interaction increased. The report noted that, overall, Student was a social student, but had difficulty knowing when his behavior had gone too far, or when to seek staff assistance instead of escalating to physical aggression. In addition, Ms. Stokman's statements to the IEP team established she was concerned about Student's on-campus conduct.

Though she reported that Student had improved in his willingness to participate in counseling sessions, she observed Student still lacked impulse control and showed no guilt or remorse for his conduct. Ms. Stokman had also concluded in a discussion with Student that a RTC placement might be required to address Student's escalating violent behavior.

82. The evidence also showed, through the reports of Dr. Manetta and Dr. Najeeb to Dr. Washington, that Rossier was no longer an appropriate educational setting for Student, and that Student required structure on a 24/7 basis, more than either Rossier could provide at school or Parents could provide at home, given Student's symptoms of severe mood disorder. In addition, Dr. Manetta reported to Dr. Washington that her observations of Student indicated his behavior had worsened since his enrollment at Rossier, which warranted his removal and placement in a more structured placement. Although Dr. Manetta did not recommend RTC at the time of her report to Dr. Washington, she supported the DMH assessment recommendation at the November 7-8, 2011 IEP meeting due to Student's escalating violent behavior, and her concern that Student's other behaviors such as trading, selling, and stealing at school were not stopping.

83. However, contrary to the above evidence, District asserts that it provided a FAPE because Student did well academically at Rossier and therefore received educational benefit. District further asserts that with respect to his behavior in the school setting, he was showing some improvement through the counseling service it provided. District also argues that Student's emotional outbursts and acts of violence were manifested more in the home setting than in school, and therefore outside of the educational setting. District's argument is not supported by the evidence. Specifically, the evidence established that Student

was not receiving educational benefit at Rossier, because counseling services at Rossier failed to meet his mental health, social and emotional needs. Dr. Washington persuasively testified that the minimal treatment Student received at Rossier to address his behaviors, such as restraining Student, and limited counseling services (i.e., no intensive group or family therapy, or medical management), had not helped to improve Student's social and emotional functioning. Moreover the District witness' testimony that NPS placement was appropriate as Student was making progress academically and behaviorally such that he received educational benefit was not credible. In fact, the evidence showed that Student's behaviors escalated. Dr. Washington persuasively opined that Student required a more intensive therapeutic program and medical management available only in a RTC. As of the date of the hearing, California's regulations still contained a provision stating that the placement recommendation of a DMH assessor was to be construed as the recommendation of the IEP team. (See Legal Conclusion 82 .) However, here, even without that regulation, the recommendation of District's assessor Dr. Washington was more persuasive than the testimony of other District members of the IEP team who did not have Dr. Washington's experience and judgment regarding RTC placements.

84. Given all of the above factors, District should have followed DMH's recommendations and offered Student an RTC placement as of November 7-8, 2011 in order to provide a FAPE. Consequently, Student has met his burden by a preponderance of the evidence on this issue. (Factual Findings 1 through 84; Legal Conclusions 1 and 4 through 89.) Whether Student is entitled to a remedy on this issue is discussed separately, below.

## REMEDY

85. As a remedy, Student is requesting that OAH order (1) independent educational evaluations for mental health and CAPD; (2) one hour a week each of group counseling, individual counseling, and family counseling provided a nonpublic agency (NPA); (3) resource support program (RSP) by a one-to-one instructor for six hours per day for remedial instruction for 10 weeks of the 2012 ESY; (4) 10 minutes per day of keyboarding instruction; (5) a BIP; and (6) placement in a RTC of Parents' choice. However, Student presented no evidence that would support reimbursement or compensatory education for the time period at issue. District's position is that Student should take nothing from his claims because District provided Student a FAPE. As discussed below, because Student prevailed on Issue Two (i) only, and did not present evidence supporting reimbursement or compensatory education, the remedy analysis will focus on implementation of the recommended RTC placement.

86. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education



services the school district should have supplied in the first place.” (*Ibid.*) Relief may be provided even though the student is no longer eligible for special education services. (*Capistrano Unified School District v. Wartenburg* (9th Cir. 1995) 59 F.3d 884, 890; *Student W. v. Puyallup School Dist.*, *supra*, 31 F.3d 1496.)

87. Here, although District denied Student a FAPE by failing to offer RTC placement and services, the remedy of placement in an RTC is not available to Student at this time. While this matter was pending, Student was arrested and detained at Los Padrinos Juvenile Hall in April 2012. Although no evidence was presented concerning Student’s actual disposition at the time of the hearing, it is the undersigned ALJ’s understanding that Student was still in detention as of the date of the hearing and was awaiting disposition of the juvenile delinquency petition under which he was being held. Accordingly, any decision about whether Student can be released for purposes of enrolling in an RTC is solely within the jurisdiction of the Los Angeles County Juvenile Court. Under no circumstances could OAH render an order that would supercede a probation or disposition order from the Superior Court.

88. Further, District is no longer Student’s LEA during the time Student is being held in Juvenile Hall. In California, a county office of education is responsible for the provision of a FAPE to individuals who are confined in juvenile hall schools within that county. (Ed. Code, §§ 48645.1, 48645.2, 56150.) Thus, during the time Student is held in Juvenile Hall, the Los Angeles County Office of Education (LACOE) would be responsible for providing Student a FAPE, and LACOE was not named by Student as a party to this action. Under these circumstances, the ALJ cannot order that Student be immediately placed in an RTC, nor was a specific appropriate RTC identified at hearing. However, under the facts presented at hearing, an award that District place Student in an RTC is

appropriate, as this is what should have happened following the November 7-8, 2011 IEP team meeting.

89. Accordingly, if Student is released by the juvenile court, and in the juvenile court's discretion, RTC placement is part of the disposition or probation order, and Student is still a resident of the District at time of release, District shall use its designated mental health service provider, such as DMH, to identify the appropriate RTC placement. If the above conditions are met, District shall fund the RTC placement and services recommended by DMH as of the November 7-8, 2011 IEP team meetings, until such time as the placement is changed by the IEP process, OAH order, or Superior Court order.

## ORDER

1. Should the Juvenile Court, in its sole discretion, decide that Student's release to an RTC is part of a suitable disposition to the delinquency proceedings, and Student has remained a resident of District at the time of the Juvenile Court's disposition order, then District shall be required to arrange for, and fund, an RTC placement and the counseling services recommended by DMH as of the November 7-8, 2011 IEP team meetings.

2. Within 45 days of a disposition or probation order by the Juvenile Court that includes release to home or an RTC placement, District shall use its contracted mental health service provider to locate an appropriate RTC placement that is consistent with DMH's recommendations, the Juvenile Court's disposition order, and California education law. District shall be financially responsible for the cost of Student's attendance at the RTC, and shall enter any necessary contracts required.

3. District shall also be financially responsible for providing Student with transportation to the RTC, parent visits to the RTC in a frequency and

reimbursement amount consistent with District guidelines, and the provision of all counseling and services recommended by DMH as of the November 7-8, 2012 IEP team meeting.

4. Should Student be placed in an RTC at District's expense, as described above, District shall continue to fund the placement until such time as it is changed by the IEP process, OAH order, Superior Court order, or Student is no longer legally a resident of District.

5. All of Student's other requests for relief are denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issue Two (i). District prevailed on all other issues.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: August 3, 2012

/s/

STELLA OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings