

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2012120545(Primary)

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT,

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CAPISTRANO UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2012120173

v.

PARENT ON BEHALF OF STUDENT.

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CORRECTED DECISION

Administrative Law Judge (ALJ) Stella L. Owens-Murrell, Office of Administrative Hearings (OAH), State of California, heard this matter in San Juan Capistrano, California on May 6-9 and May 28-29, 2013.

Tim Jon Runner, advocate, represented Student. Attorney Robert Hawekotte<sup>1</sup> was present on May 6, 2013 only. Father was present at the hearing at all times and Mother was present most days except May 7 and partial days on May 9 and 28. Student was not present at the hearing.

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<sup>1</sup> The undersigned ALJ incorrectly identified the attorney above as John Hawkotte. Accordingly, the decision has been corrected to reflect the attorney's name as Robert Hawekotte.

Attorney Justin Shinnfield represented Capistrano Unified School District (District), accompanied on alternating dates by District representatives, including Ms. Kimberly Gaither, District special education legal specialist.

District filed a request for due process hearing (complaint) on December 5, 2012. Student filed a complaint on December 13, 2012 and requested consolidation of the two matters. OAH ordered consolidation and granted a continuance of the matter on December 21, 2012, with all decision due dates to be calculated based on the date Student's complaint was filed.

On May 6, 2013, District filed a Motion to Dismiss for Lack of Jurisdiction and in the Alternative to Bifurcate the Issues. Student filed opposition to the motion on May 10, 2013. The motion was denied and the jurisdictional issue was treated as an affirmative defense at hearing.

At the hearing, oral and documentary evidence was received. The case was continued to June 14, 2013 at the parties' request to permit them to file written closing arguments. The parties timely filed written closing argument. The record was closed and the matter was submitted for decision on June 14, 2013.

## ISSUES

- 1) Did the District's individualized education program (IEP) described in the IEP's dated May 1, 2012 and continued to May 24, June 11, June 18, and September 14, 2012, as modified by letter on October 3, 2012, offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE)?<sup>2</sup>

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<sup>2</sup> Issue One was presented by both Student and District in this consolidated case. Accordingly, the two issues are combined and reorganized from those set forth in the Order Following Prehearing Conference dated April 24, 2013, for clarity of the decision.

- 2) Did the District deny Student a FAPE by failing to perform an adequate triennial assessment because the assessors failed to observe Student in his classes while school was in session?

## FACTUAL FINDINGS

1. Student is an 18 year-old young man. As of the time of hearing, he attended Waterfall Canyon Academy (WCA) Residential Treatment Center (RTC) and Oak Grove School (OGS) in Ogden, Utah. His Parents resided at all relevant times within District's jurisdictional boundaries and they hold his educational rights through conservatorship. He was eligible for special education services under the disability category of autistic-like behaviors (autism).

2. Student initially qualified for special education services when he was in preschool in District in 1997. He had unique needs in the areas of cognitive functioning, behavior, social/emotional, speech and language, communication, and academics. He had also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He took prescription medication for his conditions. He had a history of physical aggression in the home and in the classroom setting, refusal to follow teacher instructions or direction, becoming easily distracted, and eloping from the classroom. Because of his unique needs Student was in several different placements within District up to the tenth grade. He attended Behavior Intervention Classes in elementary and middle school. He attended a moderate to severe special day class program (SDC) at Dana Hills High School (DHHS) through 2010-2011; his sophomore year.

3. While at DHHS Student's curriculum was substantially modified in order to permit his participation in the classroom setting. The modified curriculum in the fall

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In addition to the two issues stated, for the reasons set forth below, it was determined that OAH has jurisdiction to hear the issues presented.

semester of the 2010-2011 school year consisted of the following: Foods IA, Modified English IIA, Basketball, Draw/Paint IA, and Modified Science. He received designated instruction and related services (DIS) in speech and language (LAS), adaptive physical education (APE), occupational therapy services (OT), and intensive behavioral intervention services (IBI).

4. Parents became concerned during the course of the 2010-2011 school year because of Student's behaviors in school and at home. He had become increasingly aggressive and violent toward his siblings and Parents. Parents obtained services for the developmentally disabled under California's Lanterman Developmental Disabilities Services Act,<sup>3</sup> which provided a male adult to be present in the home to control Student's behavior when Father was at work. His behaviors at school were equally out of control. He walked out of his assigned classes and would refuse to return. He was observed roaming the halls of the school. He was disruptive in the classroom and on occasion became physically aggressive with other students. Parents accepted all of District's placement offers until it became apparent to them that Student was not benefitting from the placements and Student was regressing. They believed the regression was apparent through a decline in Student's academic achievement scores between 2006 and 2011, which Parents described as a "free fall".

5. Parents concluded that a RTC would be appropriate due to Student's violent behaviors and poor academic performance. Parents hired an educational consultant who recommended placement at Vantage Point, a wilderness education program, in Mt. Pleasant, Utah. Parents removed Student from DHHS in the spring

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<sup>3</sup> See Welfare and Institutions Code section 4400 et seq., which establishes a mechanism to deliver services to individuals with certain developmental disabilities for the purpose of facilitating their integration in the community.

semester of the 2010-2011 school year and placed Student at Vantage Point for 30-60 days in the spring and summer of 2011.

6. On June 12, 2011, Parents obtained an independent psychological assessment from Dr. Tracine Smoot, Ph. D. Dr. Smoot diagnosed Student with ADHD and mild mental retardation. She recommended residential treatment because of his long-term serious behavioral problems that needed to be treated in conjunction with his complex educational needs, and because Student's academic scores had declined over a two year period Dr. Smoot recommended high-quality intensive instruction. Parents were referred to WCA/OGS.

7. WCA is a licensed RTC providing clinical therapeutic services to adolescents and young adults with cognitive, social, emotional and behavioral challenges. WCA serves both adolescent males and females and has an independent living program for young adult males. WCA also has a small private school, OGS, which provides academic instruction to students with cognitive, social, emotional and behavioral challenges. OGS is certified by the California Department of Education (CDE).

8. On July 19, 2011 Parents notified District in writing of their intention to place Student at WCA/OGS. Parents unilaterally placed Student at WCA/OGS on July 30, 2011.

9. On July 19, 2011, Parents filed a Request for Due Process Hearing and Mediation, OAH Case Number 2011070630. The parties executed a Confidential

Settlement Agreement on September 26, 2011.<sup>4</sup> As part of the Agreement, District funded Student's tuition at WCA/OGS for the 2011-2012 school year and Parents consented to District triennial assessments in the spring of the 2011-2012 school year as part of Student's triennial IEP to determine eligibility, his program, and placement for the 2012-2013 school year.

#### TRIENNIAL MULTIDISCIPLINARY ASSESSMENT

10. District conducted triennial assessments in psychoeducational, behavior, speech and language, and occupational therapy. The assessments were conducted on April 3-6, 2012 at WCA/OGS and were completed on May 1, 2012.

11. Dr. Stephanie L. Petty, District's school psychologist, administered the psychoeducational assessment. Christina Hesseltine, District's speech pathologist administered the LAS assessment, and Cheryl Shapland, District's occupational therapist, administered the OT assessment. They traveled to WCA and assessed Student over a four day period. Student was 17 years of age and in the eleventh grade at the time of the assessment.

#### PSYCHOEDUCATIONAL ASSESSMENT

12. Dr. Petty held a master's degree in education, education psychology, and school psychology. Her credentials included general and special education teaching, administrative, and school psychology. She had worked for District approximately 16-17

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<sup>4</sup> The parties jointly submitted the Confidential Settlement Agreement at the ALJ's request prior to the close of the record. Other than to explain the basis for District's funding of the RTC placement, the services provided, and the agreement to conduct a triennial assessment, the terms of the agreement are not otherwise relevant to resolution of the issues presented.

years. Her most recent position with District was as an RTC coordinator/case manager. In this position she consulted with the psychologists when assessments were needed to determine RTC placements, and in the development of IEP's. She administered the following assessment instruments: Wechsler Adult Intelligence Scale- Fourth Edition (WAIS-IV), Beery Buktenica Development Test of Visual-Motor Integration (VMI), Beery Buktenica Development Test of Motor Coordination, Beery Buktenica Development Test of Visual Perception, Comprehensive Test of Phonological Processing (CTOPP), Wechsler Individual Achievement Test-Second Edition (WIATT-III), Woodcock Johnson III Test of Achievement(WJ-III) – Administered by OGS staff, and Academic Record Review. Additional selected instruments included the Conners- Third Edition (Conners-3)-Parent and Teacher Rating Scales, Behavior Assessment System for Children-Second Edition (BASC-2)-Parent and Teacher Rating Scales, Gilliam Autism Rating Scale- Second Edition GARS-2)-Parent and Teacher Rating Scales, and Social Skills Rating System (SRSS)-Parent and Teacher Rating Scales. She also conducted a record review, teacher interviews, and clinical observation in the residential setting and the school library.

13. The first two days of assessments were devoted to Dr. Petty's administration of the test instruments one-to-one with Student. She was at WCA/OGS four days (Monday through Thursday, April 3-6, 2012). Ms. Hesseltine and Ms. Shapland joined her on the second day and were there for the remaining three days of assessments. Dr. Petty spent the first two days of assessments alone with Student. The assessment routine began in the morning when the assessment team picked him up at the residential facility, drove him to the school site for assessments, took him to Wendy's fast food restaurant for snacks during assessment breaks, and returned Student to the residential facility at the end of the day. During the second day of one-to-one time Student reported to Dr. Petty that he was on "suicide watch" after his mother and brother's recent visit.

14. The assessments were at OGS in a classroom. OGS was closed because of spring break and no classes were in session. District knew in advance the dates of the assessment were during Spring break. Dr. Petty observed Student interact only with OGS administrator Heidi Perry. During her assessments she observed Student to be "antsy" or inattentive, a lot of prompts were required to get responses from him, and he put his head down on the desk during certain testing. She also conducted a joint observation of the Autism Diagnostic Observation Schedule (ADOS) with Ms. Hesseltine and Ms. Shapland observing and taking notes. She observed him interact with peers in his residential setting but did not observe him interact in a classroom setting with OGS students and teachers because school was not in session. Nonetheless, she believed she had adequate information concerning his behavior in the classroom setting without observing him during regular class periods when school was in session. Regarding his behavior issues in transportation that had been reported by Parents she personally observed him during the car trips when she drove him roundtrip to and from the residence to school during the assessment. She reported that Student did not become agitated or become frustrated because he was in traffic. Although Dr. Perry did not have the benefit of classroom observations that would provide an overall picture of Student to facilitate placement decisions for the coming school year she believed that Student's assessments were adequate and appropriate.

15. The WAIS-IV assesses the cognitive ability of adults aged 16 years to 89 years, 11 months. The four index scores represent functioning in the specific cognitive domains of Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed. The test results show Student's verbal comprehension and processing speed are in the extremely low range. His perceptual reasoning and working memory skills are in the borderline range. Overall the assessment results established Student's



full scale IQ score of 62 placed him in the one percentile range. Thus his general cognitive abilities were within the extremely low range.

16. The VMI is designed to assess an individual's ability to judge size, shape, angulations, spatial orientations, and integration of presented gestalts, and to use fine motor skills in reproducing them. The results of the VMI and the Beery Buktenica Development Test of Motor Coordination showed that Student's visual motor abilities and motor coordination were in the very low range when compared to same-age peers. The results of the Beery Buktenica Development Test of Visual Perception showed Student was in the below average range.

17. The CTOPP assesses phonological processing, a type of auditory processing, in three areas: phonological awareness; phonological memory; and rapid naming. Student received a score of average in phonological awareness, poor in phonological memory, and very poor in rapid naming. The CTOPP results showed that Student had an average ability to synthesize sounds to form words, a poor ability to code information phonologically for temporary storage in working memory or short term memory, and a very poor ability to rapidly name digits and letters, efficiently retrieve phonological information from long term memory and execute a sequence of operations quickly and repeatedly.

18. The WIAT-III is a comprehensive, individually administered battery for assessing the achievement of children ages 5 years to 19 years, 11 months. Student scored in the average range in word reading, pseudo word decoding, and spelling. He scored below average range in reading comprehension and in the low average range in math problem solving and numerical operations. He also scored in the very low range in math fluency in addition, subtraction, and multiplication.

19. The WJ-III Test of achievement is a comprehensive test for assessing academic achievement. This test was administered by staff at OGS. The staff provided

the raw scores to Dr. Petty who scored the assessment. When compared with others his age level Student's standard scores were low average in basic reading and writing skills, and in the low range in brief reading. Student scored in the very low range in reading comprehension, broad mathematics, math calculation, and brief mathematics.

20. The BASC-2 is designed to evaluate behavior in children and adolescents. The Parent Rating Scale is a measure of the child's adaptive behaviors in the home and in the community. Scores in the at-risk range identify either a significant problem that may require treatment or the score may signify potential or developing problems that need to be monitored. Any score in the clinically significant range suggests a high level of maladjustment.

21. The results of the BASC-2 Parent Rating completed by Father, reported scores in the at-risk range in hyperactivity, anxiety, depression, withdrawal, attention problems, externalizing problems, and behavior symptoms. The Parent Rating Scale also reported scores in the clinically significant range in leadership, activities of daily living, functional communication and adaptive skills. Student's adaptive behavior composite was in the clinically significant range. The result of the BASC-2 Teacher Rating by Suzanne Ciraulo, Student's special education teacher at OGS, reported scores in the at-risk range in hyperactivity, conduct problems, attention problems, atypicality, externalizing problems, school problems, and functional communication. Scores reported in the clinically significant range included aggression, learning problems, withdrawal, behavioral symptoms, adaptability, social skills, leadership and functional communications. Student's overall adaptive skills score placed him in the clinically significant range.

22. The Conners-3 is used to evaluate symptoms of ADHD and related disorders including: inattention; hyperactivity/impulsivity; learning problems; executive functioning; aggression; peer relations; conduct disorder; and oppositional defiant

disorder. Father and General Education Teacher, Emily Daughton, completed the Conners-3. Their responses indicated Student was elevated or very elevated in all areas.

23. The GARS-2 is a rating scale completed by parents and teachers. This assessment tool with subtests in the areas of stereotyped behaviors, communication, and social interaction is used to determine the likelihood a child's verbal and nonverbal behaviors are characteristic of autism. The GARS-2 was completed by Father and Tina Butler, special education teacher. The assessment results indicated Student fell into the very likely range for probability of autism in the areas of stereotyped behaviors, communication and social interaction.

24. The SSRS is an additional assessment of a child's behaviors affecting student-teacher relations, peer acceptance, and academic performance. The rating scales sample the three domains of social skills, problem behaviors, and academic competence. The assessment was completed by Father and a teacher. Father's scores indicated that when compared with same aged peers Student presented with social skills in the average range at home, had fewer social skills in the areas of cooperation and assertion, and had an average amount of problem behaviors. The teacher's scores indicated that at school Student presented with overall social skills in the average range in the areas of cooperation, assertion, responsibility, and self-control. Student was rated as having more than average amounts of problem behaviors compared to same aged peers. Student was rated overall as having below average skills in the area of academics.

#### SPEECH AND LANGUAGE ASSESSMENT

25. Ms. Hesseltine conducted the Speech and Language assessment. She had been employed with District for 12 years. She held a BA in communication disorders and a master's degree in speech and language pathology. She was a licensed and credentialed speech and language pathologist. She was responsible for screening and

evaluating students' speech and language needs, attended IEP meetings, and provided speech and language interventions.

26. Ms. Hesseltine was part of the assessment team, participated in Student's multidisciplinary assessment, and prepared the speech and language portions of the Assessment Report dated May 1, 2012. She was aware prior to arriving in Utah that WCA/OGS would be on vacation or spring break and it was not feasible to observe Student in a classroom setting. Instead according to Ms. Hesseltine the assessment team observed Student's interaction with WCA/OGS staff, a few teachers, his peers within the residential placement, during the process of transporting him from the residence to the school for the assessments, during lunch at his favorite fast food restaurant, and during the last day of the assessments. She attended the May 1, 2012 IEP team meeting and reported the Speech and Language results of the Assessment Report at either the first or second meeting prior to the time the IEP goals were developed.

27. Ms. Hesseltine administered the following assessment instruments: RISB Sentence Completion-Self Rating Form; Peabody Picture Vocabulary Test-Fourth Edition (PPVT-4) form B; Clinical Evaluation of Language Fundamentals- Fourth Edition (CELF-4); Comprehensive Assessment of Spoken Language (CASL); and Pragmatic Judgment Test; and interview/observation. Overall, Student demonstrated receptive and expressive language skills and pragmatic language skills in the below average range. He had relative strengths in expressive vocabulary or semantics. His language memory skills were a relative area of weakness. Student's voice, fluency, and articulation were within normal limits and not an area of concern.

#### OCCUPATIONAL THERAPY ASSESSMENT

28. Ms. Shapland was employed by District as an occupational therapist. She administered the following assessment instruments: Adaptive Behavior Assessment System; 2nd Edition (ABAS-2)-Parent and Teacher Rating forms; Developmental Test of

Visual Perception-Adolescent and Adult (DTVP-A); Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2); Sensory Profile: Adolescent/Adult; review of previous assessment records, interviews, and observations.

29. The OT assessment results indicated Student's gross motor skills were in the average range. Student did not like loud sounds, was afraid of heights, did not like to be in crowds, and got distracted with too many visual or auditory inputs. He was in the average range at school in health and safety and self-care and below average in social. Student scored in the borderline range in communication, community use, functional academics and school living. In addition, a portion of the ADOS was administered by Dr. Petty while Ms. Hesseltine and Ms. Shapland observed and took notes. The results in the areas of communication and reciprocal social interaction indicated Student scored within the autism range.

#### SUMMARY OF TRIENNIAL MULTIDISCIPLINARY ASSESSMENT

30. The Triennial Multidisciplinary Assessment Report (Assessment Report) was issued on May 1, 2012. The Assessment Report summary confirmed Student's autism eligibility, identified his overall unique needs in the areas of intellectual and academic deficits and behavior challenges, receptive, expressive, and social language, speech and language, sensory processing, school performance and self-help. He was noted to become easily distracted in busy environments both visually and auditorily. He had low registration hearing. He had sensory sensitivity, and did not communicate with teachers when he needed to catch up on assignments, or about his future educational goals.

31. The recommended goals and or modifications/accommodations included: reduction of classroom clutter, pictures and noises; seating away from busy doorways or loud devices; use of visual and auditory cues when giving directions; speaking clearly and slowly to enable Student to process and hear directions; writing down verbal

information; have Student repeat directions back to the teacher or other individuals giving directions; reduce the amount of auditory stimuli through use of headphones; incorporate breaks and timeouts; break tasks down into smaller steps; use of a written agenda; and a transition program consideration for post school transitional needs.

## FUNCTIONAL ANALYSIS ASSESSMENT

32. A Functional Analysis Assessment (FAA) was also conducted and was completed on May 1, 2012. District also developed a behavior intervention plan (BIP). The purpose of the FAA was to provide updated behavioral data for the triennial IEP and because of Student's history and recent reports that Student was eloping, destroying property, and engaging in harmful severe behaviors. Dr. Petty oversaw the data collection process and the development of the BIP. She collected data in the targeted areas of eloping, physical harm, and remaining or leaving classroom, for four to five weeks to give District insight into Student's classroom behaviors. The data was collected from March to April 2012. In preparation for data collection, she sent Teacher Rating Scales to Marvin Baker, a teacher at OGS with instructions to distribute them to Student's teachers to complete and return. She spoke with another unnamed teacher four times, and once at OGS concerning Student's behaviors. She did not nor did she have District staff conduct observations of Student's behavior for the FAA. Instead, Dr. Petty provided a District-generated detailed eight page data collection sheet to Mr. Baker requesting detailed information concerning Student's behavior. In her opinion the data collection form was comprehensive and requested detailed information from OGS about Student's behaviors. She stated that the data she received was incomplete and admitted there could have been an error in the data collection process because she did not confirm or follow up with OGS to determine if all of Student's teachers actually received the data collection sheets. There was no evidence as to what behavior data was requested from OGS or what was provided by the teachers.

33. Dr. Petty testified that although she requested behavior records from OGS, she had never seen the behavior reports or quarterly education reports introduced by Student at hearing. However, she acknowledged that District did receive daily behavior logs midway through the FAA and at the end of the FAA, before the May 1, 2012 IEP meeting. She did not recall asking about incident reports or behavior reports from WCA/OGS concerning Student. However, she was made aware from Mr. Baker of incidents involving Student punching holes in the walls, throwing furniture, and his propensity to destroy property. Dr. Petty failed to obtain all of the behavioral data required for a comprehensive and appropriate FAA. However, she testified that she relied on OGS teachers to give her behavioral input and that even if she had had all of the information described in the behavioral incident reports, it would not have changed the BIP.

34. A FAA Report was issued on May 1, 2012. The FAA identified some of Student's antecedent behaviors as: (1) refusal to comply with teacher and staff directions; (2) runs away from classroom and/or throws things; and (3) elopes from the school setting. The functions of the antecedent behaviors were to escape or avoid non-preferred activity and to escape a demand or request. The health and/or physical factors influencing the behaviors included: Student's autism spectrum disorder; his medication regimen; low cognitive functioning; below age level language skills; lack of impulse control; inability to communicate well when agitated or frustrated resulting in inappropriate behaviors; tendency to be easily distracted requiring redirection from teachers and staff; and his motivation for attention from staff and peers. The FAA was lacking because of incomplete behavioral data.

35. There were only two behavioral goals and objectives identified in the FAA for Student to comply with staff directions (i.e. go into classroom and stay in classroom). The FAA identified goals and objectives for replacement behaviors in the areas of

frustration, class refusal, and staying in class. Most notably, the objective for the frustration goal required that when in a frustrating or otherwise difficult situation; Student will use words calmly and express his needs and possible solutions to the situation 100 percent of the time in three out of four events. The objective for the class refusal goal required that when Student was emotionally upset he would request a time-out for 10 minutes duration with teacher's permission in order to reduce the level of upset and then return to class to move on to the next task 100 percent of the time. These objectives were questionable given District's overall failure to conduct a systematic observation and analysis of Student's behaviors.

36. The BIP was developed in conjunction with Mr. Baker and District's School Psychologist Kristian Gonzalez. Dr. Petty testified that because the behavioral data provided by WCA/OGS was incomplete she was compelled to obtain older data from Student's previous years of attendance at DHHS. This data was provided by Mr. Gonzalez and was more than one to two years old.

37. The proposed BIP purported to address the target behaviors, and to provide consequent courses of action or interventions to be taken by school staff. The BIP proposed the following: (1) Student will not go into the classroom -staff will direct him to go into the classroom; (2) Student ignores staff's direction- staff will repeat direction and redirection; (3) Student continues to ignore staff direction-staff will give Student an opportunity to verbalize why he chooses not to enter the classroom and will provide Student a choice of preferred activity; (4) Student moves about in a frustrated manner and completely ignores staff requests or directions to enter the classroom-staff will choose a sensory break, praise any positive movement, and provide reinforcers; (5) Student is disruptive while refusing to enter classroom-staff will take Student to a safe area away from other students until he calms down. The BIP was based upon the FAA and was insufficient as set forth in Factual Finding 35 because of the lack of observation



and current behavioral information District should have obtained or taken in a properly conducted FAA. In addition, the BIP failed to take into account multidisciplinary assessment findings which, for example, provided insight into Student's difficulties verbalizing his needs when he was frustrated.

#### MAY 1, 2012 TRIENNIAL IEP

38. District held Student's triennial review IEP on May 1, 2012. This was the first of four IEP meetings culminating on September 14, 2012. Parents and their advocate, Mr. Runner, attended the meeting. Dr. Petty; Luci Coppola, District program specialist and IEP administrator; Ms. Hesseltine; Mr. Gonzalez, District psychologist and Student's case carrier; Larry Laguna, psychologist and Nancy Melgares, program administrator for Orange County Department of Education (OCDE), were also present. OGS staff: Ms. Perry, program specialist and OGS principal; Suzanne Ciraulo, special education teacher; Emily Daughton, general education teacher; Carson Ray, program coordinator/case manager; Marvin Baker, case manager; and Dennis Liddell, OGS administrator, participated telephonically. Justin Shinnefeld, counsel for District, also attended the IEP team meeting by telephone.

39. The primary purpose of the IEP meeting was to review the triennial multidisciplinary assessments, Student's performance at OGS, and to develop Student's program. Parents were very pleased with Student's progress at WCA/OGS. Ms. Ciraulo discussed Student's academic program at OGS. Student was in regular education classes for science, physical education (PE), and social studies. He was in special education classes for math and English. He was reading at a fifth grade level. He was able to cite the characters and the conflict in stories, but had difficulty stating why the conflict occurred. He was working on calculations with a calculator. The IEP notes reflect that Student's behavior was of concern and was discussed at length throughout the course of the meeting. OGS staff reported that from the inception of his enrollment to the

present there had been 23 incidents of Student not attending class and leaving classes. However, he was beginning to open up to school staff. A speech and language pathologist from OGS described the speech and language services she provided to Student during the 2012-2013 school year. Student met or was successful with his prior speech goals established by District. Student worked on social and pragmatic skills. He received both individual and small group speech services once per week for 30 minutes. He was generalizing prior skills that had been acquired, but continued to need support in the natural environment with pragmatic skills. Student's therapist at OGS informed the IEP team that Student was engaging in activities at WCA/OGS and his progress had been slow. His inattention and emotional dysregulation inhibited his overall performance. The therapist saw Student twice per week, at least once individually and in family sessions by telephone. The therapy sessions addressed goals in the areas of emotional management, social interactions, and independent living skills. The IEP meeting notes further indicated the OGS therapist would provide a treatment plan and monthly summary to District. OGS staff also agreed to provide current health screening information to District.

40. Dr. Petty and Ms. Hesseltine presented the Assessment Report results and recommendations to the IEP team. Ms. Hesseltine invited the speech and language provider at OGS to contact her if there were any further questions regarding the Assessment Report. The IEP team agreed to continue the IEP meeting for further review of the OT assessment results and recommendations and receipt of additional information essential to the development of Student's present levels of performance or baselines, goals and objectives. The IEP meeting was continued to May 24, 2012.

41. The May 24, 2012 continuation (Part II) IEP team meeting was attended by District staff. OGS staff appeared by telephone. Ms. Shapland presented the OT assessment report results and recommendations. The IEP team discussed present levels

of performance and progress on IEP goals from the 2011 IEP in the areas of Math, Written Expression, Reading and Study. OGS staff provided information on baselines and gave input on proposed goals in the areas of Reading (comprehension, recalling facts, reading for information, and understanding documents); Written Expression (personal information, punctuation, writing on topic, and written responses); Mathematics (money skills, personal budgeting, and time management); Behavior (class refusal, and frustration); Study (organization, remaining on task, task initiation); and Social/Emotional (social interaction). Parents were given a copy of the draft goals. The IEP team meeting was continued to June 12, 2012 to complete the proposed goals and objectives.

42. The continuation IEP meeting (Part III) was held June 12, 2012. Parents and advocate, Mr. Runner, attended the meeting. WCA/OGS staff participated by telephone. OGS staff reported they were currently working with Student on purchasing items in the community and in the classroom. Student was also working on developing his budgeting skills in the classroom. OGS staff reported that Student required a high level of support to work on these skills. The IEP team discussed and reviewed the FAA and BIP that was developed through collaboration of the District psychologists and OGS staff. OGS staff informed the IEP team they kept data on behavior incidents on a daily basis. The OGS therapist told the IEP team of OGS's observations and concerns about Student: (1) he required multiple prompts and had difficulty verbalizing his needs when he was frustrated; (2) he had made progress in his current environment, but he continued to struggle with processing and making appropriate decisions without adult prompting and guidance; (3) he demonstrated his frustrations by leaving the classroom and he rarely expressed himself verbally; and (4) Student made some progress in class refusal behaviors because he left class less frequently but still needed prompting to get to class on time. The OGS staff's concerns were based upon their hands-on classroom

experience with Student and personal knowledge of continuing issues with Student's performance in school. OGS staff took issue with the proposed behavior goals that would require Student to verbalize his frustrations and the staff informed District that the goal was unrealistic. Accordingly, the goal was rewritten to provide benchmarks allowing Student to use non-verbal cues. The IEP team, with OGS's continued participation, reviewed all proposed goals and objectives, and discussed the proposed individual transition plan. The IEP team agreed that Student would work toward a Certificate of Completion.

43. Student and Parents' advocate requested District provide a level of support in Student's IEP like that provided in a RTC. Since District had not yet made a placement offer, Parents requested an additional assessment to determine the level of support he might require in a proposed placement. Parents also requested District offer continued placement at WCA/OGS because he was making some progress. District agreed to consider Parents' requests. The IEP team agreed to continue the meeting to June 18, 2012 in order to finalize the proposed IEP offer.

44. At the June 18, 2012 continuation IEP (Part IV) District offered Student placement at Harbor Learning Center Dual Diagnosis Program (HLC) operated by OCDE, in Fountain Valley, California. Ms. Melgares, OCDE program administrator, described the school, the functional skills curriculum, class size and structure, and general education student population attending HLC in a separate program called Alternative, Community,

and Correctional Schools and Services Program (ACCESS).<sup>5</sup> Daily transportation would be provided for travel of approximately one and one-half hour round trip each day from home to school. The length of the trip depended upon pickups of other students. Parents expressed concerns about the placement and the distance required for Student to travel each day because of Student's propensity to become easily agitated and frustrated. The WCA/OGS staff expressed concerns about the unique nature of Student's behavioral and academic needs and the fact that Student was just beginning to show improvement in his current placement. Parents and OGS staff further expressed concerns about the difficulty for Student to make yet another transition with no therapeutic supports at the new location. WCA/OGS expressed concerns that placement was inappropriate as it lacked a therapeutic component and expressed overall concern that Student would regress. Mr. Runner requested District conduct an "RTC" assessment. District IEP team members denied his request because District believed the multidisciplinary assessment adequately assessed all of Student's behavioral needs.

45. District provided Parents a copy of the draft IEP offer which included the following: (1) specialized academic instruction, group/direct, five times per week, 370 minutes per day (minimum day twice per month of 193 minutes); (2) additional program support- individual/direct instruction; five times per week, 370 minutes per day; (3) individual counseling- individual/direct instruction; twice per month, 20 minutes per session; (4) speech and language- group/direct instruction; once per week, 30 minutes

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<sup>5</sup> ACCESS is an alternative education program operated by OCDE. ACCESS provides alternative education classes to students referred by Orange County school districts for various reasons including credit recovery, truancy, expulsion, and various other alternative education needs. ACCESS students also include juveniles in court-ordered juvenile detention referred to OCDE for their education.

per session; and (5) group counseling- group/direct instruction; one time per week, 30 minutes per session; psychological services- individual; one time per month, 60 minutes per session. District also offered the following supports for Student's transition to the recommended placement at HLC: (1) Student meeting with staff at OCDE during summer to review program and transition plan; (2) a transition behavior assistant to support his transition for 90 days; and (3) Parent observation of the program and class at HLC during a school day.

46. Parents requested a visit to HLC to observe the school and classroom setting before responding to the IEP offer. The IEP team agreed to suspend the finalization of the IEP offer pending Parents' visit to HLC and their response to the IEP offer.

47. On July 16, 2012, District wrote Parents to follow up with their response to the IEP offer presented on June 18, 2012. The letter reiterated the IEP offer of placement at HLC and services and contained a meeting notice scheduling a meeting on September 10, 2012.

48. By letter dated July 17, 2012, District notified OGS that District funding of Student's educational placement at WCA/OGS would end on July 31, 2012.

49. Parents observed the proposed placement at HLC on August 25, 2012. Parents were accompanied by their advocate. Mr. Laguna, Ms. Coppola, and Ms. Melgares were also present for the observation to answer Parents' questions. Parents passed through a security system used to check for weapons. The observation lasted for approximately one to one and one-half hours. They observed special education classrooms. Parents were greeted by students in the classrooms. They observed a noisy classroom that appeared to be unstructured and poorly supervised. The physical layout of the program consisted of three rooms; two classrooms, and a small room used as a lunch room, break room and utility closet. They observed metal detectors at the

entrance to the campus and an outside campus area used for lunch, recess, and recreation. They also observed that the gate at the front of the campus was open. They were told the gate was locked from the outside but could be opened by anyone from the inside. Father believed the student population in the high school aged classroom appeared to be severely handicapped and several were "mechanical in their greeting to the observers". Parents were informed by one of the teachers that most of the students had either a primary or secondary eligibility of emotional disturbance (ED). Parents were also told that the special education students would spend 35 to 50 percent of the time either daily or weekly with general education students in the ACCESS Program. Parents were concerned that ACCESS students were not typical peers from whom Student could observe model behavior.

50. On August 25, 2012 Parents gave District written notice of their concerns and objections to HLC. They concluded that HLC was an inappropriate placement for the following reasons: (1) transportation involved transport of one or two additional students. The distance and time to travel estimated at one and one-half to two and one-half hours one way. Student had a history of becoming agitated, frustrated and likely to show aggressive behaviors on long car trips and in congested traffic; (2) one of the two teachers at HLC identified the students as having a primary or secondary disabilities of emotional disturbance; (3) the lack of frequent and structured counseling or therapy provided at HLC; (4) the program is limited to one teacher and one classroom for the entire school day and is too restrictive; (5) the classroom atmosphere would not be conducive to learning and Student would be distracted because of the activity level, noise level, and large number of students in the class; (6) the presence of metal detectors and students in the ACCESS program who were not appropriate typical peers; and (7) the campus was not secure and Student would be able to access the campus gate which easily opened from the inside.

## SEPTEMBER 14, 2012 IEP

51. The continuation IEP meeting was held on September 14, 2012 (Part V). Parent provided District with a written summary of their concerns about HLC and the daily transportation offered for Student. The District IEP team members continued the meeting to respond to Parents' concerns about their observation of the placement offer and the information provided to them by HLC personnel about the makeup of the proposed classroom.

52. On October 3, 2012, District responded to Parents in writing and amended the IEP offer to include the following additional services: (1) District estimated the distance from Student's home to HLC was approximately 27 miles one-way. The time for travel would be extended by making stops to pick up other students. To address the travel time, District offered aide support on the bus to and from HLC to address any possible behaviors precipitated by traffic conditions or any other event. An IEP would be held within 30 days thereafter to determine the appropriateness of the support; (2) District clarified that that the majority of the students attending the proposed placement had eligibilities of either limited intellectual functioning or autism; (3) District revised and offered structured counseling services consisting of individual counseling once per week for 30 minutes a session.

53. The final IEP offer as amended included the following: placement in the HLC dual diagnosis program with (1) specialized academic instruction, group/direct, five times per week, 370 minutes per day( minimum day twice per month of 193 minutes); (2) additional program support- individual/direct instruction, five times per week, 370 minutes per day; (3) individual counseling- individual/direct instruction, once per week 30 minutes per session; (4) speech and language- group/direct instruction, once per week, 30 minutes per session; (5) group counseling- group/direct instruction, one time per week, 30 minutes per session; psychological services- individual, one time per



month, 60 minutes per session; and (6) aide support on the bus to and from HLC to address any possible behaviors precipitated by traffic conditions or any other event. An IEP would be held within 30 days thereafter to determine the appropriateness of the support. Parents disagreed with the placement offer and did not consent to the IEP.

#### OPINIONS CONCERNING APPROPRIATENESS OF HLC AND DISTRICT'S OFFER

54. Tracine Smoot, Student's expert witness, visited HLC at Parent's request. She held a bachelor's degree in education, a master's degree in psychology, and received her Ph. D. in psychology in 2000. She was a licensed psychologist in the state of Utah practicing in Utah. She held a school psychologist license that was not current. She was a psychologist consultant in private practice and the co-owner of Psychology Solutions. She performed psychoeducational evaluations of students placed at RTCs and she specialized in autism spectrum disorders and other learning disabilities. As part of her services, she developed IEP goals and made placement recommendations. She had assessed approximately 100 students in the school setting and approximately 100 students in RTC settings. She gave expert testimony in special education cases for both Students and Districts. She had also evaluated Student in June 2011 at Parents' request. That assessment was a specialty psychological evaluation while Student was attending Vantage Point, in which she ultimately recommended an RTC placement. She had not evaluated Student in his setting at WCA/OGS or at any time prior to the May 1, 2012 triennial IEP and she did not participate in the May 1, 2012 IEP meetings

55. Dr. Smoot reevaluated Student after the May 1, 2012 IEP in December 2012.<sup>6</sup> She had assessed other students at WCA/OGS and was very knowledgeable about its programs. She was also knowledgeable about Student's cognitive, social, and

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<sup>6</sup> The evaluation was not admitted into evidence because it was not available to the May 1, 2012 IEP team.

academic deficits from her June 2011 assessment. Dr. Smoot's visit to HLC occurred prior to the conclusion of the May 1, 2012 IEP. She was limited to 45 minutes of observation. She observed a special education student refuse to do his class work. The student was pacing around back and forth in the classroom and the aides appeared to be nervous. She observed the teacher bargain with the student which ultimately allowed the student to avoid doing his work. She concluded that there was no effective structure or system in the program to manage this type of behavior. Finally she observed students in the utility closet room area. A female student was lying on the floor in front of the other students and there was no adult supervision in the area at that time. Dr. Smoot asked questions of the school administrator concerning the student population and the type of typical students attending HLC. She asked specifically about the ACCESS students and the amount of time Student would be exposed to them. She concluded that HLC was not the least restrictive environment and was an inappropriate placement for Student. She opined that HLC lacked a culture of learning, had no specific behavior management system, had inconsistency in provision of counseling and had no therapeutic programs.

56. Ms. Melgares was a licensed speech and language pathologist. She was employed by OCDE as one of two program administrators. She attended IEP meetings in her capacity as a speech and language pathologist. She was familiar with the HLC program as a dual diagnosis special education program. The students have multiple disabilities with a range of social emotional needs, largely behavioral issues. The program typically focused on functional academics with community based instruction and an additional focus on communication skills. HLC was for students with severe social/emotional and cognitive deficits that needed a structured small classroom environment in which they were provided services. The classrooms had between eight to ten students referred by school districts within Orange County. District contacted OCDE

before the May 1, 2012 IEP meetings about the possibility of placing Student at HLC. Ms. Melgares attended the June 18, 2012 and September 14, 2012 IEP meetings to answer any questions about the HLC Dual Diagnosis Program. She knew nothing about the ACCESS general education students at HLC and she was not aware of the type of students enrolled in the program. She had not reviewed the Assessment Report nor was she familiar with Student's placement at WCA/OGS. She relied on Mr. Laguna's input to formulate her opinions about what would be an appropriate placement for Student. She did not hear anything specific about Student's program at OGS that could not be supported in the HLC program. She reviewed the IEP offer at the June 18, 2012 meeting and concluded that Student's needs could be met at HLC. She was present when Dr. Smoot visited HLC to observe the program. Dr. Smoot was limited to a 45 minute visit. OCDE's observation policy is 55 minutes to one hour. She had a discussion during Dr. Smoot's visit at HLC concerning whether some of the students in the ACCESS program had been expelled and whether these students were typical general education peers to whom Student should be exposed.

57. Patricia McGehee was employed as a special education teacher at HLC. She held a bachelor of science degree in childhood development, master's degree in special education and certificates of clinical competence in special education and multiple subjects. She had been employed with OCDE for more than 30 years teaching at all levels of special education. In 2002 she started the Dual Diagnosis Program. There are two classes: one for middle school aged students and the other for high school aged students. She taught the high school class that Student would attend. As of the time she testified at hearing there were seven students in the class; two boys and five girls. All of her students had BIP's. One of her students was on diploma track and the rest were on a certificate of completion track. The daily class schedule consisted of (1) morning work on IEP goals (math, reading, etc.); (2) PE; and (3) a community outing Monday through

Thursday to work on appropriate behavior. There were two job training sites: a store where the students stocked shelves and a real estate office where the students were hired to distribute flyers door-to-door. Every other Thursday was a minimum day.

58. Ms. McGehee explained the curriculum included social studies or science (subjects alternated), current events, mathematics, and reading (high school subject level). Related services were scheduled as follows: (1) Monday: speech and language; (2) Tuesday: group counseling and basketball with ACCESS students; (3) Wednesday: group PE; (4) Thursday: group with journal writing and word games; and (5) Friday: fun day games and current events. Math was taught 20-30 minutes per day four days per week. Reading was taught one-to-two hours per day four days per week. The students remained in one classroom all day. The classroom had one teacher and three to four aides including a one-to-one aide for one student. The aides accompanied the students to their activities. HLC handled a student's refusal to do work by providing a reward system and using redirection techniques. If it did not take effect the student was sent to another room. She recalled when Dr. Smoot observed her class but did not recall an incident with a student that day. She confirmed there was a gate that locked coming into the school but it was not locked going out of the school grounds. HLC had metal detectors used by the ACCESS students but not for the special education students. The special education classes mingled with the ACCESS students approximately 33 percent of the day except during basketball games on Thursday and at lunch. Even though she did not attend Student's IEP meetings or review assessment data she thought his goals could be met in her class.

59. Larry Laguna was employed as a school psychologist with OCDE. He had 30 years with the OCDE, 20 of which were as a paraeducator. He held a bachelor's degree in psychology, master's degree in science education, and a pupil personnel services credential in psychology. He completed a master's degree in psychology in

2001. At the time of the hearing, he worked at HLC Fountain Valley, Orange Coast College Adult Transition Program, Golden West College Adult Transition Program, and Goodell School. His duties at HLC included assessing students, chairing IEP meetings conducting group counseling once per week and individual counseling. He also prepared BIP's. Though he was based at HLC he traveled weekly to the other locations where he worked as well. For example he worked at Golden West once per week then returned to HLC. He was also required to work at Orange Coast College at least once per week and traveled to work at Goodell whenever contacted by the school principal. When at HLC he conducted a morning group session for one special education class and an afternoon group session for the other class about social strategies once per week for one hour. Additional group sessions were conducted during the week by the special education classroom teachers who were not school psychologists and had no psychology credentials. There were no other credentialed therapists or school psychologists to provide services to HLC students when he was working at another location.

60. Mr. Laguna gave some insight into the program and behavior management system in place at HLC. The teaching staff was trained in Applied Behavioral Analysis techniques (ABA). HLC was located on Harbor Blvd. which is a major thoroughfare. Students were not allowed to leave campus on their own because of safety issues. If a special education student misbehaved in the classroom they were given time out to leave the classroom and sit in another room until ready to return to the classroom. Each class took lunch separately and at different times and was segregated from one another during the school day. Each class traveled off campus separately for community based instruction, e.g. learning how to purchase items. In addition to Thursday basketball games with the special education students, ACCESS students were permitted to collaborate with the special education students in a

classroom activity such as art or in the health class where ACCESS students attended to show special education students how to make smoothies.

61. Mr. Laguna attended the May 1, 2012, June and September IEP meetings. Mr. Laguna did not assess Student for a recommendation to place him at HLC nor had he met or observed Student, but based upon information provided in IEP meetings he believed Student had needs similar to HLC students. In one of the IEP meetings he attended he learned of Student's behavior challenges at the WCA/OGS and Student's noncompliance, argumentative behavior, and eloping. He could not recall other behaviors discussed by OGS staff. He reviewed the multidisciplinary assessment, FAA, and BIP. Based upon that review he believed Student's goals and educational needs could be met at HLC.

62. Kristian Gonzalez was employed by District as a school psychologist for four years. He held a bachelor's degree in psychology, a master's in education psychology and received a pupil personnel credential in 2004. His duties included conducting assessments, counseling, collaboration with teachers, working with ED students, and crisis management. He worked with Student at DHHS to resolve a conflict in approximately 2010. He helped Dr. Petty develop the FAA, goals and BIP for the May 1, 2012 IEP by providing behavioral data from Student's prior enrollment at DHHS. He had had no contact with Student since 2010. He participated in the May 1, 2012 IEP team meeting. He and Dr. Petty had conversations with WCA/OGS staff concerning Student's behaviors. He observed the proposed placement at HLC in June 2012 accompanied by Dr. Petty, Ms. Bajarano, and Ms. Coppola. The observation was 45 minutes. He observed both special education classes. In Ms. McGehee's class there were six to eight students working on a task. The classroom was small and quiet and he observed the reward system displayed on the wall of the classroom. He met school psychologist, Mr. Laguna, during his visit to HLC and again at the IEP team meeting. He

was under the impression that the school psychologist was on campus at all times. He believed that based upon his observation and his participation in the May 1, 2012 IEP meeting that HLC was a suitable placement for Student.

63. Krystal Bajarano was employed with the SELPA and was previously employed by District as the informal dispute resolution specialist until July, 2012. In that capacity she worked with Student and Parents to resolve the complaint filed in 2011070630 which resulted in a settlement agreement. She also attended the post-resolution IEP in July 2011 confirming the terms of the agreement in which District funded Student's placement at WCA/OGS for the 2011-2012 school year. She attended the May 1, 2012 IEP continuation meetings on June 11, 2012, and the June 18, 2012 meeting as the IEP administrator. She was made familiar with Student's needs at these meetings. She had observed HLC on four prior occasions for other District students and observed HLC again as a proposed placement for Student prior to the June 18, 2012 IEP meeting. Even though she had no personal knowledge of Student, based upon her knowledge of HLC's program, the multidisciplinary assessment and the FAA, she believed HLC could meet Student's needs and was appropriate.

64. Luci Coppola was employed as a program specialist for secondary and adult programs for District. She provided support at IEP meetings as an administrator designee. As administrator she assisted the IEP team by clarifying and providing information concerning procedural safeguards, answering questions, recording the IEP discussions by taking notes, and she binds the District to the IEP offer by signing the IEP on behalf of District. She has a bachelor's degree in psychology, master's degree in art education, teaching credentials in mild moderate and moderate to severe, general education, and an administrative credential. She also worked as an autism specialist for four years, and as a preschool and elementary school teacher. She served as the administrator designee at the May 1, 2012 IEP and at all of the continuation meetings

except June 18, 2012 where Ms. Bajarano took the notes. Ms. Coppola testified that her notes were true and correct. She also signed the IEP offer on District's behalf. Prior to the IEP she reviewed Student's Assessment Report, and goals and objectives. When shown WCA/OGS Quarterly Education Reports she stated that she had not seen them until preparing to testify at the hearing. She had not seen or had any prior knowledge of the Incident Information Report, Progress Monitoring Report, and Discipline Incident Reports until the hearing. However, she acknowledged that portions of the Discipline Incident Reports were discussed in the May 1, 2012 IEP meetings but OGS staff did not mention fighting, or disrespect for authority. Ms. Coppola recalled the only mention of Student's behaviors concerned his actions at home. Ms. Coppola's testimony regarding the knowledge of Student's behaviors provided in the IEP team meetings was not credible. The IEP team meeting notes for the May 1, 24, and June 12, 2012 IEP meetings for which she was responsible all gave accounts of discussions of behavior reports by OGS staff.

65. Ms. Coppola observed HLC along with Ms. Bajarano and Mr. Gonzalez between June 12 and June 18, 2012 to determine if it was an appropriate placement for Student. They were allowed to observe for approximately one and one-half hours. In that time frame she observed both the middle school and high school classes. The high school class was structured; there were visuals around the classroom and behavior management systems; the teacher worked with the students one-to-one; another room opposite the school psychologists office was designated as an eating area; a third room was a designated quiet area for students who needed a break from the classroom; and there was regularly scheduled community based instruction. She had previously worked with the ACCESS students who she described as "credit deficient" for various reasons including trancies, poor attendance, and expulsions. She had not worked with Student when he was in District but she believed HLC was an appropriate placement.



## WATERFALL CANYON ACADEMY AND OAK GROVE SCHOOL

66. WCA/OGS had an enrollment of approximately 20 special education students and 20 regular education students in the 2011-2012 school year. In the social setting Student was able to interact with typical peers before school, during lunch, during passing periods, and after school. There were newspaper articles available for the students to read and write responses that allowed conversations to start. At lunchtime students all ate together and had the opportunity to socialize. The nature of instruction for Student at OGS provided for small classes with a small student to teacher ratio (6:1). Student had between five and six classes per day with general and special education students in some of the classes. Student participated in PE activities, got time to do computer work, and was provided with opportunities to watch his peers in other activities.

67. Dennis Liddel was the founder of OGS which is the academic component of WCA. He was currently the Director at OGS and responsible for the day-to-day operations. There were between 35-45 students comprised of both general and special education students at WCA/OGS. OGS had six classrooms and six full-time teachers. Approximately 50-60 percent of the students had active IEPs. OGS was housed in an approximately 5,000 square foot building. All classrooms were located on the main corridor. A "front desk" was situated on the main corridor where OGS staff met with students whose problems need to be addressed during school hours. A gymnasium where PE classes were held was also located inside the school building. Most classes had a maximum of 10 students. However, there were six to eight children in Student's classes because of the level of supports he needed. The students changed classes throughout the day so as not to remain in one classroom all day. The students were transported from the residence to school by van. OGS had a community-based program.

68. Carson Ray was currently employed at WCA/OGS. He was assistant director for WCA at its residential facility. He did not have a college degree or teaching credentials. He worked with or was involved in the planning of treatment goals for residents. He worked with Student over the two year period of Student's stay there. Student was currently on the South campus where there is a two-to-one teacher to student ratio. There were 13 students/residents, seven of whom had IEPs. There was 24 hour staff coverage at the residential facility. Student's daily schedule consisted of the following: Up at 6:45 a.m., personal hygiene, clean room, medication regimen, breakfast, morning household tasks, group, school 9:45 a.m. to 3:30 p.m., processing group meeting at 4 p.m. to review the day's events, snack, recreation therapy, evening snack, dinner, household tasks, hygiene, skills development, free time, lights out at 9:00 p.m. on weekdays but later on weekends. Mr. Ray testified that WCA/OGS was a secular institution but residents attended church on Sunday and church functions at school. Student participated in three group sessions daily: individual, family, and social skills (daily living skills, anger aggression group, and processing group), conducted by a therapist.

69. WCA maintained daily logs on each resident to report daily activity including significant behavioral incidents. Several incidents occurred at WCA involving Student during the period of the May 1, 2012, IEP. These incidents involved acts of escalating violent behavior, physical aggression, destruction of property, failure to follow instructions, fighting, threatening to shoot staff with an AK-47 and beat up students, absence without leave (AWOL), and disrespect for authority. Documented incidents took place on May 4, 8, 22, June 18, July 24, August 26, and September 3, 2012. Mr. Ray believed Student's behaviors were triggered by a change in his routine, loss of behavior points, noise, other students, female staff, and task avoidance. The number and frequency of incidents had decreased over time, which showed Student made some

progress. As of the time of the IEP meetings, Mr. Ray did not believe Student was ready to return home because he still displayed processing deficits and highly destructive behaviors.

70. Ryan Richter testified as Student's expert. He was a licensed clinical therapist and mental health counselor. He was currently the clinical director at WCA. He had 10 years of experience training counselors and received training from credentialed clinical therapists in treating children with ADHD, autism and all special education disability categories. He supervised five counselors and had a caseload working with individual students and their families. Parents referred Student to WCA because his anger and aggression was out of control. He worked with Student from the inception of his enrollment at WCA/OGS on July 30, 2011 to treat his social and emotional disorders. According to WCA's intake summary, Student was diagnosed with autism, ADHD and mild mental retardation (MMR) with a full scale IQ of 51. Student had a very difficult time socially and emotionally after his enrollment at WCA and the staff was not sure if Student would be a fit for their program. WCA records show that he assaulted two residents in two different homes shortly after he was enrolled at WCA. Student records showed he struggled with emotional regulation and required one-to-one supervision. Student could become easily frustrated when he did not get his way and act out aggressively toward family members and individuals in other settings, including school.

71. Student had received counseling and therapy since his enrollment on a daily and weekly basis as follows: Social Skills and Goal Group which teaches appropriate social skills and interaction and develops individual goals for the day and the week, Monday-Sunday; Independent Living Group which teaches independent living skills and self-care, and Recreational Therapy to address behavior in the community, Monday-Sunday. Student also received Aggression Replacement Therapy and Character Development Group, once per week; Monday and Tuesday respectively. All group

sessions were conducted after school by trained staff one hour per day. Mr. Richter provides therapy in the form of individual and family counseling to Student one hour per week.

72. WCA/OGS used a Behavior Improvement Report to track Student's classroom behavior. The Behavior Improvement Report was prepared by Ms. Ciraulo with input from Student's teachers. Mr. Richter regularly received these reports. The Behavior Improvement Report showed that from November 2011 to May 2012 Student was charged with 11 refusals to go to class; 10 instances of leaving class or school building without permission; six refusals to participate in class, being disruptive, drawing a swastika, refusal to follow directions, and one instance of going AWOL meaning Student left the school grounds.

73. Mr. Richter testified that though Student had struggled emotionally and behaviorally, the incidents of aggression subsided over time. Overall, Student made progress but more improvement was needed. He believed Student struggled with frustration. He observed Student become angry when frustrated. Student became verbally aggressive, used foul language, punched, kicked, hit, destroyed property, and threatened others with physical harm and/or to kill. However, given what he knew of Student, he persuasively opined that Student would struggle if he changed placement and had to ride on a school bus for more than one and one-half hours with other students on board as he is easily frustrated and provoked. He further opined that the presence of an aide on the bus would help but would not prevent Student's angry and violent response if frustrated by the distance or if provoked by others on the bus. He further opined that Student had difficulties with time management which would present a challenge getting him to the bus in the morning on time and would be another source of frustration to Student. He further opined that a change in placement at this time would not be appropriate because of Student's emotional behavior patterns, slow

processing speed, difficulty in communicating, and inability to accept change. At the time of the May 1, 2012 IEP meeting Student's behavior progress monitoring report showed he was meeting his behavior goals.

74. Mr. Richter was present during the May 1, 2012 IEP meeting where the team discussed various scenarios for a proposed placement. He opined that HLC was not an appropriate placement. He believed that moving Student to HLC would likely lead to increased anger, aggression and regression. Mr. Richter's opinion that Student's needs could not be met at HLC is entitled to great weight because of his more than two-year relationship with Student as his therapist.

75. Suzanne Ciraulo was currently employed by WCA/OGS as a special education teacher. She held a bachelor of science degree in special education and a master's degree in English as a second language. She was licensed in the state of Utah to teach special education K-12. She was a full time teacher at OGS since 2010. She taught Student's English and math classes. There were eight students in both classes with one aide in the English and two aides in the math class. The students were assessed at the start of the school year. The classes were highly structured. The special education students had modified curriculums. The math class started the year with basic math and ended the year with fractions. The math aides pulled students out of the classroom to work with one student at a time. The English aides worked with the struggling students individually. Student received accommodations in accordance with his IEP. He received extended breaks, books on tape, modified assignments, preferential seating, Dragon Speak Computer Program, and positive reinforcements. Ms. Ciraulo was familiar with Student's abilities. He was at a second to third grade level in math. He had a sixth grade reading level and second grade skills in writing. He spelled well but struggled in writing. He could not draw inferences, make predictions, or understand abstract reasoning. Ms. Ciraulo also taught the study skills class. In this class Student struggled with note-taking.

Student also had problems getting to classes on time. She observed that overall Student had improved in math in that he readily told the teacher or aide if he was stuck on a math problem. However, he would get frustrated when he was stuck in reading and writing and tended to react or balk, leading to a time out. He was getting to class on time more frequently than in the past.

76. Ms. Ciraulo prepared the WCA/OGS Behavior Improvement Reports and the Quarterly Education Reports for the 2011-2012 school year. She participated telephonically in all of the May 1, 2012 IEP meetings and discussed Student's behaviors in several of the meetings. Overall Ms. Ciraulo believed Student showed progress in his current school setting. She testified the factors to consider in determining the appropriate placement for Student were the number of students in the class, maturity level of students, use of pull out services, appropriate related services, and age of teaching staff. She was present when District offered HLC and based upon the description of the placement Ms. Ciraulo did not believe HLC was an appropriate placement. She opined that Student would become overwhelmed and frustrated in a single classroom setting and without the benefit of interaction with higher functioning students and typical peers in a multiple classroom setting. She also testified HLC was more restrictive than OGS. She indicated that in his current placement Student was restricted only at the residential facility.

77. Heidi Perry was employed as a school coordinator and administrator for WCA/OGS. She had almost four years of college but did not have a college degree. She was a certified instructor in positive control, which is a program used to teach WCA staff behavior modification techniques, physical interventions, and communication skills. She had 14 years prior work experience as a psychiatric tech using behavior modification strategies with cognitively impaired patients six to 19 years of age. She explained that OGS was on a quarterly school year system. The class offerings included English, math,

history, healthy lifestyles, fitness for life, and financial literacy. The classes were modified to meet each individual student's needs. Some of the students were on diploma track while others would receive a certificate of completion. Students were grouped together in classes according to their ability levels. Every student was assigned an advocate teacher. Student attended classes with both higher and lower level students.

78. Ms. Perry was Student's case manager responsible for his behavior and academic needs, and attendance at his IEP meetings. She also worked with Student's special education teacher, Ms. Ciraulo for weekly reviews of his progress, review of quarterly reports and behavior improvement reports written by Ms. Ciraulo. Ms. Perry reviewed the reports before sending them to Parents. For example the Quarterly Education Report for the fourth quarter of the 2011-2012 school year (April to June 2012) showed Student made good grades in all of his classes, improved in class participation, made excellent academic progress, and appeared to work hard most of the time. He continued to work on his reading comprehension, paragraph writing in language arts, time management, and money management in math. He still had difficulty reading social cues and was also working on limits and boundaries, anger, and compliance with staff directives. The progress report also established Student earned final grades as follows: "A" in art, fitness for life, and geography; "A-" in environmental science, and math; "B" in study skills and "B-" in history; and "C+" in language arts. Student enjoyed his teacher's attention and continued to have problems interacting with certain students who required more assistance and attention than he did. He was observed to become agitated when in the presence of a lower functioning student. He also tended to react to loud noises in the classroom caused by other students. Student would lash out at the other student or leave the classroom without permission. Ms. Perry observed that transitions from class to class helped to dissipate Student's frustration levels. OGS had a "front desk" at the front of the classroom corridor where

OGS staff could address Student's tantrums or any problem he needed to address when he walked outside the classroom.

79. As of the May 1, 2012 IEP Student transitioned between his six classes with a three minute break in between each class. Overall Student showed improvement in some of his target behaviors. During the beginning of 2011-2012 school year at OGS Student presented as a very rigid individual with profound dangerous and problem behaviors. Student left class four to five times per week, compared to the end of the school year, where he left class two to three times per month. His propensity to tantrum in the classroom during the 2011-2012 school year was at a very high level and occurred almost daily compared with the beginning of the 2012-2013 school year in August to September where tantrums occurred less frequently. She participated telephonically in the May 1, 2012 IEP team meetings. WCA/OGS staff discussed Student's behaviors and his current needs for behavior support. She was present when District proposed placement at HLC for the 2012-2013 school year. She did not believe HLC was an appropriate placement because of Student's needs for intensive supports that HLC could not provide.

80. Student attended WCA/OGS for the 2012-2013 school year. Parents incurred expenses for tuition, and travel for the 2012-2013 school year as follows: (1) tuition for the period from August 1, 2012 to July 31, 2013- \$84,000.00; and (2) travel- \$2,000.00 per parent trip for three trips and \$ 1,000.00 for Student's home visit. Parents also sought reimbursement at hearing for expert witness fees and costs in the amount of \$7,000, and legal fees in the amount of \$24,000.00.

#### THE OCSD PRIVATE SCHOOL SERVICES PLAN

81. Student's last agreed upon IEP from District established LAS goals and LAS services to be provided by WCA/OGS.



82. WCA/OGS contracted with Ogden City School District (OCSD) to provide LAS services to Student pursuant to a private school services plan (PSSP). The initial PSSP was prepared and signed at a meeting held on October 12, 2011. The PSSP form provided for and identified Student's current placement at WCA/OGS, Student's school of residence at DHHS, and Student's LAS goals and related services previously developed in Student's IEP by District's IEP team for the 2011-2012 school year to be provided by WCA/OGS. The IEP provided for Student to receive LAS for 30 minutes once weekly. The PSSP form also contained a line for parent's signature and a note at the bottom of the form contained a footnote that stated "...if parents signature is missing provide a copy of 'SP' and regulations regarding private schools and check below". The form provided three boxes at the bottom with the options to check- "Did not attend (document efforts to involve parent)", "Via telephone"; and "Other\_\_\_\_\_" -none of these boxes were filled in.

83. The PSSP was signed by OCSD speech therapist Marcia Simpson. Ms. Ciraulo and an administrator at WCA/OGS also signed the PSSP. The PSSP was continued for the 2012-2013 school year pursuant to a PSSP signed by representatives for OCSD and WCA/OGS on May 1, 2012.

84. There was no IEP team meeting to implement the PSSP and Parents never signed the October 12, 2011 or the May 1, 2012 PSSP's. OCSD did not document efforts to involve Parents in the development or execution of the PSSPs or any other efforts that may have been required.

85. Diane Adams was the special education director for OCSD. OCSD provided services to private school students pursuant to a PSSP. A PSSP requires the private school to identify the goals for which services are required. OCSD then, based upon a proportionate share of expenditures agreement with the private school, provided the services to the student. Typically the PSSP was signed by parents, therapist, a teacher

from the local education agency (in this case WCA/OGS), and an OCSD representative approving the expenditure of District funds.

86. According to Ms. Adams in this case OCSD dealt exclusively with WCA/OGS on the PSSP's. The meetings were by telephone, and she assumed but was not sure that WCA/OGS contacted Parents or the District of residence and/or provided them with the signed PSSP's. She never met with Parents, never had conversations with Parents in the preparation of the PSSP's, and never obtained their consent to the PSSP's. She credibly testified that OCSD provided progress reports to WCA/OGS on OCSD forms; she knew Parents resided out of state, and she assumed WCA/OGS provided the forms to Parents. Overall, she misunderstood the process for development and/or implementation of a PSSP for an out-of-state student placed at a private school in Utah.

87. Ms. Simpson was employed by OCSD as a speech and language therapist for 33 years. She provided LAS services for a variety of schools including private schools. WCA/OGS was part of her caseload. She received Student's IEP from WCA/OGS prior to the October PSSP meeting and she transferred the goals onto the PSSP. She participated in a meeting on October 12, 2011. It was a telephonic meeting lasting two hours. She discussed LAS goals and she assumed this was an IEP meeting. She provided LAS to Student starting October 12, 2011 and continuing until sometime in May 2013 when the services were terminated. She credibly testified that in out of state cases she was not sure if Parents were required to sign the PSSP if they had already consented to and signed the underlying IEP. In this case she believed that Parents signed the underlying annual IEP from which she took her information and placed in the October 12, 2011 PSSP. However, she wrote on the May 1, 2012 PSSP that the speech goals were proposed because Parents had not signed a new annual IEP. She was also aware Parents did not sign the May 1, 2012 PSSP. Like Ms. Adams she was not familiar with policies or the state's requirements for processing PSSP's for out of state students and believed the

May 1, 2012 PSSP needed only the signature of the local educational agency (LEA) to be valid.

88. She signed the PSSP's for both October 12, 2011 and May 1, 2012. She had never spoken with Parents or ever contacted them to discuss Student's LAS. She interacted only with the WCA/OGS staff during the time she served Student. She provided quarterly progress reports on OCSD standard forms to WCA/ OGS and it was her understanding that they would be forwarded to Parents. She did not know if Parents ever received the PSSP's and she assumed that Ms. Ciraulo, Student's special education teacher, provided the PSSP and/or quarterly progress reports to Parents.

89. During the course of the May 1, 2012 IEP meetings District speech and language pathologist, Ms. Hesseltine, had direct contact with Ms. Simpson and received progress reports from Ms. Simpson. Ms. Hesseltine interacted with Ms. Simpson on several occasions for input in her assessment, when she provided Ms. Simpson a copy of the assessment in advance of the IEP meetings, and telephonically at two of the IEP meetings including during presentation of the Assessment Report. When questioned by the ALJ to state when she received the progress reports from Ms. Simpson she did not respond directly to the question but responded by saying that the progress reports were not on OCSD forms. Ms. Hesseltine's testimony concerning her knowledge of OCSD's involvement in Student's program was not credible. Based upon Ms. Hesseltine's contact with Ms. Simpson and Ms. Simpson's active involvement in the May 1, 2012 IEP meetings District knew or should have known of OCSD's involvement in Student's program.

90. Parents credibly testified that neither WCA/OGS nor OCSD notified them of the PSSP. Parents assumed WCA/OGS were providing speech and language services to Student in accordance with the IEP. Parents never attended an IEP meeting to discuss a PSSP and never signed or received a PSSP from either entity. They had never met or

spoken to Ms. Simpson or anyone from the OCSD nor did they receive progress reports from her or OCSD. They first became aware of the PSSP when District filed a motion to dismiss the consolidated matter on May 6, 2013. Parents immediately ordered the WCA/OGS to cease provision of speech and language services to Student by OGCSO.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Because both District and Student filed requests for due process hearing, they respectively have the burden of proving the essential elements of each of their claims. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

### OAH JURISDICTION

2. As a preliminary matter, District contends OAH lacks jurisdiction to adjudicate the issue of a FAPE for Student in the 2012-13 school year due to his receipt of services under an Individual Services Plan (ISP) provided by the OCSD. District argues that as a matter of law, a child who is parentally placed in a private school by his parents, with an ISP provided by the District in which the private school is located, is not entitled to assert a legal challenge against the District of residence for a proposed IEP for the same period as the ISP is in place.

3. Student contends the IDEA extends to parentally-placed private school children and California law obligates the district of residence to provide an appropriate IEP irrespective of parental placement in a private school in another school district.

4. As discussed below, District's argument fails. OAH has jurisdiction over this consolidated action based upon the law and facts discussed below.

5. The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those

children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) Thus, the parents of a disabled child have the right to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education (FAPE) for the child. (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(2006)<sup>7</sup>; Ed. Code, § 56501, subd. (a)(1)-(4).) (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

6. Under the IDEA, an LEA is responsible for “providing for the education of children with disabilities within its jurisdiction.” (20 U.S.C. § 1413(a)(1); 34 C.F.R. § 300.101(a).) An LEA’s FAPE obligations extend to a student attending a private school out of state as parentally-placed private school students are entitled to an IEP provided by the district of residence. (*Moorestown Twp. Bd. of Educ. V. S.D.* (D. N.J. 2011) 811 F.Supp. 2d 1057, 1069, citing *James v. Upper Arlington School District* (6th Cir. 2000) 228 F.3d. 764, 766-768, cert. den’d, 532 U.S. 995, 121 S.Ct. 1655, 149 L.Ed. 2d 637 [parents withdrew their learning disabled child from the public school system and placed him in

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<sup>7</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

a private school at their expense...the "obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment."].)

7. Here, the evidence established that Parents resided in District's jurisdictional boundaries at all times relevant and at the time of Student's unilateral enrollment at WCA/OGS. More importantly, the evidence showed that Parents were unaware that Student was even receiving services from a public school in Utah, such that it cannot be demonstrated that any act by Parents caused a change in residency. Similarly, the OCSD employees themselves admitted that they had no idea whether it was appropriate for them to be providing services to a minor student who had been placed by out-of-state parents. In short, the fact that WCA/OGS and OCSD may have been improperly using the PSSP cannot be considered a change of residency for Student. Thus, District was Student's district of residence and responsible to offer Student a FAPE at all times.

8. District argues that "a broad reading" of Title 34 Code of Federal Regulations part 300.137(a) together with *District of Columbia Public Schools* (D.C. SEA 2012) 113 LRP 11778 "suggests" OAH does not have jurisdiction over this case. District's reliance on the holding in *District of Columbia Public Schools* (D.C. SEA 2012) 113 LRP 11778 is not persuasive and does not support District's position in the present matter. As a matter of law, jurisdiction was not at issue in *District of Columbia*. *District of Columbia* resolved the matter on the merits. Therefore, if the case is instructive of anything in this matter, it illustrates that jurisdiction was proper.

9. As a factual matter, *District of Columbia* is also distinguishable. In that case, a parentally-placed private school student attending a private school in the district of residence received speech services from that district under an ISP. A few days after parent agreed to the ISP Parent requested an IEP from the district of residence. The district denied the request because student was not enrolled in the district. Parent filed a

due process hearing request alleging the district's refusal to convene an IEP denied student a FAPE. The hearing officer found, regardless of the district's continuing obligation to develop an IEP for parentally placed private school students, parent failed to prove district's refusal to provide an IEP resulted in a denial of FAPE. *District of Columbia* does not support District's argument and is clearly distinguishable from the present case.

10. District's argument that speech and language services provided to Student, whether Parents knew about it, consented to it or as described by District under "what appears to be" an ISP, deprives OAH of jurisdiction of over IDEA claims brought by both parties, is not supported by Title 34 Code of Federal Regulations part 300.137(a), or any other Federal Regulation. Part 300.137(a), and authorizing section 1412(a)(10)(A) of Title 20 of the United States Code govern access and funding for special education to children attending religious or private schools. Neither Part 300.137(a) nor the sections of the IDEA regarding funding stand for the proposition that under these facts, District is relieved of its status as Student's LEA based on his and Parent's residence within District boundaries.

11. District has failed to prove that because it is not the district of residence, OAH lacks jurisdiction to hear this consolidated matter. (Factual Findings 1 through 53 and 81 to 90; Legal Conclusions 1, and 4 to 11.)

#### ISSUE 1: OFFER OF FAPE IN THE LRE IN THE MAY 1, 2012 IEP

12. District contends the May 1, 2012 IEP offered Student a FAPE in the LRE appropriate to meet his needs for the 2012-2013 school year. Student contends District denied Student a FAPE because it failed to offer him a placement in the LRE appropriate to meet his needs. For the reasons set forth below, the IEP did not offer Student a FAPE in the LRE.

13. Legal Conclusions 1 and 5 are incorporated by reference.

14. A pupil with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) consisting of special education and related services. (20 U.S.C. § 1400 et. seq.) (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

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

16. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services



must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley*, supra, at p. 200.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Rowley*, supra, at p. 201.)

17. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "'meaningful' educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

18. There are two parts to the legal analysis of whether a school district offered a pupil a FAPE, whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, supra 458 U.S. at pp. 206-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the

decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; see also *Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d at p. 1033, fn. 3 [assessments].)

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

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

21. School districts are required under the IDEA to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

22. The Ninth Circuit Court of Appeals has developed a four-part test to determine whether a student can be satisfactorily educated in a regular education environment. The Court has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class;" 2) "the non-academic benefits of such placement;" 3) the effect [the student] had on the teacher and children in the regular class;" and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a

general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

23. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

24. The offer of placement HLC in the May 1, 2012, IEP did not offer Student a FAPE for the reasons set forth below.

25. Applying the *Rachel H.* factors, the evidence shows that Student certainly would not benefit from placement in a full-time regular class. The non-academic benefits to Student would be minimal due to his behavioral challenges. The effect on his placement in that type of classroom setting would be highly disruptive to students and teachers. Finally the costs of mainstreaming are not a factor in this case.

26. Instead, the evidence established that the continuum of placement options dictated that Student needed to be placed in a small and structured classroom environment. While it is undisputed that Student needed a structured educational placement and that both HLC and WCA/OGS offered small classroom settings, Student required a structured classroom environment with intensive behavioral and academic supports throughout the school day. Further, Student needed intensive therapeutic

support on a regular and consistent basis, which could not be provided at HLC in order to achieve some educational benefit.

27. The evidence established that Student had especially unique needs. Student had a long history of aggressive behaviors, failure to comply with teacher instructions, eloping, going AWOL, destruction of property, and threatening physical harm to others as well as family members. According to Mr. Richter, who had been Student's therapist and counselor for the past two years, he struggled with emotional regulation, had an extraordinarily low tolerance level, was easily frustrated and driven to anger, had difficulty communicating his needs in the educational setting, and required one-to-one supervision. All of OGS teaching and administrative staff similarly credibly testified about Student's needs and challenges. Mr. Ray, who was also responsible for Student's counseling, also credibly testified that Student's behaviors were triggered by changes in his routine, noise, other students whose actions provoked him, female staff, and task avoidance.

28. Further, the nature of Student's social skills and communications deficits and inability to transition were so severe that placement at HLC was not appropriate and could not meet Student's unique needs even with substantial accommodations and related services. HLC was inappropriate because of the one-classroom environment, the lack of regular and consistent counseling, and the lack of consistent behavior supports during the school day

29. Finally, although District characterized HLC as being in the LRE because of some daily exposure to typical peers, such opportunities were extremely limited, particularly when the ACCESS students were not necessarily typically developing students, and many had other challenges. While technically less restrictive on the continuum of program options because HLC was a day program in Student's home county, which would require Student to live at home, with some exposure to a few

typical children, the evidence showed HLC was not an appropriate placement for Student for the reasons set forth above. Simply put, District does not prevail on the issue of offering a placement in the LRE if HLC was not appropriate at all.

30. In sum, based upon what the IEP team knew at the time of May 1, 2012 IEP meetings about Student's behavior, emotional dysregulation, and struggles, it was not objectively reasonable to offer placement at HLC. Accordingly, the May 1, 2012 IEP offer of placement at HLC denied Student a FAPE. Student met the burden of proof by a preponderance of the evidence that District's offer of placement did not provide Student a FAPE, and District did not meet its burden of proving that it had offered a FAPE. (Factual Findings 1 through 80; Legal Conclusions 1, 5, and 12-30.)

## ISSUE 2: FAILURE TO CONDUCT CLASSROOM OBSERVATION IN THE TRIENNIAL ASSESSMENT

31. Student contends that the triennial assessment was flawed because District's offer of placement was based in part on assessment data that did not include classroom observations. District contends the triennial assessment met all of the legal requirements and was appropriate.

32. Legal Conclusions 1, 5, and 18, are incorporated by reference.

33. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

34. For purposes of evaluating a child for special education eligibility, the District must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union 20 School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158

[assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

35. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(l); Ed. Code, § 56321, subd. (a).) The assessment plan must be understandable to the student, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(l)-(4).) A school district must give the parents and/or the student 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The proposed written assessment plan must contain a description of any recent assessments that were conducted, including any available independent assessments and any assessment information the parent requests to be considered, information about the student's primary language and information about the student's language proficiency. (Cal. Code Regs., tit. 5, § 3022.)

36. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the

assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7) (2006).)

37. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) The report shall include relevant behavior noted during the observation of the student in an appropriate setting. (Ed. Code, § 56327, subd. (c).)

38. The IDEA also provides that as part of any reevaluation, the IEP team and other qualified professionals as appropriate shall review existing evaluation data on the child including evaluations and information provided by the parents of the child; current classroom-based, local or State assessments, and classroom-based observations, and observations by teachers and related service providers to determine eligibility, needs, program and services. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1) (2006).)



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

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

41. Following an FAA, the school district must prepare a written report of the assessment, which must include the following: (1) a description of the nature and

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

42. Here, the evidence establishes that classroom observation of Student's behavior and the relationships of that behavior to Student's academic functioning were insufficient. This is especially true in light of the fact that the classroom was where Student exhibited difficulty with inconsistency in work performance, task avoidance, and distractibility during individual work assignments, following teacher instruction, difficulty with comprehension, and behaviors when frustrated because of his inability to communicate.

43. The evidence establishes that District's multidisciplinary assessment were conducted at WCA/OGS during their spring break when school was not in session and any meaningful classroom-based observations could not have been conducted. Moreover, the need to observe Student in an active classroom was important because of the history of behavior challenges and would be essential to District's decisions regarding placement for the 2013-2014 school year. The testimony of Dr. Petty and Ms. Hesseltine that they were aware their visit to WCA/OGS to assess Student during spring break supports a conclusion that the multidisciplinary assessment was inappropriate as regards Student's behavior.

44. Further, Dr. Petty testified regarding the FAA that the data collection received from WCA/OGS was incomplete. It logically follows that inasmuch as the FAA required data collection of classroom observations District's failure to obtain all of the data required to formulate an appropriate BIP shows the assessments were inadequate.

45. Prior to the May 1, 2012, IEP team meeting, Student had not been enrolled in a District program for more than one year. District could not possibly assess Student's current classroom behaviors, particularly after a year in a therapeutic setting, without actually seeing Student in a classroom setting. Not only is this true for purposes of the multi-disciplinary report, but in particular for the development of a BIP, which relies heavily on observations of the environment and immediate antecedents to behaviors. Accordingly, District failed to obtain critical information regarding Student's behavior in four areas: (1) not observing Student in a classroom for Dr. Petty's psychoeducational assessments; (2) not observing Student in a classroom for purposes of the FAA and BIP; (3) as to both the psychoeducational assessment and FAA, not fully reviewing the behavior logs and incident reports discussed by WCA/OGS staff at the May 1, 2012 IEP team meetings; and (4) not taking all reasonable steps to obtain complete behavioral data in preparation of the FAA. Thus, Student demonstrated that the triennial assessment was not appropriately conducted. However, as discussed below, to prevail on this claim, Student must also demonstrate that a denial of a FAPE resulted. Student has met his burden on this aspect as well.

46. As set forth in Legal Conclusion 18, a procedural violation of an inadequate assessment does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C.

§ 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d at p. 1033, fn. 3 [assessments].)

47. Here, although the evidence did not show that the failure to adequately assess significantly impeded Parent's opportunity to participate in the decision-making process, the inadequate assessment did impede Student's right to a FAPE. The testimony of Student's witnesses established Student struggled with emotional regulation. Student had difficulty reading social cues and was quick to react in anger. His behaviors were triggered by a number of things including a change in his routine, noise, female staff, and task avoidance. Consequently these triggers prompted Student to become verbally and physically aggressive in the classroom setting in addition to other settings. These witnesses credibly opined that Student required a classroom setting that provided opportunity for brief transitions throughout the day along with intensive one-to-one daily support and therapeutic interventions that could not be provided in a placement such as HLC. As discussed in detail in Issue One, District's placement offer did not take into account Student's unique needs, which, had District performed classroom observations and adequately reviewed all relevant and complete behavior data, should have resulted in a placement recommendation other than HLC.

48. Based upon the evidence and Factual Findings above, Student proved that District's failure to conduct classroom-based observations in the multidisciplinary assessment and FAA resulted in a denial of a FAPE. (Factual Findings 1 through 80; Legal Conclusions 1 and 5; 12 through 30 and 32 through 48.)

#### REMEDIES

49. As a remedy for the FAPE denials found in Issues One and Two, Student seeks reimbursement for expenses incurred at WCA/OGS for the 2012-2013 school year including tuition, travel, counseling and expert fees. Student also requests prospective placement at WCA/OGS for the 2013-2014 school year. District contends if it is

determined the IEP offer was not a FAPE then (1) any remedy should not include prospective placement or services for Student at District expense, and (2) any award of reimbursement must be substantially reduced or denied in its entirety. District further contends that a remedy of prospective placement or services is inappropriate because the issues are limited to the IEP in dispute. In addition, District contends any reimbursement must be substantially reduced or denied because Student received LAS services from OCSD, another publically-funded local educational agency, while paying for WCA/OGS.

50. A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private school placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S. Ct. 1996, 85 L. Ed. 2d 385] [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE] (*Burlington*); see also *Forest Grove School Dist. V. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-1239 [the IDEA expressly provides that parents of parentally-placed private school students may be entitled to reimbursement for costs of placement or services procured for their child when FAPE is at issue].)

51. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student,

having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].)

52. Transportation may, when educationally appropriate, include transportation costs and expenses related to family visits to a distant residential placement. (See *Aaron M. v. Yomtob* (N.D. Ill. 2003) 2003 U.S. Dist. LEXIS 1531 (FAPE for residential placement included transportation costs for five, two-day parental visits, which included a \$35 per person meal allowance); *Richmond Elementary Sch. Dist. and Lassen County Office of Education* (CA 2003) 104 L.R.P. 4695 [meal reimbursement provided for parental visits to in-state distant placement].) Parental transportation expenses may be denied where there is no evidence that parental participation at the school was required to meet an IEP goal. (See *Agawam Public Schools* (MA 2004) 42 IDELR 284.)

53. Reimbursement may be denied or reduced if at least 10 days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district's placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).) Reimbursement must not be denied on this basis if the parents had not been provided notice of the notice requirement or compliance with the notice requirement "would likely result in physical harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iv)(I)(bb) & (cc); 34 C.F.R. § 300.148(e)(1)(ii) & (iii).) The cost of reimbursement, may, in the discretion of the ALJ, not be reduced for failure to provide the required notice if compliance with the notice requirement "would likely result in serious emotional harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 C.F.R. § 300.148(e)(1).)

54. Reimbursement may also be denied based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).)

For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.” In *Patricia P.* reimbursement was denied where the parents had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

55. To provide a pupil a FAPE, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c) (3) (2006); *Burlington, supra*, at p. 374.) ALJ’s have broad latitude to fashion equitable remedies appropriate for denial of FAPE. (*Burlington, supra*, at p. 370; *Parents v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

56. Having proven that he was denied a FAPE, the analysis of Student’s reimbursement requests requires determining whether Parent’s unilateral placement was “appropriate” within the meaning of *Carter, supra*, and whether equitable factors require reduction of the requested reimbursement. Here, the evidence showed that the educational program at WCA/OGS was designed to provide a highly structured learning environment for students with intellectual, cognitive, behavioral, social/emotional, and communication deficits that impeded a student’s ability to access their education. WCA/OGS included an intensive therapeutic component that provided Student group and individual counseling on a daily basis and family counseling on a weekly basis and a transitional program for adult male students. The academic component provided for intensive one-to-one support for those in need, like Student, in a small structured classroom setting as well as a functional vocational instruction, with opportunities to transition between classes. The campus is small and located in the community. The school has approximately 30-45 students. The classes have no more than 10 students

with a high adult-to-student ratio in the special education classes. Student made progress and was becoming more engaged in his educational program, participated fully in his classes, and improved academically. He began to show improvement in his behavior and willingness to attend classes. Student met his burden of proof that WCA/OGS was an “appropriate” placement for purposes of reimbursement. Thus, Parents are entitled to reimbursement of tuition expenses incurred for the 2012-2013 school years.

57. Equitable factors do not support District’s request to reduce the amount of requested reimbursement. Parents timely provided a 10-day letter to District in July 19, 2011, which notified District of their intention to unilaterally place Student at WCA/OGS. Further District’s assertion that Parents acted unreasonably in permitting Student to receive LAS services under a PSSP and therefore were guilty of “double dipping” is not supported by the evidence. Student’s IEP called for LAS and the evidence showed Parents were not aware that WCA/OGS were providing the LAS component of the program with services from OCSD. Regardless of how the LAS services were provided, Parent’s out-of-pocket costs were the same. Thus, the fact that Student received those services would not justify a reduction in reimbursement for the total costs Parents expended for tuition at WCA/OGS.

58. Parents presented a bill for tuition for the 2012-2013 school year in the amount of \$84,000 and travel costs in the amount of \$7,000.00. Father testified that Parents paid the amounts stated on the itemized statement produced at hearing. Parents are entitled to an award of \$84,000.00 for tuition expenses incurred at WCA/OGS. Parents are also entitled to an award of travel costs for Parents to visit Student in the amount of \$6,000.00 and \$1,000.00 for Student’s travel for the 2012-2013 school year.



59. Parent's request for prospective placement at WCA/OGS for the 2013-2014 school year is denied because Student failed to assert a denial of FAPE for the 2013-2014 school year in the complaint. A party requesting a due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the complaint unless the other party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B), Ed. Code, § 56502, subd.(i).)

60. Parent's request for expert and counseling/evaluation fees and attorney fees is denied. Reimbursement of expert witness fees is not available in IDEA cases. (*Arlington Central School District Board of Educ. v. Murphy* (2006) 548 U.S. 291, 300-304 [126 S.Ct. 2455, 165 L.Ed.2d 526].) Accordingly, no expert witness fees are awarded. There was no documentary evidence of the costs paid for counseling or evaluation, so accordingly, reimbursement for such costs is denied. As to the request for attorney fees, Education Code section 56507, subdivision (b)(1) provides that they may only be awarded "with the agreement of the parties following the conclusion of the administrative hearing process or by a court of competent jurisdiction pursuant to Section 1415(i)(3) of Title 20 of the United States Code." OAH is not a "court of competent jurisdiction" and its function is limited to conducting the administrative hearing. Because there is no agreement to award fees, and OAH is not a court of competent jurisdiction, the request for attorney fees is denied. (Factual Findings 1 through 80; Legal Conclusions 1 and 5, and 11 through 60.)

## ORDER

1. Within 30 days of the date of this Order, District shall reimburse Parents tuition and travel costs in the amount of \$91,000.00
2. All other requests for relief are denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

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

Dated: July 29, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

STELLA L. OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings