BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. LUCIA MAR UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2011120452
LUCIA MAR UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2012030796

CORRECTED DECISION[1]

Administrative Law Judge (ALJ) Rebecca Freie, from the Office of Administrative Hearings (OAH), State of California, heard this matter on May 29 through 31, 2012, June 4 through 7, 2012, and June 21 through 22, 2012, in Arroyo Grande, California.

Attorney Andrea Marcus represented Student. She was assisted by paralegal, Anne Zachry. Mother was present for much of the hearing, as was Student's maternal grandmother (Grandmother). However, there were times when neither was present, or

[1] The first corrected decision changed the caption of the case to reflect the District's name as Lucia Mar Unified School District, rather than Arroyo Grande Unified District. However, the body of the Decision was not changed to reflect the correct name of the District, which is now being done.

only one was present. Student did not attend the hearing. Spanish interpreter services were provided by either Richard Cox or Jonathon Graham when Grandmother was present.[2]

Attorney Peter Sansom represented Lucia Mar Unified School District (District). Director of Student Services Don Dennison and Coordinator of Special Education Tisha Quam, were present throughout the hearing as the District's representatives.

On December 14, 2011, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH). On January 18, 2012, OAH granted the parties' joint request for a continuance. On March 19, 2012, the District filed its own complaint, and on March 29, 2012, OAH consolidated the cases, and ordered that hearing timelines be based on the filing of Student's complaint.

At hearing, oral and documentary evidence were received. The matter was then continued to July 10, 2012, to permit the parties to submit written closing arguments. The record was closed on July 10, 2012, upon receipt of the closing arguments, and the matter was submitted for decision.[3]

[2] Mother stated at the beginning of the hearing that she did not need an interpreter for the due process hearing. However, she did consult with the interpreter about the Spanish word for "fidgety" when she was testifying.

[3] For the record, Student's closing argument is designated as Student's Exhibit S-49, and the District's closing argument is designated as District's Exhibit D-53.

ISSUES[4]

STUDENT'S ISSUES:

1. Did the District deny Student a free appropriate public education (FAPE) from August 18, 2011 to the present because it failed to adequately implement the supports and services for Student's behavioral difficulties in conformity with Student's individualized education program (IEP) of January 18, 2011, as amended; and

2. Did the District deny Student a FAPE from August 18, 2011 to the present because it failed to fade Student into a general education classroom, in conformity with the IEP of January 18, 2011, as amended, and instead withdrew him from that environment, and thus failed to provide Student a program in the least restrictive environment (LRE)?

Student's Proposed Resolutions

a. Reimburse Mother for the costs already incurred for private placement;

b. Provide Student with behavior support in his private school placement that consists of a one-to-one aide trained in Applied Behavior Analysis (ABA) behavior support, supervised by a non-public agency (NPA) other than Autism Partnership, that provides autism behavior support and is chosen by Mother.

[4] The issues have been renumbered and slightly reworded from the Order Following Prehearing Conference (PHC) for clarity of this decision by the ALJ. No substantive changes were made. At Student's request at the beginning of the hearing, a proposed resolution that the District prospectively pay for placement in a private school was eliminated. The proposed resolution for the District was reworded for clarity.

c. Provide Student with compensatory education in the form of 50 hours of one-to-one tutoring by a credentialed teacher or speech pathologist, assisted by Student's aide, and 50 hours of counseling from a private child psychologist.

DISTRICT'S ISSUE:

Is the District's IEP offer of February 3, 2012, an offer of a FAPE in the LRE?

District's Proposed Resolution

The District seeks an order that its IEP of February 3, 2012, offered Student a FAPE in the LRE and that it may implement its IEP offer without parental permission, should Student return to the District as a student.[5]

PROCEDURAL MATTERS

EVIDENTIARY MATTER

During the hearing, Student attempted to introduce evidence of events occurring prior to January 13, 2011, the date the parties signed a settlement agreement resolving all issues raised in a previous complaint from Student, OAH Case No. 2010100527. That settlement agreement was admitted into evidence and contains a waiver of any and all claims Student might have had against the District prior to the signing of the settlement agreement. Accordingly, testimony concerning any events prior to the signing of the settlement agreement was not heard, nor were documents related to and dated prior to the date of execution admitted into evidence. Rulings regarding this proposed testimony and documentary evidence were made on the record, and Student's

[5] At the time of the due process hearing Student was attending a private school outside the boundaries of the District.

exceptions to those rulings noted for the record. These documents were marked for identification, and remain in the evidence binder but were not reviewed by this ALJ.[6]

MOTION TO STRIKE

The parties were permitted to submit written closing arguments with a page limit of 25. Student added two additional pages at the end of his 25 page closing argument, calling it an appendix. The appendix purports to summarize Student's progress on his goals as reported at the February 3, 2012 IEP team meeting, and also contains comments regarding that progress that appear to be the opinion of his attorney. The District has filed a motion to strike the appendix. Because Student did not ask leave to exceed the 25 page limit, and the addition of the appendix appears to be an attempt to do so, the District's motion to strike is granted.

MOTION FOR SANCTIONS

An ALJ is authorized to issue sanctions to shift expenses to a party acting in bad faith, or using tactics that are frivolous or solely intended to cause unnecessary delay to the other party and/or their attorneys. (Gov. Code, § 11455.30; Code Civ. Proc., § 128.5.) Sanctions may include reasonable attorneys' fees and expenses. (*Ibid.*) The authority of an ALJ to shift expenses in special education matters is further supported by the California Code of Regulations, title 5, section 3088.

A comprehensive discussion of the grounds for sanctions under Code of Civil Procedure section 128.5 is set forth in *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635-637.

[6] Although the documents might have had some marginal value in providing additional information about Student, this ALJ also determined that the probative value of these 130 pages was outweighed by the time it would take to review them. (Govt. Code § 11513, subd. (f); Evid. Code § 352.)

A trial court may impose sanctions under Code of Civil Procedure section 128.5 against a party, a party's attorney, or both, for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." A bad faith action or tactic is frivolous if it is "totally and completely without merit" or if it is instituted "for the sole purpose of harassing an opposing party." (*Id.*, subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: Whether any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose; i.e., subjective bad faith on the part of the attorney or party to be sanctioned. An improper purpose may be inferred from the circumstances. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

An ALJ conducting a special education due process hearing may not initiate contempt sanctions against a party, witness or counsel, without obtaining approval from the General Counsel of the California Department of Education. (Cal. Code Regs., tit. 5, § 3088, subd. (c).)

At the heart of Student's case is an incident that occurred on October 21, 2011, at the District's Dana Elementary School (Dana) that involved Student; his then instructional assistant (IA), Rianna Martinez; Megan Piatt, a special day class (SDC) teacher; and Jacqueline Williams, a District autism behavior specialist (ABS). On June 5, 2012, Ms. Martinez arrived at the District's Student Services offices to testify in the instant due process hearing. She had been subpoenaed by Student. According to the Declarations submitted by Ms. Martinez, Ms. Marcus, Ms. Zachry, and Mr. Sansom, when Ms. Marcus asked Ms. Martinez if she could speak to her during a recess prior to Ms. Martinez testifying, Mr. Sansom told Ms. Martinez that she was not obligated to speak to Ms. Marcus, and then added that if she did so it was "at [her] own peril." Ms. Martinez then told Ms. Marcus that she would not step outside to speak to her, and would wait until she testified.

When the hearing resumed on the record and Ms. Martinez was sworn in by this ALJ, Ms. Marcus proceeded to question her about the incident that had just occurred outside the hearing room, and asked the ALJ to order Mr. Sansom to pay fifty dollars as a sanction for intentionally "intimidating" a witness. Ms. Marcus also stated that she believed the remark "at your own peril" would compromise the witness's testimony. The ALJ advised Ms. Marcus that she could not impose contempt sanctions without express permission from CDE, and told Mr. Sansom that his comment was inappropriate. Ms. Martinez acknowledged, in response to questioning by Mr. Sansom, that she had met with him the previous afternoon to discuss her testimony. Ms. Martinez is no longer an employee of the District.

After the witness finished her testimony and left the hearing room, Mr. Sansom asked to be heard and explained that he had made his remark because he was aware that Ms. Marcus had filed a Government Torts Act claim against the District, and had named Ms. Martinez in the claim. Thus, he felt he had an obligation to let her know that she was not required to speak to Ms. Marcus before she testified. The ALJ again advised Mr. Sansom that his remark was inappropriate, but mitigated somewhat by his explanation. Ms. Marcus stated that because the area is small and rural, and Ms. Martinez continues to pursue a career in teaching, her testimony might have been affected by Mr. Sansom's comment.

Ms. Marcus filed her Motion for Sanctions of Reasonable Expenses as a Result of Bad Faith Misconduct (motion for sanctions) and supporting declarations contemporaneously with Student's closing argument. She persists in her belief that Ms. Martinez's testimony was compromised by Mr. Sansom's remarks and asks that Mr. Sansom be ordered to pay costs in the amount of $1,560.00, which include Ms. Marcus's time for preparing the subpoena and locating Ms. Martinez, Ms. Zachry's time and travel to personally serve Ms. Martinez, the time of Ms. Marcus's and Ms. Zachry's participation

in the hearing when Ms. Martinez testified (claiming that this "participation was rendered useless by threat by Mr. Sansom"), and the time Ms. Marcus and Ms. Zachry took to prepare the motion for sanctions.

The ALJ sat less than six feet from away from the witness and heard her and observed her demeanor when she testified. Ms. Martinez was clear and straightforward as she responded to questioning. She testified to the best of her recollection, and gave absolutely no appearance of being deceptive or fearful. Mr. Sansom's explanation following her testimony and the declaration he has filed with his opposition to the motion for sanctions are given great weight.

Ms. Marcus also claims, in her motion, that Mr. Sansom violated California Rule of Professional conduct 3-310 (C)(1) by meeting with Ms. Martinez the day prior to her testimony, quoting at length a passage from *Miller v. Alagna* (C.D. Cal. 2000) 138 F.Supp. 2d 1252, 1255-58. This ALJ has carefully reviewed the cited case, and the declarations of all parties.[7] The cited case concerns a matter of alleged police misconduct where a law firm, retained to represent the public entity in tort litigation filed against the public entity and law enforcement officers, interviewed the officers without informing them that they had a right to their own legal counsel. The court found that there was a potential conflict of interest in the law firm representing both the officers and the public entity. Ms. Marcus intimates that Mr. Sansom may have such a conflict of interest. However, based on the information provided by the parties both on and off the record,

[7] This ALJ reviewed the cited case and the record in this matter, including the declarations submitted in support of and opposition to Student's motion for sanctions because Canon 3-D(2) of the Code of Judicial Ethics requires a bench officer to report any attorney's breach of the Rules of Professional Conduct to the California State Bar Association.

there is no evidence that Mr. Sansom is involved in any litigation on behalf of the District other than special education matters which are confidential. (34 CFR § 300.610 *et seq.* (2006).) If Ms. Marcus believes that Mr. Sansom has violated any Rule of Professional Conduct, she should file her own complaint with the California State Bar Association. Student's motion for sanctions is denied.

CONTENTIONS

Student contends that the District failed to properly implement his BIP, which became part of his IEP on June 8, 2011. As a result, Student claims he did not receive a FAPE when the 2011-2012 school year (SY) began on August 18, 2011, and thereafter. In addition, it is undisputed that there was an incident on October 21, 2011, in which District staff physically restrained Student, and he was subsequently handcuffed by a San Luis Obispo County sheriff's deputy for a few minutes. As a result, Mother refused to return him to school, and Student alleges that he was thus denied a FAPE after that incident.

Student claims that an IEP of January 18, 2011, provided for him to be transitioned from special education classes into a general education setting, and the District failed to provide services to enable him to be placed in that LRE. He also contends that the District is now offering him placement and services at the same school where the incident of October 21, 2011, occurred, and due to the trauma he suffered, he will not benefit from placement at this school. The District made this placement offer following an IEP team meeting on February 3, 2012. Student also claims that this placement offer is nearly identical to an IEP amendment dated October 18, 2011, that placed him at that school, and therefore denies him a FAPE. Student seeks compensatory education in the form of counseling and tutoring services, and one-to-one behavioral aide services provided by an NPA of Mother's choice in the parochial school he now attends.

The District contends that it did everything it could to appropriately implement the BIP, but Student's escalating behaviors posed a danger to himself and others, which led to his restraint and the subsequent events on October 21, 2012. The District argues that many possible factors may have led to Student's escalating behaviors following the start of the 2011-2012 SY, but it was attempting to make modifications in various parts of the BIP to make it more effective. The District denies that there was any provision in either the settlement agreement executed on January 13, 2011, or the subsequent IEP dated January 18, 2011, that incorporated the terms of the settlement agreement, that called for him to spend increasing time in the general education environment. The District believes that Student requires placement in an SDC with behavioral interventions, combined with mainstreaming in the general education setting, which is what it is offering in the IEP of February 3, 2012, to which Mother refuses to provide written consent.

In this Decision, this ALJ evaluates the evidence in light of the parties' contentions, the testimony of witnesses and evidence admitted in the due process hearing, and her legal analysis, and finds that Student failed to meet his burden of persuasion on the issues he presented for decision, and the District met its burden of persuasion on the sole issue it asked to be decided.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is presently nine years of age, and has resided with Mother within the boundaries of the District since May 2005. He is eligible for special education as a child with autistic-like behaviors and also has a specific learning disability and speech and language impairment. Student is a client of Tri-Counties Regional Center (Tri-Counties).

FAILURE TO IMPLEMENT THE BIP [8]

2. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. Student contends that after August 18, 2011, the District denied him a FAPE because it did not properly implement the BIP in place when 2011-2012 school year (SY) began on August 18, 2011, which is included in an IEP originally developed on January 18, 2011, and subsequently amended several times, including June 8, 2011, when the BIP was added.

Provision of a FAPE

3. Under both the Individuals with Disabilities Education Improvement Act (IDEA) and State law, students with disabilities have the right to a FAPE. A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, which meet the state educational standards, and conform to the student's IEP. The IDEA does not require school districts to provide special education students the best education available, nor to provide instruction or services that maximize a student's abilities. A student with special needs receives a FAPE when he receives special education and related services that meet his unique needs and he receives educational benefit.

Behavioral Interventions

4. There are many behaviors that will impede a child's learning, or that of others. These behaviors require the IEP team to consider and, if necessary, develop a

[8] In the District, a BIP is often referred to as a PBIP: positive behavior intervention plan. In this Decision it will be referred to generically as a BIP.

behavior support plan (BSP). A proper BSP will identify the antecedents of the behavior one is seeking to change, and formulate a plan of action to be taken to prevent the behavior, or change the behavior to that which is desired, usually with a description of positive reinforcement that is to be given when the desired behavior is demonstrated. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE.

5. For a student with more serious behavior problems that impede a child's learning or that of others, a school district is required to conduct a functional analysis assessment (FAA), and if warranted, develop a BIP. California regulations provide detailed criteria that govern the contents of an FAA and a BIP.

2010-2011 SY at Dorothea Lange Elementary School (Lange)

6. Historically, Student had received home behavioral services through Tri-Counties for toilet training and when he first came to the District 2005, Student was having at least one tantrum each hour, during which he would fall to the floor, scream, throw things or try to run away.

7. Student's problematic behaviors now include noncompliance, outbursts (such as pushing things off his desk and verbal aggression), and physical aggression. Student's first BSP was developed on December 19, 2007, and since then, he has had either a BSP or BIP included in his IEP. It was unclear when Student began to have a one-to-one aide, also known as an instructional aide (IA). Each BSP addressed verbally and physically aggressive behaviors, and in December 2008, noncompliance was added as another behavior to be addressed

8. Student's cognitive level is in the average to above average range. However, because he was behind academically, he was repeating second grade for the 2010-2011 SY at Nipomo Elementary School (Nipomo), where he attended a special day class (SDC) for most of the day, and a general education class for the last part of the

day. Because Student's birthday is late in the calendar year, he was probably not significantly older than some of his classmates.

9. Student filed a complaint with OAH in October 2010, and the parties executed a settlement agreement on January 13, 2011. Pursuant to that agreement, an IEP team meeting was held on January 18, 2011, to develop an IEP for Student that conformed to the terms of the settlement agreement.

10. The January 18, 2012 IEP, contained 12 goals. Most addressed academic deficits, but at least three addressed behavioral issues directly. The IEP called for Student to be placed in a general education program for all but 115 minutes each day, at which time he would be in a special education classroom with a credentialed special education teacher, commonly referred to as a resource specialist program (RSP) classroom.[9] Student was to be provided with a full-time IA, five 25-minute sessions of speech and language services each month, and 30 minutes of occupational therapy (OT) each week, to be provided collaboratively with staff. A BSP was part of the IEP. The IEP specifically placed Student at Lange, his neighborhood school, pursuant to the settlement agreement.

11. Pursuant to the settlement agreement, and written into the IEP, the District was obligated to provide Student's IA with 25 hours of training, at least six of which would be provided by an NPA employee with a master's degree.[10] The remainder of the

[9] The settlement agreement called for 128 minutes each day in the RSP classroom, but also designated that Student would spend 60 percent of the day in a general education classroom, and 40 percent of the day in the RSP classroom.

[10] Brenda Parker had served as Student's IA since September 9, 2009, and would continue to serve as his IA for the remainder of the 2010-2011 SY. When Ms. Parker took breaks or was absent, IA's from the RSP classroom, who had also been trained to

training was to be provided by a District ABS, with a master's degree. This training was to be provided within 10 school days after Student began attending Lange. The ABS and NPA supervisor were also obligated to provide, respectively, three hours each week and six hours per month additional IA training during the following month. Thereafter, the ABS was to provide ongoing IA training for 60 minutes each week, and the NPA supervisor was to provide one hour of supervision and training each month. Team meetings were to be held monthly and include Mother, Student's teachers, and District service providers.

12. A new BSP for Student was developed at the IEP meeting on January 18, 2011, based on his maladaptive behavior at Nipomo. Behaviors targeted in the January 2011 BSP were noncompliance and physical and verbal aggression. These behaviors manifested themselves as screaming; crying; throwing objects such as desks and chairs; knocking things over, or sweeping objects off tables or shelves; disrupting class by giggling; falling off his chair; and hitting and kicking other students, and staff when they tried to intervene. These incidents occurred two to five times each school day at Nipomo, with each incident lasting as long as 15 to 30 minutes. In earlier school years, Student would try to run from his classroom, or away from staff, a behavior referred to as elopement.

13. The January 2011 BSP contained appropriate replacement behaviors, such as asking for a break, and a systematic reinforcement schedule, in which he received coins for using appropriate replacement behaviors. Student was able to "cash-out" the coins periodically to purchase items such as toys, or to be able to engage in a preferred

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implement Student's BSP, would replace her. Ms. Parker was the IA who received the training as specified in both the settlement agreement, and the IEP.

activity. Stress management skills were to be specifically taught, and the IA was given reactive strategies to use when Student's maladaptive behaviors began to escalate.

14. Mother consented to the IEP in its entirety on January 18, 2011. On January 25, 2011, Student began attending Lange. Initially he was reported to do well in both his general education and RSP classrooms.

15. Training of the IA was provided by Jacqueline Williams, an ABS with the District who has provided ABS services to Student since September 2009.[11] Autism Partnership was the NPA the District contracted with to provide consultation services. Stephanie Dale of Autism Partnership was the consultant assigned to Student's case.[12]

16. In February 2011, the District began collecting data pursuant to Student's BSP.[13] Each day a sheet called a Daily Communication Log was to be completed by the

[11] Ms. Williams graduated with a bachelor's degree from University of California, Santa Barbara, and obtained her master's degree in education from the same institution in 2009. She has obtained ongoing training from an NPA in the area of ABA, and has completed coursework to become a Board Certified Behavior Analyst (BCBA). She has a special education teaching credential and has been employed by the District since the beginning of the 2009-2010 SY.

[12] Ms. Dale has been employed by Autism Partnership since 2002 and her current position is Behavior Consultant. She graduated from the University of Colorado at Boulder in 2001 with a bachelor's degree in psychology, and received her master's degree in ABA in 2008. She received her BCBA certification May 31, 2011.

[13] Although data collection is not required as part of a BSP, part of the documentary evidence reviewed by this ALJ were data collection sheets and logs completed by IA's who worked with Student. It appears that data collection did not

IA and sent home to Mother. There were other data collection sheets as well, although it does not appear that there are data collection sheets for each day of school attended. However, the Cash-out Log was recorded daily, as was the Daily Communication Log. The combination of data sheets and logs for the 2010-2011 SY when Student was at Lange accurately confirm the testimony of District personnel that Student exhibited much better behavior at Lange for the remainder of the school year than he had at Nipomo, although his behavior began to deteriorate in May 2011. There was only one incident where Student was restrained during that period, February 10, 2011, when he shoved a teacher and hit and kicked his IA.[14]

17. On February 24, 2011, another IEP team meeting was held. Student was reported to be doing well, although his time in the general education classroom tended to be more problematic than his time in the RSP classroom. However, personnel who had also worked with Student at Nipomo were extremely pleased at how well he was doing.

18. Pursuant to the settlement agreement, the District contracted with Randall Ball to assess Student and prepare an FAA report.[15] In conducting the assessment, Dr.

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begin until early February 2011, as the first dated document, a Cash-out Log, begins on February 1, 2011.

[14] Mother testified that Student was restrained more than once during this period at Lange, but she gave no specific examples, and this testimony was not supported by the evidence.

[15] Dr. Ball received his bachelor's degree from California Polytechnic State University (Cal-Poly) in 1975 with a major in social science. He received his master's degree from Cal-Poly in 1977 with a major in counseling and an emphasis in developmental psychology. He received his doctorate in education (Ed.D.) in counseling

Ball interviewed Mother, Student's teachers, Ms. Parker, Mr. Dennison, Ms. Williams, and the school psychologist. He also reviewed school records and other assessments of Student, including psychological, medical and behavioral records provided by Tri-Counties. Mother and teachers completed a form provided to them by Dr. Ball. In addition, Dr. Ball observed Student on March 8, 10, 11 and 14, 2011. He made these observations in a variety of school settings, and each observation lasted one to two hours. Dr. Ball also reviewed Student's then current IEP, and then current and prior BSP's, as well as the data collected by the District concerning Student's behavior before, during and after the assessment.

19. The FAA authored by Dr. Ball described the behaviors targeted by the FAA, generally referred to as noncompliance to teacher instructions, outbursts, and physical aggression. It described in great detail specific manifestations of each behavior. For example, outbursts included both loud, vocal behaviors, or physical behaviors that were disruptive, such as overturning furniture, or throwing objects to the ground but not at others. Physical aggression included hitting or kicking others, throwing an object at another person, or pushing another person.[16]

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and educational psychology from the University of San Francisco in 1988. Dr. Ball has been licensed as a Marriage and Family therapist (LMFT) since 1988. He is also certified as a BCBA. Dr. Ball has been in private practice since 1990, specializing in evaluations of individuals with psychological and developmental disabilities. He has worked as a behavior consultant or behavior analyst for many San Luis Obispo County public and private agencies and schools since 1977.

[16] Some children on the autism spectrum exhibit this type of behavior, and it is related to the disorder.

20. The FAA describes positive "functionally equivalent replacement behaviors" (FERB's) for the targeted behaviors with specific examples. These are generally communication of needs or concerns, such as asking for help, or use of a coping strategy such as counting or taking a break. The FAA also described 15 "setting events" or environmental antecedents to the targeted behaviors, which might predict a maladaptive behavior surfacing and escalation, such as Student feeling a task is too difficult or boring, having a substitute teacher or IA, or losing a competitive game. It then described 13 behavioral antecedents, i.e., signs that Student might exhibit a maladaptive behavior that could escalate, such as Student verbalizing "Aw, come on!," pushing work off his desk, refusing to take a break when offered, or becoming teary and crying. The FAA described the antecedents and functions for the three targeted behaviors. Finally, the FAA described possible reinforcers for exhibitions of positive behaviors and FERB's. The evidence established that the effectiveness of reinforcers waxed and waned, and it was necessary to frequently observe which reinforcers were currently effective, and replace those that were not with new reinforcers after the ABS talked to Student, Mother, and other District staff.

21. The FAA concluded with a summary, and specific recommendations, which included a recommendation that a BIP be developed, based on the then-current BSP. Dr. Ball noted that Student was doing very well at Lange, but based on his behaviors at Nipomo, giving him a BIP would be the best method of ensuring that his behavior did not deteriorate at Lange to the level of his behaviors at Nipomo.

22. An IEP team meeting was held on March 31, 2012, to review Dr. Ball's report. A new goal was added concerning "attending," or paying attention, during large group instruction. Ms. Williams, Ms. Dale, and Dr. Ball then collaborated during the next few weeks on the development of a BIP based on the FAA and many of the strategies in the current BSP.

23. On June 8, 2011, the IEP team met to review the proposed BIP developed by the District in consultation with Dr. Ball. The record reflects that the IEP team, including Mother and her advocate, went through the proposed BIP "word by word." Changes were made in a few sections, and three new goals were added; one goal was in the area of outbursts, another in the area of physical aggression, and the third in the area of communicating needs. Mother agreed to the new goals and the BIP as amended during the June 8, 2011 IEP team meeting. The BIP incorporated the FAA by reference.

24. Pursuant to his January 18, 2011 IEP, Student was to attend extended school year (ESY) during the summer of 2011. There were two programs, one called Social Academy for ESY, a program specifically for children with social skills deficits—common for children on the autism spectrum—and another program called the Extended Autism Program (EAP) followed to ensure that students on the autism spectrum did not go more than two consecutive weeks without services.[17] Although the end of the school year was June 10, 2011, Mother did not inform the IEP team on June 8, 2011, that Student would not attend either program.[18] Instead she enrolled him in a

[17] ESY is included in a student's IEP when it is felt that the child will regress if he goes without services for the summer break, or its equivalent. However, there is no legal requirement that a child attend ESY, or any other program outside the regular school year.

[18] Mother testified that she was told by Ms. Williams not to send Student to ESY, but this testimony was persuasively rebutted by Ms. Williams and others. In his closing argument Student claims that District staff, including the RSP teacher, Barbara Frasher, told Mother that Student "needed a break," and therefore should not attend ESY, and claims that Ms. Frasher so testified. However, what Ms. Frasher testified was that in her opinion Student "needed a break from school," but not that she told Mother that.

private judo program, and obtained private academic tutoring for him. ESY would have been an optimal time to initiate the BIP in an environment where Student could gradually adjust to the BIP without the additional stressor of being in a general education environment.

2011-2012 SY at Lange

25. The 2011-2012 SY began August 18, 2011. Ms. Parker was no longer available to be Student's IA. The District hired Rianna Martinez to be Student's IA. Ms. Martinez had not previously been employed by the District in any capacity, and had no previous experience working as an IA. She had a bachelor's degree from University of California, Santa Barbara, and was working on her master's degree in education at the University of Phoenix. She anticipates receiving her secondary teaching credential in the near future.

26. On the first day of school, or possibly the day before, Ms. Williams introduced Ms. Martinez to Student, and the new BIP was explained to him. Ms. Williams initially worked as Student's IA for the first day or two, shadowed by Ms. Martinez. Following this modeling by Ms. Williams, Ms. Martinez gradually assumed those duties, under the close supervision of Ms. Williams. Following that first week, Ms. Williams allowed Ms. Martinez to act as Student's IA, although Ms. Williams visited the school at least twice a week to observe how Ms. Martinez was doing, and to provide additional training, spending anywhere from an hour or two with Ms. Martinez and Student, up to an entire day. Ms. Williams was also available by telephone when Ms. Martinez had questions. In fact, the evidence established that Ms. Martinez, as a newly assigned IA for Student, received the same training outlined in Factual Finding 11 above, and more.

27. Student had the same RSP teacher from the previous year, Ms. Frasher, and she had at least two IA's who had worked with Student the previous school year when Ms. Parker took a break or was absent. For the general education portion of the

day, Student had a new teacher, Katie Langley.[19] Ms. Langley taught third grade, and had not taught Student before. There were more children in this class than had been in Student's general education class at Lange during the 2010-2011 SY.

28. There were some changes with the BIP, compared to the BSP from the previous school year. First, instead of receiving coins throughout the day, which Student would put in a "treasure chest" and could use at the end of the day to purchase toys and other desirable items as reinforcement for positive behaviors, the IA now kept a tally sheet. Several times a day Student would be shown what he had earned so far, and did not have to wait until the end of the day to cash-out. Additionally, a "cost-response" was part of the BIP, which called for Student to lose tally points and or preferred items or activities, such as recess, as a consequence for extreme maladaptive behaviors. However, Mother objected to this concept, particularly Student losing recess, so that did not occur initially.

29. The first few days of school went relatively smoothly, although it was observed that Student was having a difficult time transitioning back in to the classroom after lunch. He tended to disrupt the class by giggling and making farting sounds.

30. On August 26, 2011, Student had to be restrained. When he returned from lunch, he was making noises and being noncompliant, so he was asked to step outside to take a break. Once outside he kicked and broke the bucket holding playground balls, broke off branches from a bush, and threw them and rocks at the classroom window. Student broke a ceramic dish, and also scratched the window with the objects he threw. He also hit and kicked staff on this date. Similar incidents occurred more than once after August 26, 2011, until Student left Lange on September 23, 2011, although Student required restraint on only one other occasion.

[19] Ms. Langley has a teaching credential and has taught for five years.

31. Although Dr. Ball had told the participants at both the March 31 and June 8, 2011 IEP team meetings that an escalation in Student's targeted behaviors could be expected when the BIP was initially put into use (sometimes called an extinction burst), Student's entire demeanor had changed over the summer break. Ms. Frasher testified that it was as though an entirely different Student had returned to school in August. Whereas Student had verbally complained at times in the past when given a nonpreferred task, he was now loudly, rudely, and defiantly refusing to do the task. At times he told staff, "You can't make me do it," and "I'll tell my mom and she'll have my lawyer sue you."

32. There were several incidents where Student became violent both within and outside the classroom. On September 20, 2011, Student was again restrained. The next day, Mother came to school to observe Student, leaving with him between 1:00 and 2:00 in the afternoon. On September 22, 2011, the following behavior was described: tearing papers, ripping materials from the NPA behavior consultant, kicking a table, banging on a desk, ripping the cover off a library book, dropping a chair, knocking over the backpack rack, kicking the backpacks of other students, kicking bushes, throwing a ball at the classroom window, punching the window with his fist and elbow, throwing balls and a jump-rope over the fence, kicking over potted flowers and plants, and punching the IA in the back. On some occasions, Student would rip up papers, including the tally sheet that was used to keep track of his behavior, and break pens and pencils. On several occasions, Student was violent towards staff, hitting and kicking them, and shoving them.

33. During the 2010-2011 SY at Lange, Student had several friends whom he played with at recess. Although there were a few reported incidents of verbal conflict with classmates that school year, there were only two or three incidents of physical conflict between Student and classmates, and in each incident Student was the

aggressor. Following the beginning of the 2011-2012 SY at Lange, Student was physically and verbally intimidating his classmates, calling them names, and threatening to punch them. Because Student was much larger than his classmates, they became very fearful of him.[20] Sometimes when Student "took a break" and left the classroom with his IA, Ms. Langley would lock the door and Student would try to come back in, throw things at the door and window, and shout and yell. Ms. Langley testified that children inside were very frightened when these outbursts occurred, and edgy when Student had calmed himself and returned to the classroom. Ms. Langley lost at least four to five hours of instructional time in her class between August 18 and September 23, 2011, due to Student's maladaptive behaviors, and the effect on the other students.

34. During those first few weeks of the 2011-2012 SY, both Ms. Dale and Dr. Ball came to observe Student, and witnessed some of these behaviors. By the week of September 19, 2011, Student was refusing to do virtually all classwork, and instead (when not engaged in disruptive behavior) sat at his desk and read a personal book most of the time. It was clear that Student was doing poorly in this educational placement.

September and October 2011 IEP Team Meetings

35. An IEP team meeting was held on September 23, 2011. Mother attended with her advocate, and Dr. Ball was also in attendance, as were most of the District staff involved with Student. The IEP team meeting was interrupted when Student had another violent incident outside Ms. Langley's classroom, and Mother was asked to come and

[20] Mother testified that at that time Student was four feet, seven inches tall and weighed 120 lbs. However, other witnesses estimated he was five feet, one to three inches tall, and weighed between 120 to 150 lbs. These witnesses were more credible than Mother.

intervene. When Mother returned, the team discussed the fact that Student's placement at Lange was no longer feasible.

36. District personnel and Dr. Ball explained to Mother that placement at a new school, Dana, with Student primarily placed in a SDC, which focused on behavior, and then mainstreamed into a general education class for a portion of his day, would be best for him. It was explained that if Student was in an SDC that addressed maladaptive behaviors, he would get much more educational benefit than he was currently getting by spending 115 minutes each day in an RSP class, and the remainder of the day in a general education class. Because the SDC was smaller with greater adult support, replacement behaviors could be taught more efficiently than in a general education class or RSP class where fellow students were either neurotypical, or if they had a disability, it was much less severe than Student's. Further, Dr. Ball proposed some changes to the BIP, and expected that once these changes were implemented Student's targeted behaviors would initially escalate even further, which placed him, other students and staff at risk.

37. At the September 23, 2011 IEP team meeting, Mr. Dennison explained to Mother that currently Student was not gaining social benefit from being mainstreamed because his classmates were afraid of him. Further, the evidence established that since Student was now either outside a classroom attempting to de-escalate, or reading a book and not attending or working in both the RSP and general education classrooms, he was not gaining academic benefit.

38. Mother responded by criticizing certain aspects of the BIP, such as using a tally to reward appropriate behavior, rather than the more concrete system of giving Student coins throughout the day. However, Dr. Ball testified persuasively that the tally system was more appropriate for a child of Student's age and maturity. Mother also

claimed that Student thought other children were "picking on him." However, the evidence, including District's daily data sheets, established that this was not the case.

39. Mother claimed that the problems were due to the District not properly training Ms. Martinez. However, Ms. Dale, Ms. Williams and Dr. Ball had all recently observed Ms. Martinez working with Student as his aide, and each persuasively testified that Ms. Martinez implemented the BIP with fidelity, and Ms. Williams, with the assistance of Ms. Dale, had provided her with sufficient training.

40. Mother also claimed that the classwork was not being modified for Student, but the evidence established that it was. One of the problems was that Student did not seem interested in accessing the reinforcements that were being offered, and Ms. Williams was addressing this, or had addressed it, by creating a new reinforcement schedule, following interviews with both Mother and Student.

41. The September 23, 2011 IEP team meeting concluded with agreement from Mother that she would observe the SDC at Dana. In the meantime, Student would receive home-hospital services for the next two weeks.[21] The IEP team agreed to reconvene after Mother had completed her observation.

42. On October 4, 2011, after Mother had observed the Dana SDC, the IEP team reconvened. At this meeting, Mother told the IEP team that although she could find nothing objectionable about the SDC, she did not want Student in an SDC at all. The IEP team discussed further proposed changes to the BIP, including the addition of a "cost-response," or consequence to certain targeted behaviors, such as Student missing a recess.

[21] Home-hospital means educational services are delivered to a student in a home setting by an appropriately credentialed teacher.

43. Recess was very important to Student, and during the 2010-2011 SY at Lange, an area where he excelled, in terms of his BSP. He usually played with other children, and interacted with them in a positive manner. There was one occasion, at the end of that school year where Student lost a recess as the direct result of an incident of physical aggression. However, the loss of two or three other recesses during the spring were the result of a schedule change/conflict, or because Student required that time to use calming strategies following a behavioral incident. No evidence existed that these occasional losses of recess exacerbated Student's behaviors.

44. Although loss of recess was discussed at the IEP team meeting of June 8, 2011, as a possible consequence when Student was physically aggressive or demonstrating increasing lack of compliance, the team decided not to implement this cost-response when the BIP began to be implemented.

45. At the IEP team meeting of October 4, 2011, the District team members and Dr. Ball discussed the possibility and need for a cost-response system in the BIP, with the hope that this would bolster its effectiveness. Dr. Ball pointed out that initially there would probably be increased escalation when this was implemented, which was another reason for Student to be placed in an SDC with some mainstreaming in a general education class. Further, the SDC had greater structure, which would be a better environment to successfully work on some behaviors. The SDC teacher from Dana informed the team that Student's behavioral goals were similar to those of other students in the class, and addressed every day.

46. The Tri-Counties representative noted that although they had offered Mother in-home behavioral services she had declined them, indicating she did not need them. Mother again questioned the effectiveness of Student's IA, Ms. Martinez, but as previously noted, the evidence established that Student's increased escalation was not the result of having an IA with insufficient training. District personnel familiar with

Student from the previous year pointed out that Student responded to them this year in the same manner as he responded to Ms. Martinez with his behavioral problems. The IEP team meeting ended with Mother's advocate telling the team that Mother would support a cost-response/consequence system in the BIP, and the Tri-Counties representative stating that Mother had agreed to Tri-Counties providing in-home behavioral services. Since Ms. Martinez was attending a five-day training the next week in the area of autism and ABA techniques, Mother agreed to another week of home-hospital services.

47. On October 18, 2011, another IEP team meeting was held. Mother agreed to placement at Dana, with 60 percent of the time in a general education classroom, and 40 percent of the time in the SDC. For the time being, Ms. Martinez would continue as Student's IA because she was familiar with him and his BIP, although once staff at Dana had been trained to implement Student's BIP and were familiar with him another IA might replace Ms. Martinez. The team agreed to add a cost-response/consequence strategy to Student's BIP, and Dr. Ball again advised the team that it was likely Student's targeted behaviors would escalate initially with this addition. He also told the team that in such an event, physical restraint might have to be used. The team decided that Student would begin attending Dana the following day, a Wednesday, but only attend through the lunch recess for the first three days in the general education classroom, with full time attendance at Dana beginning October 24, 2011. Finally, it was agreed that there should be a "safe place" for Student to be taken, should his behavior escalate to a point where he became a danger to himself or others.

October 21, 2011 Incident at Dana

48. Student began attending Dana on October 20, 2011, rather than October 19, because it was determined that additional preparation was needed before Student could attend. His first day was seemingly uneventful. He was in the general education

third grade class, only going to the SDC for check-in.[22] However, the next day resulted in a behavioral incident that led to Student being restrained, and ultimately being handcuffed by a sheriff's deputy in the safe room. This was the last day Student attended a school in the District, although he continued to receive home-hospital services for several months thereafter.

49. The incident began mid-morning on October 21, 2011, shortly after Ms. Williams had arrived at the general education third grade class at Dana, taught by Cosima Hopper. Ms. Williams was there to observe Ms. Martinez and Student, and to conduct additional training. Student was participating in a math activity group. Ms. Hopper then directed the children to complete a math assessment at their desks. Although Student remained seated at his desk initially, he was not working on the math paper, and began fidgeting and making silly noises. He remembered that he had left his sweatshirt on the playground, but Ms. Hopper told him he could get it later. Ms. Hopper gave him a different math assignment. Ms. Martinez provided Student with reinforcement tally marks for remaining seated, but he was not responding to requests to start work on the math assignment. Finally Ms. Martinez said to him, "[Student] you are not listening, I think it is time for you to go outside and take a break," and Student responded by walking outside.

50. Ms. Williams and Ms. Martinez followed Student outside and gave him some space to de-escalate and use his coping strategies. Pursuant to a previously established protocol, Megan Piatt, the SDC teacher was radioed to come provide

[22] At check-in, which occurred several times each day, Student would find out how many points he had earned during the previous time period, and what cost-response/consequence he might also have earned; he could also cash-out his points for a preferred object or activity.

backup assistance if needed. Ms. Piatt remained several feet distant from Student, Ms. Williams and Ms. Martinez.[23] Student sat down on the ground several feet away from the classroom door and began talking to himself, calling people names, expressing frustration and using profanity. At one point he kicked the wall, but he was also taking deep breaths to calm himself and was less escalated than he had routinely been at Lange the previous month. He was not seated the entire time. After he stopped talking to himself, Ms. Martinez verbally prompted him to come over to where she and Ms. Williams were standing, once he felt calm. After 10 minutes or so, Student came over to Ms. Martinez and Ms. Williams and said, "Okay." Student was given a few one-step instructions to determine whether he had regained compliance, and when he showed that he had, Student, Ms. Martinez and Ms. Williams returned to Ms. Hopper's classroom, and Ms. Piatt returned to hers.

51. Upon return Student, went to his desk, sat down and picked up his pencil. However, he again became disruptive and silly, making noises, giggling and stepping on his pencil box to make noise. He began talking out loud to himself, saying things such as "Oh man, this is ridiculous," or saying something about farting. Ms. Hopper then stepped in and told Student he needed to be quiet because the other children were doing a timed assessment. Student then said, "This is a freak show," and ripped up both the tally sheet and the math paper. Ms. Martinez gave Student the choice of going outside to calm down or losing part of a recess. The Student and Ms. Martinez and Ms. Williams then went outside, and again Ms. Piatt was called.

[23] Although there was some discrepancy in the testimony as to how far away Ms. Piatt was from Student and Ms. Martinez and Ms. Williams, this was not relevant to any factual finding regarding a denial of a FAPE nor reason to disbelieve any of their other testimony as percipient witnesses of the event.

52. The second time Student went outside he was unable to de-escalate entirely. Ms. Martinez and Ms. Williams decided that since lunchtime was approaching and the time for Student to go to Ms. Piatt's SDC to check-in, he should go to the SDC. This was especially true since the three staff realized that Student was going to be told that he was going to lose some recess minutes as a response-cost for his failure to de-escalate after leaving the class the second time. All three staff were concerned that Student's behavior in response could escalate further, and they did not want him to become stigmatized at his new school if other children were present during this escalation.

53. As Student, Ms. Martinez, Ms. Williams and Ms. Piatt walked to the SDC, Student was told he could now go look for his sweatshirt. He had not been permitted to do so earlier because he could have used that as an excuse to not complete his math assignment, and it was hoped that Student would learn to appropriately negotiate with adults to gain permission to do something he wanted to do. However, when Student went to the place where he thought he had left his sweatshirt, it was not there. Student then became very agitated, saying he would be in trouble with Mother for losing it. He was told that this was a "little deal, not the end of the world," but Student began to escalate again. Student was then told they could go now to see if it had been turned into lost and found. However, Student did not respond to this offer.

54. Many children were now outside for recess. Because Student did not respond to the offer to go to lost and found and appeared to be escalating, he was told that they were now going to the SDC for check-in. Student then began jogging away from Ms. Martinez, Ms. Williams, and Ms. Piatt and went behind a building. The three staff members briskly walked towards him, but when they were a few feet away from him, Student turned and charged them, swinging his plastic water bottle. He was then placed in a two-person team restraint.

55. All three staff had received Crisis Intervention Training prior to this date. When properly done a two-person team restraint causes little or no harm. With one staff person on each side, each person places the hand closest to the child on one shoulder and the other on his wrist. Using the staff persons' hips, the child is then bent slightly forward, but the idea is to keep the child from falling to the ground. Once Ms. Piatt and Ms. Martinez restrained Student, he began struggling, attempting to bump them with his body, and head-butting them. Once restrained, the team waited until he was calm and then straightened him up. Student would then take one to two steps, and then attempt to hit them with his arms, legs, head, and body. Student was repeatedly restrained because the three staff were afraid Student would run off campus, which was near a busy street, a large field, and a large park. They decided that Student needed to be taken to the safe room.[24]

56. The safe room was the size of an office—perhaps 10 to 15 feet in length and width as described by District witnesses. It was believed to be a safe place for an out-of-control child to de-escalate. It had a window in the door so the child could be constantly observed, a screened window to the outside, and a whiteboard on one wall, but was otherwise unfurnished. Student had visited Dana on October 19, 2011, before he began attending, and had seen the safe room, and told of its purpose.

57. Normally, to get from the location on campus where Student was initially restrained to the safe room would take four minutes. However, with Ms. Martinez, Ms. Williams and Ms. Piatt periodically spelling each other, it took them between 15 to 25 minutes, by Ms. Piatt's estimate, to walk Student to the safe room. As previously noted, Student weighed anywhere from 120 to 150 lbs., and was over five feet tall. Ms. Martinez and Ms. Piatt appeared to be taller than Student, but both were quite slender when they

[24] This room was called the "calm room" at Dana.

testified. Ms. Williams's physical ability was limited by a recent medical procedure--she had just returned to work following major throat surgery and still had stitches.[25]

58. The safe room does not have a locking door. Once Student was in the safe room, staff held the door shut, periodically spelling each other, because sometimes Student was pulling on the other side trying to open the door. At all times Student was observed through the window in the door. Student yelled and cried and ran around, trying to get out of the room. Student then found a pen on the floor of the room and opened the window to the outside, slashing one screen with the pen and pushing it outside. He then pulled the other screen inside, at which time he attempted to use it as a ramp to the window and broke the metal frame of the screen. He then began to swing the broken metal frame around. Fearful that Student would injure himself, all three staff entered the safe room. Although Student charged towards them when the door opened, staff removed the screen and pen and left the room. Shortly thereafter, Student began to climb on the ledge of the whiteboard that holds the markers. Fearful that his weight would pull the board off the wall and on top of Student, the three adults again entered the room and physically restrained him.

59. After several minutes of restraint in the safe room, Student seemed to de-escalate. He followed simple directives and once the three felt that he was fully de-escalated they waited five to 10 minutes and told him they would now go to Ms. Piatt's SDC. Once outside, with Ms. Piatt and Ms. Williams flanking him on each side, Student suddenly bolted and ran into a fenced, dead-end area next to the building. The three

[25] All three staff sought medical care later that day to ensure they were not seriously injured. All just suffered from bumps and bruises, although Ms. Piatt was ordered to wear a wrist guard and not physically restrain any child, pending medical release.

staff blockaded the entrance to the area. Student tried to climb the fence. Unsuccessful, he turned towards the three and charged them, swinging his arms. Students began to come out for lunch. Fearful that he would harm himself or other students, Ms. Piatt and Ms. Williams again restrained Student and returned him to the safe room.

60. At this point Student was very escalated and began hitting his head on the wall and floor of the room, so again he was put in a two person restraint for his safety. Someone had alerted other school personnel to this event. A sheriff's deputy was on campus and had finished making a presentation to other students. She was approached and asked to come and see if she could assist in de-escalating the situation.[26]

61. When the deputy arrived, Ms. Martinez and Ms. Williams left the safe room after Ms. Williams had given some information to the officer. The deputy calmly tried to speak to Student, asking him what was happening and acknowledging that he seemed upset. Student at this time was pacing the room. The officer instructed Student to sit on the floor, which he did, cross-legged against a wall. He then began banging his head on the wall and the floor. At that point, the deputy handcuffed Student, after telling Ms. Piatt that she was going to have to do so. The deputy explained to Student that she had done so because he needed to calm down, and she could not let him hurt himself. At that point, Mother, who had arrived at school to pick up Student and had been directed to the safe room, entered and asked the deputy to remove the handcuffs. The deputy did so, explaining to Mother that she had been trying to keep Student from hurting himself. Mother then quickly ushered Student out of the room and off campus.

[26] It was unclear who asked the deputy to intervene, but it was someone other than the three staff with Student in the safe room.

Aftermath of October 21, 2011

62. An IEP team meeting was held on November 2, 2011, to discuss the October 21, 2011 incident. The IEP team was presented with a modified BIP prepared by Dr. Ball, which contained a new reinforcement method combined with a cost-response of losing recess if Student did not comply with a direction to do something or not do something after being warned that not doing so would cost him recess minutes. The District proposed that Student return to Dana. Student would check-in to the SDC three times a day and at that time he would be told how many reinforcement points he had earned thus far, and/or how many minutes of recess he had lost. The reinforcement system and the cost-response system were separate, meaning Student could earn points for appropriate behavior—FERB reinforcement—yet still lose minutes at recess under some scenarios.

63. At this November IEP team meeting, Mother asked that there be a provision in the IEP that Student never be restrained. District team members explained that in certain instances it might be necessary to do so, such as when he was a threat to self or others, but restraint was a last resort. However, Mother insisted that if the District allowed Student to be restrained, even under the most dangerous circumstance, she would prefer to home-school him. Because Mother verbalized how traumatizing the incident of October 21, 2011, had been to Student, the District offered 120 minutes of counseling for Student.[27] It was agreed that the IEP team would meet again on November 18, 2011, and home-hospital would be provided until that time. Mother canceled that IEP team meeting on November 15, 2011.[28]

[27] Mother never contacted the District to arrange for this counseling.

[28] There were two documents concerning that cancelation, one an email from Mother saying she was canceling an IEP meeting set on November 17, 2011. It was

64. Following the cancelation of the second November IEP team meeting, the District noticed another IEP team meeting for December 12, 2011. Mother did not respond to that notice, and Mr. Dennison wrote her on December 7, 2011, to ask if she would attend. On the evening of December 11, 2011, Mother sent an email to the District saying that she had retained legal counsel and would not be attending the IEP team meeting on December 12, 2011. Ms. Marcus emailed Mr. Dennison the following morning advising him that she had been retained, and she and Mother could not attend the meeting. Student's complaint was filed with OAH on December 14, 2011. The District continued to provide home-hospital services to Student.

Student's Arguments re Implementation of the BIP

65. Student presented no expert testimony on his behalf. He attempts to present his opinion in his closing argument, unsupported by evidence, as to why this ALJ should discredit the testimony of the District's expert witnesses in the area of behavior modification. However, this tribunal can only consider admitted evidence such as the testimony of witnesses and documentary exhibits. Statements of opinion in a closing argument that are unsupported by the evidence admitted in the case, and cannot be deduced from that evidence, cannot be considered. (See Evid. Code, § 140.)

66. In his closing argument, Student's first major contention is that District staff used the BIP to eliminate Student's maladaptive behaviors, not to provide him with appropriate FERBS, focusing on the events of October 21, 2011. The evidence did not establish that staff were trying to eliminate Student's problems behaviors rather than teaching him appropriate FERBS. The BIP, as designed by the District and Dr. Ball, and

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unclear whether this was just confusion about the date, or if the date had been changed from November 18 to November 17 at some time after the IEP team meeting of November 2, 2011.

implemented by the District, was designed to replace noncompliance with compliance, and to give Student coping strategies to relieve the stress that often led to noncompliance, outbursts or physical aggression. Noting that noncompliance occurred when Student wished to avoid doing something, or wanted to do something that he was told not to do, the BIP provided strategies for staff to teach Student that would systematically help him develop the ability to comply, even when he would prefer not to. For example, some of these strategies recognized that stress reduction, such as taking a break, counting to ten, or communicating needs, might need to be accomplished before Student could comply, so the systematic teaching of stress reduction was built into the plan. These stress reduction strategies could also be used to reduce the incidences of outbursts and physical aggression, both means by which Student might be able to succeed in avoiding an undesirable request.

67. Student claims that he communicated his needs on October 21, 2011, when he asked permission to retrieve his sweatshirt, and therefore the District failed to implement the BIP when it did not immediately grant him permission to leave the classroom to get it. This is an untenable argument, and unsupported by the evidence. In making this claim, Student fails to recognize that asking to retrieve the sweatshirt, rather than doing math, was a means of escaping the classroom to avoid doing the math, and simply another form of noncompliance, the same as an outright refusal to do the task. Student contends that he should have been allowed to get the sweatshirt and then make choices as to how to complete the math assignment, thereby eliminating the antecedents to his subsequent behavioral escalation. Mother testified in the same manner. However, if one simply removes every antecedent to maladaptive behavior from a student's environment, one does not teach the child replacement behavior. Further, it does not explain why Mother was so resistant to the SDC placement at Dana, which would have removed or limited certain antecedents to Student's target behaviors

that were more likely to exist in a general education classroom, so Student could be explicitly taught replacement behaviors in the SDC. Student could then generalize these replacement behaviors to the regular education classroom.

68. The District's experts, Dr. Ball, Ms. Dale, and Ms. Williams presented persuasive evidence that the purpose of the BIP is to teach a child replacement behaviors so he can use them at the very earliest time in a setting where a targeted behavior might occur. If the child has a FERB to replace the targeted behavior, and antecedents are removed, the targeted behavior is less likely to occur, so a FERB is less likely to be learned. Children need to learn how to behave appropriately over many environments and in many circumstances. One cannot simply remove all antecedents from a child with behavioral problems and expect him to learn replacement behavior to be automatically used once he is back in an environment where the antecedents exist. Student failed to present sufficient evidence, especially due to the lack of an expert witness, to rebut the District's position that it properly implemented the BIP, and did not use the BIP simply to eliminate Student's problematic behaviors.

69. Student claims that his behavior escalated on October 21, 2011, after being told to go to Ms. Piatt's SDC for check-in because he "had every reason to expect he would receive a response-cost of lost recess minutes. . . ." There was no evidence as to what Student's expectations were as to what would happen when he went to the SDC for check-in, so this additional argument as to how the BIP was not appropriately implemented on October 21, 2011, is invalid. Further, as previously discussed in Factual Finding 43, Student had lost recess a few times during the 2010-2011 SY at Lange, and had not reacted negatively.

70. Student's second contention in his closing argument is that the District's failure to implement proactive strategies in the BIP led to the need to restrain him and violated California statutes and regulations prohibiting the use of procedures to

eliminate maladaptive behaviors if they cause pain or trauma.[29] However, the evidence was overwhelming that Student's behavior escalated quite rapidly during the fall of 2011, which made it difficult to utilize the proactive strategies in the BIP. Some proactive strategies were used on October 21, 2011, such as Ms. Hopper giving him a different assignment, Ms. Martinez giving him the opportunity to take a break outside, and then giving him a choice about losing his recess or going outside the second time his behavior began to escalate in Ms. Hopper's classroom. Further, on several occasions on October 21, 2011, Student's behavior escalated to a point where he put himself and others in danger, and destroyed property. These situations are exceptions to the statutes and regulations Student claims the District violated.[30] Although Ms. Dale testified in response to Student's attorney's hypothetical question that she might not have handled the events of October 21, 2011, by finally making the decision to take Student to the SDC for check-in under the circumstances, she was not there at the time, and the hypothetical was incomplete. All three women, Ms. Martinez, Ms. Piatt and Ms. Williams, had the necessary training to work with Student, and were familiar with Student's BIP, and experienced in implementing a BIP. Ms. Martinez and Ms. Williams were very familiar with Student, more so than Ms. Dale. The evidence established that District personnel routinely utilized the proactive provisions of the BIP, and did so on October 21, 2011.

71. Student next claims that the District should have conducted another FAA at some time after August 18, 2011, particularly when it was obvious that the BIP developed in June 2011, was not working. This contention is not a failure to implement claim, but rather a failure to assess claim. During the PHC convened by ALJ Charles

[29] Ed. Code §§ 49001; 56520; tit. 5, Cal. Code. Regs. 3052, subd. (a)(5).

[30] Ed. Code, § 49001; tit. 5, Cal. Code Regs. 3052, subd. (i).

Marson, Student's attorney made it clear that she was contending that the District failed to implement the IEP of January 18, 2011, as amended.[31] Student's attorney stated that she agreed with the IEP of January 18, 2011, but she did not believe the District properly implemented it in terms of behavior supports and services. Student did not raise the issue that the District failed to assess Student by not conducting another FAA after August 18, 2011, in either his complaint, his PHC statement or during the PHC. There was also no evidence that another FAA was either discussed or requested during any of the IEP team meetings in September, October and November 2011, or during the IEP team meeting in February 2012. Accordingly this claim will not be decided in this decision.

72. Several reasons were hypothesized by various witnesses as to why Student's behavior deteriorated so seriously after school started on August 18, 2011. First of all, the plan had not been used since it was adopted just two days before the previous school year ended and Student did not attend ESY and EAP before school started, when the BIP could have been implemented in a more structured setting. Another theory was that the list of reinforcers was stale and needed to be updated—in fact, reinforcement lists often need to be frequently updated for some children. The fact that it was outdated was established by Student's frequent destruction of tally sheets, and occasional refusal to purchase a reinforcer with his points. As a result, Ms. Williams talked to both Mother and Student and was creating a new reinforcement list every one to two weeks, adding new items and deleting those that were no longer effective. One hypothesis was that Student's general education classroom had more students than the previous year, and he did not know all of them. Another reason given was that the

[31] This ALJ listened to the OAH recording of this PHC in its entirety to ascertain this.

general education class and RSP room at Lange were simply not appropriate places to appropriately teach Student about FERBs and how to use them. That was why, at the IEP meeting of September 23, 2011, the District recommended that Student change schools and attend an SDC for part of the day where his behavioral issues could be addressed in a more structured setting.

73. The evidence did not establish which of the hypothesized reasons discussed above was why Student's behaviors were escalating. It could have been just one reason, several, or all. Student did not establish a case that his own hypotheses for problems with the BIP in the fall of 2011 were applicable. There was no evidence that the change in IA from Ms. Parker to Ms. Martinez was the cause. Student's attitude toward school personnel who had been with him the previous school year had changed overall. There was no evidence that Ms. Martinez was not properly trained. There was substantial evidence that she had been properly trained. There was no evidence that the change in gender from male to female of the general education teacher in the fall of 2011 at both Lange and Dana was a cause.[32]

74. Another argument promulgated by Student again relates back to the incident of October 21, 2011. Student contends that the District failed to implement the IEP on that date because it relied on reactive strategies after Student's behavior had escalated rather than proactive strategies. Again, that single incident does not mean that the District was failing to implement the BIP. The persuasive testimony of Ms. Williams, Dr. Ball, Ms. Dale, and Ms. Martinez established that all of the proactive strategies in the BIP were being used in the fall of 2011. The problem was that sometimes they worked, and sometimes they did not; as Student's behavior and demeanor varied from day to day. A BIP is subject to multiple changes, such as methods

[32] Student's general education teacher at Lange for the 2010-2011 SY was male.

of reinforcement, reinforcement schedules, reactive strategies and proactive strategies during period of use. The District did its best to make various changes, meeting with some resistance from Mother. Student's comments threatening staff that Mother would kill them, or they would be sued, indicated that Mother discussed her apparent frustration with the District in his presence, which undermined the authority school personnel had with Student.

75. Student claims that he has "thrived" in his current parochial school classroom, and this proves that the District failed to properly implement the BIP.[33] Student began attending a Roman Catholic school in Santa Maria, California in the spring of 2012. Student's attorney notified the District in early March 2012, that Mother would be seeking reimbursement for Student's tuition at a private school.

76. Student is in a third grade class of 31 children, all typically developing. The classroom teacher does not have a special education credential, although she does have a California teaching credential. Mother testified that either she or her adult sister is with Student constantly, not even leaving him to take a restroom break because Mother is afraid someone might "hurt" him. When something happens in the classroom setting that Mother thinks might escalate Student, she removes him from the classroom for a "break." She helps to modify his work whenever he appears frustrated, or gives him a preferred replacement task for a while. As was the case at Lange and Dana, Student is

[33] He also argues that after he began attending Lange in January 2011, he was "bullied" by other students, but other than Mother's testimony, there was absolutely no evidence of that. Rather, in August and September 2011, Student routinely bullied other children. He further claims that the only behavioral progress he made at Lange occurred during his first week and a half there. Again, the evidence by way of the testimony of witnesses and data collection sheets belie that assertion.

significantly taller and heavier than his classmates. Barbara Valente, Student's teacher at the parochial school, made it clear in her testimony that Student needs full-time, hands-on adult support, and if Student were to seriously misbehave, such as hitting her, the principal could summarily expel him. Student does not have the protections of the IDEA in this private school setting. Again, Student presented no expert testimony to establish the appropriateness of this private school placement.

77. In his next argument to support his theory that the District failed to implement the IEP, Student appears to argue that the District should have been implementing the BIP even when Student was not attending school and was receiving home-hospital services. It is unclear what legal grounds exist to support this theory, since the BIP was related to Student's in-school behavior, and specifically geared to address that. There was no evidence whatsoever that Student had behavioral issues when receiving his home-hospital schooling, and his Mother did not testify that he currently, or earlier in the 2011-2012 SY, experienced behavioral problems in the home.

78. Student also argues that the District failed to implement the BIP because it denied him recess on one occasion prior to the October 4, 2011 IEP as a "punishment." [34] In a footnote Student mentions data showing access to swings as a reinforcement is an indication that Student was being deprived of recess during the 2011-2012 SY. However, all of the data sheets received into evidence were reviewed by this ALJ, and based on this review it is clear that Student was encouraged to engage in more active and less solitary activities during recess periods. Student received more points when he used the swings at recess and talked to other children who were also swinging.

[34] Student also claims this occurred during the 2010-2011 SY at Lange. However, since the 2010-2011 SY is not at issue in this case, and no BIP existed at that time, this argument is irrelevant.

(Swinging is often a solitary, self-stimulating activity that many children on the autism spectrum engage in as a perseverative action.) More often than not, Student played soccer with other children during recess. Therefore, a reinforcement of being allowed to swing was reasonable, and did not establish that Student was being deprived of recess when at Lange.

79. Student then gives as grounds for a finding that the District failed to implement the BIP, that it failed to properly keep appropriate data on his progress on goals, and criticizes the District's data-keeping methodology. Again, failure to present expert testimony in this regard seriously weakens this argument.

80. So long as a school district's educational methodology is research-based, or generally acceptable, a district is free to choose the educational methodology that works best for it. There is no statute or regulation that mandates specific intervals at which data must be taken, how it must be taken, and how often it must be measured, in order to determine the effectiveness of a BIP. The frequency when required data must be taken and reported to establish the effectiveness of a BIP is determined by the IEP team.

81. In this case, the IEP of January 18, 2011as amended, specified that progress reporting must occur every trimester. Student did not present evidence that Mother had not received periodic reports of the progress on his goals, nor did he present evidence that these progress reports did not meet all legal requirements.[35] Rather, Student seems to argue that some of methods of data collection employed by the District were inadequate to allow the District to meaningfully measure the effectiveness of the BIP. Student contends that the District should have been keeping data on specific manifestations of target behaviors, such as crying or pushing objects off

[35] The ALJ considered this argument only as it pertains to the 2011-2012 SY.

of his desk, rather than just keeping data on the target behavior of outbursts. However, Student did not present evidence in this regard.

82. Ms. Williams designed the data sheets with the assistance of Dr. Ball and Ms. Dale. Data collection occurred daily, and the evidence established that Ms. Williams was tabulating data every few weeks. Part of the consultation agreement the District had with Dr. Ball was for him to periodically evaluate the effectiveness of the BIP, and assist the District in making any necessary changes. Although Student argues that the data sheets were inadequate to measure Student's progress on his behavior goals, Student did not present evidence in this regard. Further, the evidence established that the data sheets were not the only source of information the District had to rely on to determine if Student was making progress on his goals, and whether the BIP was effective.

83. Built in to Student's program was a requirement for periodic meetings of District staff responsible for implementing the BIP, which would include Student's teachers, Ms. Williams, and possibly other personnel and Mother. By way of these meetings information could be exchanged, and as a result the BIP might be changed in some way. The evidence established that these meetings occurred. Further, reports concerning Student's progress in meeting the behavior goals were presented at the IEP team meeting of February 3, 2012, which Mother and Student's attorney refused to attend. Copies of the IEP documents were subsequently mailed to Mother.

84. Student then contends that the District failed to implement the BIP, because it failed to revise the reinforcement system. As previously noted in Factual Finding 72, Ms. Williams was revising the reinforcement schedule every one to two weeks. The District revised the reinforcement system in October 2011, before Student began attending Dana. There is no legal requirement that the reinforcement schedule be presented to the entire IEP team, only that a parent approve its use. Of course, had Student attended ESY and the later program for children on the autism spectrum, this

deficiency in the reinforcement schedule and system would have been discovered earlier. In criticizing the data collection, Student again attempts to create a legal argument that might have been supported had he had his own expert witness. However, Student's argument was not supported by the testimony of the witnesses who testified at the hearing.

85. Student's final argument concerning the failure of the District to implement the IEP is a barebones allegation that the District failed to implement the BIP in keeping with Special Education Local Plan Area (SELPA) guidelines.[36] This ALJ admitted the SELPA guidelines, a document of 120 pages in length, but cautioned Student that if there was no reference in his closing argument to specific pages explaining which SELPA guidelines the District violated, this document was unlikely to be read. The closing argument contains no reference to specific pages, but merely makes a conclusionary statement that the District did adhere to these guidelines. There was no evidence in this regard, other than the guidelines themselves, which this ALJ has declined to read pursuant to notice given to Student on the record, so this argument fails.

86. The District's witnesses, especially Ms. Williams, Ms. Martinez and Dr. Ball, were very persuasive in establishing that the BIP was properly implemented by the District. Student did not present any evidence to the contrary except Mother's self-serving testimony and a focus on the events of October 21, 2011. Accordingly, Student did not prevail in establishing that the District failed to implement the BIP after August 18, 2011.

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[36] A SELPA is often several school districts that pool their resources to coordinate services for special education students in the districts. Some school districts are their own SELPA.

LRE

87. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." In light of this preference, and in order to determine whether a child can be placed in a general education setting, one must use a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. In general, a regular education setting is the least restrictive of available environments considered in placement decisions.

88. As previously discussed, Student argues that he was "bullied" by other Students and by staff, and as a result of this the BIP was unsuccessful, and further that the stigmatization resulting from his behaviors led the District to "disingenuously" recommend that he be removed from the general education environment in the fall of 2011, and placed in an SDC, rather than an RSP class for part of the day. Although Mother did tell the IEP team on September 23, 2011, that Student thought other children were "picking on him, the only evidence that Student was "bullied" was the testimony of Mother. A review of the data sheets from both school years, which include the daily communication log, reveals that Student had friends at school, and if there was anyone bullying children in Student's classes, it was Student himself, as discussed in Factual Finding 33 and footnote 32 above.

89. The evidence established that by the time of Student's last week at Lange, he refused to do virtually all of the academic work in both his general education class,

and RSP, choosing instead to read books he had brought to school. Therefore as to the first factor, he was no longer achieving any academic benefit from his placement in the general academic class, or the more restrictive setting of an RSP class.[37] In regards to the second factor, the nonacademic benefits, sometimes referred to as social benefits, by the time of Student's last week at Lange, his interactions with other children in the general education class consisted of him calling them names, or threatening to hit them. Further, there was strong evidence that because of his outbursts, other children in both the RSP and the general education classes were afraid of him. Clearly, there were no longer any social benefits from placement in either class at Lange. The third factor, effect of the special education student on other students in the class and the teacher was amply demonstrated by the testimony of Ms. Langely. She vividly described an episode in the fall where Student had gone outside the classroom, and began throwing sticks and rocks at the classroom and kicking the backpacks of other children in the class, which resulted in Ms. Langley locking herself and the other children in the classroom until Student could be calmed. As discussed in Factual Finding 33 above, instructional time was lost due to Student's behaviors. There is no need to discuss the fourth factor, cost, since that is not an issue in this case. The evidence amply established that as of September 23, 2011, placement in a general education class, coupled with 40 percent of the day in an RSP class was inappropriate for Student, and therefore not the LRE for him.

[37] Education Code section 56361 contains a continuum of placements available to special education students in California, with an RSP class less restrictive than an SDC, referred to in subdivision (d) as "special classes pursuant to Section 56362.4."

90. Neither the settlement agreement, nor the IEP of January 18, 2011, and subsequent amendments to that IEP, mandated that Student be faded into more time in the general education setting.

DISTRICT'S FEBRUARY 3, 2012 OFFER OF PLACEMENT

91. On December 16, 2011, following the filing of the due process complaint by Student on December 14, 2011, Mr. Dennison sent Mother a letter suggesting nine different dates for an IEP team meeting, the first date being January 20, 2012, and the last February 3, 2012.[38] Receiving no response from either Mother or Student's attorney, Mr. Dennison sent a follow-up letter on January 13, 2012. On January 16, 2012, Ms. Marcus asked to defer her response to this letter to January 18, 2012, the date the parties were scheduled to engage in mediation pursuant to the complaint filed in December 2011. She subsequently sent a letter that neither she nor Mother would participate in any IEP team meetings. On January 17, 2012, the District sent OAH a letter canceling the mediation scheduled for January 18, 2012. On January 18, 2012, the District noticed Mother that the annual IEP team meeting was scheduled on February 3, 2012, and would go forward whether or not she and/or Student's attorney appeared.

92. The District held the IEP team meeting on February 3, 2012, as scheduled. Neither Mother, nor Student's attorney appeared. Attending the February 3, 2012 IEP meeting were Student's speech and language and occupational therapists; Dr. Ball; a general education teacher from Dana; Ms. Piatt; Ms. Wilson, the school psychologist at Dana; and Ms. Quam.

93. The February 3, 2012 IEP, contains a description of Student's present levels of performance based on progress reports from the end of the 2010-2011 SY, and

[38] Student's next annual IEP team meeting needed to be held by January 18, 2012, but this is not an issue in this case.

information from his teachers and other staff who worked with him when he was still attending school in the District in the fall of the 2011. The IEP has new goals, a total of eight social/emotional/behavioral goals, three communication goals, a two reading goals and a writing goal. The District's IEP team decided against having a math goal since it was found that his math skills were close to grade level when he stopped attending school in the District, and any deficits could be addressed by services in the general educational setting at this time.

94. Five pages of the BIP attached to and part of the February 3, 2012 IEP, were modified from the BIP developed and discussed at the IEP team meeting on November 2, 2011. The first of these five pages is single-spaced in small font (10 point or less), and contains very detailed step-by-step reactive strategies and guidelines should Student engage in disruptive behavior in the classroom, and cautions that "staff will need to react calmly and quickly to ensure the safety of [Student], all students, and staff." These strategies are well thought out and draw heavily from preventing an incident such as the one on October 21, 2011, as well as some of the other more violent incidents that occurred at Lange, primarily during the last four weeks of the 2010-2011 SY, and the portion of the 2011-2012 SY that Student remained at Lange. The remaining four pages cover the protocol, and contain the charts for determining reinforcement and cost-benefits for Student, and the check-in system.

95. The placement and services recommended for Student in the February 3, 2012 IEP, are as follows:

- Five hours consultation services from the ABS, at the rate of one hour per week
- One hour supervision and consultation services from a masters level NPA supervisor

- One-to-one individualized adult support for behavioral intervention and implementation of proactive behavioral strategies and assistance with instruction six hours per day
- Access to breaks per his BIP; access to his water bottle while in class and at all times; redirection; access to a consistent reinforcement system six hours per day
- Access to modified assignments and academic tasks; preferential seating access
- Placement in an SDC for 155 minutes per day (45 percent of the day) for English/language arts, academic support for other mainstream subjects such as math, and proactive teaching on social/behavioral goals
- Speech and language services for 150 minutes monthly in group
- Occupational therapy services of 120 minutes per month to be provided collaboratively
- ESY and EAP (with speech and language)
- Placement in a general education classroom for 55 percent of the day
- A four-week transition plan with Student beginning full time in the SDC, and ending with the final placement offer of 55 percent per day in general education and 45 percent of the day in the SDC. [39] An IEP team meeting will convene at the end of these four weeks to review Student's daily schedule and consider changes. During this time, if student requires physical restraint an IEP team meeting will be convened right away to determine if changes are necessary in the IEP or the transition plan

[39] The transition plan is far more detailed than reflected here.

- Speech and language and any direct OT is provided in the SDC [40]
- Progress reports will be provided at the end of each trimester

96. On February 7, 2012, Mr. Dennison mailed Mother a copy of the IEP and the notice of procedural safeguards, and asked her to notify the District whether or not she would consent to the IEP. He also informed her that if she wished another IEP team meeting, she should send a written request to the District. Mother did not respond to this letter, nor did she consent to the IEP. On March 2, 2012, Student's attorney wrote to the District, advising it that Mother was placing Student into a private placement and would be seeking reimbursement for that placement. On March 19, 2012, the District filed its own due process complaint with OAH, and on March 29, 2012, OAH consolidated the cases.

97. The District is asking that OAH find its IEP offer of February 3, 2012, is an offer of a FAPE. Student contends that the proposed IEP is a virtual duplicate of the January 18, 2011 IEP, as subsequently amended, the last time on October 18, 2011. According to Student, that amended IEP was not effective as the incident of October 21, 2011 occurred, and any IEP that places Student back at Dana is not an offer of a FAPE due to the trauma he experienced on October 21, 2011. Instead, Student asks that he be provided with a one-to-one aide experienced in ABA from an NPA at his parochial school, and compensatory education of 50 hours of one-to-one tutoring, and 50 hours of psychological counseling. Student did not present evidence as to his need for the 50 hours each of psychological counseling and tutoring, nor did he establish that he needs those for a FAPE to be provided to him in the coming school year.

[40] Student does not dispute the offers of speech and language services, or occupational therapy.

98. Student's claim that the IEP is "very similar" to previous IEPs that have been "ineffective," is without merit. The progress reports for Student's academic goals in the IEP of January 18, 2011, and attached to the IEP of February 3, 2012, established that Student made academic progress. He met his two goals in reading, and his goals in spelling, and writing. He almost met goals in the areas of ending peer interactions and social conflict, demonstrating that he was able to achieve those goals 75 percent of the time, rather than the 80 percent required to meet the goal, and met a goal concerning use of leisure time. He did not meet a speech goal in using conjunctions, but he did meet an articulation goal.

99. The goals in which he fell short, and in some cases showed regression, were all behavioral goals in the areas of following three-step directions, attending, controlling outbursts, physical aggression, frustration tolerance and compliance. However, because Student was only in school for a few weeks at the beginning of the 2011-2012 SY when the BIP went into effect, and the BIP was still being fine-tuned and has now been significantly altered to prevent a recurrence of the events of October 21, 2011, Student cannot argue that the BIP is still "very similar" to the one adopted and incorporated into the January 18, 2011 IEP, on June 8, 2011, and as amended on October 18, 2011.

100. The IEP of February 3, 2012, is not similar because it provides for an increased percentage of time in the SDC, and a very detailed transition plan for Student to return to placement at a District school. In addition, every effort will be made for Student's placement in the general education setting to occur during times when that class is taught subjects or engaged in activities that are preferred by Student. Further, changes in the BIP are significant.

101. Student's argument that the IEP of February 3, 2012, does not provide a FAPE because it calls for his return to Dana where he was restrained is also without

merit. Student was restrained in February 2011 at Lange, yet returned to school and made progress for the remainder of the school year. He also was able to return to school at Lange after restraint in both August and September 2011. He presented no evidence, other than Mother's testimony, as to why returning to Dana would be harmful.

102. There is no evidence that Student's placement will necessarily be at Dana, other than Dana being named as the "school of attendance" on the IEP offer of a FAPE. The IEP certainly contains no other words to that effect. It calls for a specific type of placement, but does not mandate placement at Dana, unlike the IEP of January 18, 2011, which specifically called for placement at Lange. An SDC for children with behavioral issues could be located at any elementary school in the District.

103. The evidence established that the IEP of February 3, 2012, will provide Student with a FAPE, and can be implemented without parental consent if Student returns to the District. Further, the District shall, if Student returns to the District and Mother consents, provide him with not less than 120 minutes of psychological counseling concerning the events of October 21, 2011, to be provided over a six week period, for the reasons the District set forth at the November 2, 2011 IEP team meeting. The therapist shall be familiar with counseling children with autistic like behaviors. The order for counseling shall not be construed as compensatory education, or a finding that the District and its staff negligently or intentionally harmed Student by what occurred on October 21, 2011.

COMPENSATORY EDUCATION AND REIMBURSEMENT

104. When a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. If a school district does not offer a student with a disability a FAPE, and a parent privately places that student, that parent may be entitled to reimbursement for the cost

of that private placement. Here, because the District did not deny Student a FAPE at any time, Student is not entitled to relief.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. In this case, Student bears the burden of persuasion for the issues in his complaint, and the District bears the burden of persuasion for the issue in its complaint.

ELEMENTS OF A FAPE

2. Under both the IDEA and State law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, and meet the state educational standards. (20 U.S.C. § 1401(9); Ed Code, § 56040.)

3. In *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, nor to provide instruction or services that maximize a student's abilities. (*Id.*, at pp. 198, 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. Oregon,* (9th Cir., 1999) 195 F.3d 1141, 1149 (*Adams*).)

4. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid; Rowley,* 458 U.S. 176, 188-189.)

5. The methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley*, 458 U.S. 176, 208; *Adams, supra,* 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley,supra* 458 U.S. 176, 208; *Student v. Corona-Norco Unified School District* (2005)Cal.Ofc.Admin.Hrngs. Case No. 2005070169.)

6. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley*, *supra*, 458 U.S. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130;

E.S. v. Independent School Dist., No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School District* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

PROCEDURAL VIOLATIONS

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. 176, 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.).

FAILURE TO IMPLEMENT AN IEP

8. A failure to implement a student's IEP is a procedural violation and will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 820-822.)

SCHOOL BASED BEHAVIOR INTERVENTION

9. Behavior intervention is the implementation of procedures to produce lasting positive changes in the student's behavior, and includes the design, evaluation, implementation, and modification of the student's individual or group instruction or

environment, including behavioral instruction, to produce significant improvement in the student's behavior. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (e).) This type of behavioral intervention is referred to as a BSP in California, although there is no statute or regulation that uses that term.

10. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that a local educational agency, here, the District, conduct an FAA, resulting in a BIP, when a student develops a "serious behavior problem," and the IEP team finds that the instructional/behavioral approaches specified in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subds. (d), (e), and (g).) A serious behavior problem means the individual's behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (ab).) Regulations

concerning the implementation of a BIP are found in the California Code of Regulations, title 5, section 3052.

11. A "behavioral emergency" is the demonstration of a serious behavior problem, that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (d).)*Student's*

ISSUE 1: DID THE DISTRICT DENY STUDENT A FAPE FROM AUGUST 18, 2011 TO THE PRESENT BECAUSE IT FAILED TO ADEQUATELY IMPLEMENT THE SUPPORTS AND SERVICES FOR STUDENT'S BEHAVIORAL DIFFICULTIES IN CONFORMITY WITH STUDENT'S IEP OF JANUARY 18, 2011, AS AMENDED?

12. Student's contention that the District denied him a FAPE because it did not properly implement his BIP is without foundation, as demonstrated by Legal Conclusions 2-11 and Factual Findings 2-86. Student takes a position that is analogous to the legal concept of *res ipsa loquitur*, which is translated as "the thing speaks for itself." (Black's Law Dictionary (9th ed. 2009).) For the doctrine of *res ipsa loquitur* to apply, it must be found that: "1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and 3) the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. [Citations.]" (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75–76, 215.) Student believes that the handcuffing incident of October 21, 2011, was somehow due to the failure of the District to implement the BIP. He presents many purported reasons why he believes the District did not properly implement the BIP and that any such failure to implement was material, but none of these reasons are supported by the facts of the case.

13. The evidence established that a BIP must be flexible to fit changing circumstances. Ms. Williams, Ms. Martinez, and Ms. Piatt were all familiar with the BIP,

and trained to implement it. Several theories were posited by District personnel as to why Student's behaviors escalated after his return to school in August 2011, when the BIP was first implemented: 1) Student's failure to attend ESY and EAP; 2) Student's lack of interest in the reinforcers incorporated into the BIP, which were not current because he had not attended ESY and EAP; 3) a larger class size in the general education setting with children unfamiliar to Student; 4) the need for Student to be in an SDC where behavioral issues were constantly addressed, and where he could proactively be taught the FERBS for the target behaviors; and/or 5) the need for a cost-response system to be built into the BIP. There was no conclusive evidence that any of one or more of these factors was why Student's behaviors escalated. The evidence established that on October 21, 2011, District personnel acted reasonably under the circumstances to protect Student from himself, and other children from Student's sudden physically aggressive behaviors. Before that date, the evidence established that Ms. Martinez and other District personnel and contractors were properly trained and implementing the BIP correctly, and Student's escalation at Lange was not due to a failure to implement the BIP. Accordingly, Student does not prevail on this issue.

LRE

14. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily."(20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006).) "Educating a handicapped child in a regular education classroom with nonhandicapped children is familiarly known as 'mainstreaming' . . . ." (*Daniel R.R. v. El Paso Independent School Dist.* (5th Cir. 1989) 874 F.2d 1036, 1039.) In light of this preference, and to

determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 (*Rachel H.*), 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. In general, a regular education setting is the least restrictive of available environments considered in placement decisions. (See Ed. Code, § 56361.) In selecting the LRE, a district must consider any potential harmful effect on the child or on the quality of services that he or she needs. (34 C.F.R. § 300.116(d).)

15. In his closing argument, Student cites *L.B. V. Nebo School District* (10th Cir. 2004) 379 F.3d 966 (*Nebo*) to support his claim that the District failed to educate him in the LRE, and "undermined his progress" in the LRE of the general education classroom.[41] Student asserts that in *Nebo* "[t]he court determined that the ABA was a supplemental service needed to support the child's mainstreamed placement." Student then analogizes if he had been provided "appropriate behavioral intervention," he would have succeeded in his general education classroom. Student's reliance on a Tenth Circuit case as authority for his claim that the District denied him an LRE placement is misplaced. In *Nebo*, the Court used a two part test developed in *Daniel R.R, supra,* 874

[41] Student failed to include a citation for this case, and there are two published opinions called *L.B. v Nebo School District*. The earlier case, a U.S. District Court decision, is found at 214 F.Supp.2d 1172, (D.C. Utah 2002), and was appealed to the 10th Circuit, which resulted in the decision cited in the text. After reading both cases, and based on the context in which Student used it in his closing argument, this ALJ cites the 10th Circuit opinion.

F.2d 1036, to determine whether a placement was LRE, stating that "the court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate." (*Nebo, supra,* 379 F.3d 966, 977-978.) However, because this tribunal is in the Ninth Circuit, *Rachel H., supra,* 14 F.3d 1398, provides the proper standard to determine whether a specific placement is LRE for a specific student.

STUDENT'S ISSUE 2: DID THE DISTRICT DENY STUDENT A FAPE FROM AUGUST 18, 2011 TO THE PRESENT BECAUSE IT FAILED TO FADE STUDENT INTO A GENERAL EDUCATION CLASSROOM, IN CONFORMITY WITH THE IEP OF JANUARY 18, 2011, AS AMENDED, AND INSTEAD WITHDREW HIM FROM THAT ENVIRONMENT, AND THUS FAILED TO PROVIDE STUDENT A PROGRAM IN THE LRE?

16. Legal Conclusions 14-15 and Factual Findings 87-90 establish that placement at Lange with RSP services for 115 minutes each day, and mainstreaming in Ms. Langley's class for the remainder of the day was not LRE for Student. The settlement agreement of January 13, 2011, and the IEP of January 18, 2011, had no provisions to gradually fade Student into a full-time general education placement. As of September 23, 2011, Student was receiving neither academic nor social benefits from this placement, spending most of the day reading his own books, and ignoring instruction. His classmates in the general education class had become frightened of him because of his increasingly violent episodes, which were very disruptive. Applying the first three *Rachel H.* factors, and without even addressing the cost factor, it is abundantly clear that the Lange placement was not meeting his needs, and he needed the structure of an SDC class which addressed behavioral issues for part of the day. Accordingly, Student did not prevail on this issue.

REQUIREMENTS OF AN IEP

17. An IEP must contain a statement of measurable annual goals related to"meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

18. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

19. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra,* 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.)

DISTRICT'S ISSUE: IS THE DISTRICT'S IEP OFFER OF FEBRUARY 3, 2012, AN OFFER OF A FAPE IN THE LRE?

20. Legal Conclusions 2-6 and 17-18 and Factual Findings 91-103 establish that the February 3, 2012 IEP offer, is an offer of a FAPE in the LRE, and should be implemented, should Student return to the District. Although Student argues that the IEP is almost identical to the IEP of January 18, 2011, as amended on October 18, 2011,

this is not the case. The BIP that is incorporated into the IEP of February 3, 2012, has a much more rigorous and detailed description of reactive strategies to address Student's escalating behaviors, as were seen on October 21, 2012. Further, the reinforcement and cost-response system is more detailed, and the IEP calls for very explicit proactive teaching of behavior strategies in the SDC. In addition, there is a transition plan for Student if he transfers back into the District, which calls for beginning in the SDC full-time for the first week, and then gradually moving into the IEP placement offer of 45 percent of the time in the SDC, and 55 percent of the time in the general education class. This time division is also different than the IEP of October 18, 2012, which called for Student to spend 40 percent of the time in the SDC, and 60 percent of the time in the general education class. Also, the IEP of February 3, 2012, makes it clear that Student will spend his time in the general education class, when that class is engaged in activities and subjects that are preferred by Student.

21. Student also complains that the SDC placement is at Dana, and Student was so traumatized by that experience that he is unable to return to Dana. However, not only does the IEP not name a specific school for placement, but Student did not introduce sufficient evidence, such as the testimony from a therapist, to establish this contention. Lastly, an IEP offer is a snapshot in time. Although Student claims that he is doing well in the general education classroom of a private parochial school, he was not attending that school when the IEP was developed on February 3, 2012. The evidence established that this IEP was an offer of a FAPE for Student when it was developed on February 3, 2012. However, to ensure that Student is no longer suffering from any residual trauma, it will be ordered that the District offer 120 minutes of counseling to be completed within 45 days after the issuance of this order, if Student wishes to access this therapy. The evidence and witnesses the District presented, and Student's lack of

compelling evidence to the contrary, established that the February 3, 2012 IEP is an offer that will provide Student with a FAPE in the LRE.

COMPENSATORY EDUCATION AND REIMBURSEMENT

22. In general, when a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Sch. Comm. of Burlington v. Dep't of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].) Here, as established by Factual Finding 104, because the District did not deny Student a FAPE at any time, Student is not entitled to relief.

ORDER

1. Student's requests for relief are denied.

2. The IEP offer of February 3, 2012, is an offer of a FAPE. Should Student be returned to the District it may implement the IEP of February 3, 2012, in its entirety.

3. If Student returns to the District, it shall provide Student with not less than 120 minutes of psychological counseling concerning the events of October 21, 2011, to be provided over a six-week period. The therapist shall be familiar with counseling children with autistic like behaviors. The District shall not provide this counseling if Mother does not consent to it. This is not intended to be compensatory education, nor should it be inferred that the District denied Student a FAPE.

PREVAILING PARTY

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

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision.

A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: August 14, 2012

_____/s/_____

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings