

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SANTA MONICA-MALIBU UNIFIED
SCHOOL DISTRICT

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014100025

DECISION

Santa Monica-Malibu Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on September 26, 2014, naming Student.

Administrative Law Judge Kara Hatfield heard this matter in Santa Monica, California, on October 27, 28, 29, and 30, 2014.

Adam Newman, Attorney at Law, represented District. Sara Wolverton, District's Director of Special Education, attended the hearing.

Mother represented Student.

After District and Mother made closing oral arguments, the matter was continued until November 6, 2014, so District could file and serve written supplemental authorities in support of its oral closing argument. Upon timely receipt of District's supplemental closing argument, the record was closed and the matter was submitted on November 6, 2014.

ISSUE

Whether District offered Student a free appropriate public education in the least restrictive environment in the March 31, 2014, individualized education program, with placement at Linden Center nonpublic school as specified in the September 2 and 18, 2014 prior written notices, such that District may implement the program without parental consent.

SUMMARY OF DECISION

District seeks a ruling that its offer of placement at Linden Center, a nonpublic school, would provide Student a FAPE in the least restrictive environment because Mother refused to consent to District's proposed placement at a nonpublic school. Student works below grade level standards and engages in behaviors that interfere with her learning and the learning of other students. District contends it offered and provided Student every support and resource available in District's public school facilities and that Student was unable to receive educational benefit in the public school environment. District asserts Linden Center nonpublic school, located in Los Angeles on Fairfax Boulevard near Santa Monica Boulevard, with a very small total student population, very small physical campus, and intensive services designed to meet the needs of Students with attentional, emotional, and behavioral challenges, is an appropriate nonpublic school to serve Student's unique needs.

Mother wants Student to continue attending Santa Monica High School because Mother believes that Student likes her teachers and administrators at school and Mother would like Student to stay with teachers Student likes. Mother's opposition to Student attending Linden Center nonpublic school is based on her negative opinion of conduct Mother believes she saw at a public school campus located in Santa Monica at Lincoln

Boulevard and Ocean Park Boulevard, which Mother mistakenly believes is Linden Center.

District met its burden of demonstrating that nonpublic school is the appropriate placement for Student and that Linden Center has programs and services that can meet Student's academic, social/emotional, and behavioral needs. Therefore, if Student is enrolled in District, District is authorized to implement placement at Linden Center nonpublic school.

FACTUAL FINDINGS

1. Student was 15 years and five months old at the time of hearing. At all relevant times, she lived with her Mother, who provided District with a residential address within District boundaries. Student attended eighth grade at John Adams Middle School in the 2012-2013 school year, and ninth and tenth grades at Santa Monica High School in the 2013-2014 and 2014-2015 school years. Student was eligible for special education and related services as a student with an emotional disturbance because she was unable to build or maintain relationships with peers and/or teachers, had inappropriate behaviors or feelings under normal circumstances, and exhibited physical symptoms or fears, such as anxious thoughts and feelings of nervousness and worry, and a general and pervasive mood of unhappiness or depression.

STUDENT'S EIGHTH GRADE YEAR, 2012-2013

2. During eighth grade, Student was placed in District's Positive Behavior Support Program, a special day class on a public integrated campus. The campus had a total enrollment of approximately 100 students. The Positive Behavior Support Program was for students with very significant behaviors that interfered with academics and prevented the students from benefitting from the general education setting. All of Student's classes in the Positive Behavior Support Program had less than 10 students,

except her Curriculum Skills class, which had 12 students, and there were between three and four adults in her Positive Behavior Support Program classes.

3. Student had a difficult year and was suspended 12 times for hitting, punching, screaming profanities, and threatening other students, which occurred most frequently during unstructured times such as recess, lunch, and after school. Although Student had many behavioral referrals which lead to suspensions, there were many more incidents that did not result in referrals because they were handled within the Positive Behavior Support Program by the special day class teachers and staff. Two manifestation determination meetings held during eighth grade concluded the behaviors for which Student had been repeatedly suspended were caused by, or had a direct and substantial relationship to, Student's disabilities and were not the direct result of District's failure to implement Student's IEP.

4. Student had a positive behavior support plan that was updated during the school year to address kicking, hitting, making threats, yelling profanities, and defiance, such as talking at inappropriate times and engaging on off-topic conversations, being out of her seat or assigned area at inappropriate times, walking out of class without permission, running away from adults, and going to areas of the classroom or school that she was not supposed to go. Student required multiple and constant prompting to follow through on directives. The interventions District used were somewhat effective in reducing inappropriate behaviors momentarily, but the behaviors returned. Student's inappropriate behaviors distracted other students and interfered with their learning because of the disruption and because teachers and aides had to stop instruction to other students while addressing Student's inappropriate behavior. Also, Student did not benefit from instruction while she was engaged in or de-escalating from her outbursts, and when she eloped from class.

5. Student had average cognitive ability, but ended middle school with a 1.62 grade point average. She struggled with work completion and did not benefit from instruction because of attention and behavioral difficulties.

6. During the two manifestation determination meetings held during eighth grade, Student's counseling services were discussed. Although Student was receiving counseling from the school psychologist, District offered to assess Student for Educationally Related Mental Health Services, a more intensive counseling program that provided sessions, on or off campus, that were longer and more in-depth, addressing broader social/emotional issues that may affect a student's ability to access the curriculum and/or education. Mother refused consent for the mental health services assessment both times it was offered.

7. Based on the discussions held at Student's manifestation determination meetings and at Student's annual IEP in May 2013, District recommended placement in the Off Campus Learning Center program during the summer between eighth and ninth grades to facilitate Student's transition to high school, and District formally offered Student placement at the Off Campus Learning Center at the start of her ninth grade year. The Off Campus Learning Center was a program that assisted students who needed support to successfully transfer to a large, inclusive high school campus, such as Santa Monica High School, which had over 3,000 students. The Off Campus Learning Center was located on the campus of Olympic High School, in Santa Monica at Lincoln Boulevard and Ocean Park Boulevard.¹ Although Father, who attended the IEP meeting,

¹ The Olympic High physical campus was much smaller than the campus of Santa Monica High. The Off Campus Learning Center operated in two classrooms, one with a general education teacher and one with a special education teacher. At the time of the due process hearing, there were 14 students attending the program. The Off

consented to Student's placement at the Off Campus Learning Center, Mother, who did not attend the IEP meeting, returned the signature page of the IEP document three days later consenting to the IEP with the exception of placement. Mother insisted that Student attend Santa Monica High.

STUDENT'S NINTH GRADE YEAR, 2013-2014

8. Less than a month after Student began ninth grade at Santa Monica High, an IEP meeting was held to discuss Student's transition and academic progress. Student reported she was having difficulty getting to all her classes. Student was tardy to classes, and went to class but then walked out. Student slept in class, was impulsive, and had minimal academic endurance. District again offered placement in the smaller learning environment of the Off Campus Learning Center, and Mother again declined that offer. District adjusted Student's schedule to have her in the Positive Behavior Support Program for three academic classes and in another special day class for Math, replaced Spanish with Dance as a general education elective, and kept her in general education

Campus Learning Center provided small group instruction and students worked at their own pace on the general education curriculum. This reduced transitions, as students were not forced to move from class to class. Students at the Off Campus Learning Center attended school on a modified schedule and could arrive later than at 8:00 a.m. and could leave earlier than at 3:00 p.m. Students received individualized support, to which Student had responded well during middle school. However, students were not supervised at all times on campus, were free to leave the classroom and walk the campus independently, and were allowed to leave campus at lunch because there were no cafeteria services on campus.

Physical Education (Yoga). A new goal in the area of behavior/impulsivity was added to Student's IEP.

9. Student's Positive Behavior Support Program classes had seven to 10 students, with one teacher and one or two aides. Student's classroom behavior was as disruptive as it had been in eighth grade, but her profanities escalated from saying "shut up" to frequent shouting of expletives her teachers did not want to repeat at the due process hearing, referring to them by their initial letters as "the B word," "the F word," and "the N word," among others, and also in combination with each other. Student often believed other students were looking at her when they were not, and Student would shout to them to stop looking at her. Student also often believed other students were talking about her when they were not, and Student would shout to them to stop talking about her. These verbal outbursts usually included profanity, and occurred while the teacher was talking or presenting. Student's shouting took her attention away from her class work, and also disrupted class and prevented the other students from focusing on the teacher's instruction or their class work. Student sometimes cried and became unable to function in the classroom. Student only completed 25 to 35 percent of her academic work because she was resistant, distracted, and had emotional difficulties. She required constant redirection, but it rarely worked.

10. In addition to directing her verbal outbursts at other students, Student had physical altercations with her peers. The aggression she showed during eighth grade continued and her Positive Behavior Support Plan was not effective at reducing her punching, pushing, hitting, kicking, slapping, and elbowing of peers as well as school staff. Student participated in counseling with the school psychologist approximately 40 minutes per week, but Student had poor insight and had difficulty reflecting on her actions. Although during sessions she sometimes indicated an understanding of appropriate strategies she could use when she felt angry, disappointed, or frustrated,

she could not apply them either in the classroom or on campus during recess and lunch breaks. Student was avoidant during counseling sessions and would shut down or redirect the conversation off topic. She was making little progress toward her treatment goals.

11. Near the end of October 2013, Student was suspended and while out of school, she called both her school psychologist and academic advisor. While sobbing uncontrollably, she said she “couldn’t take it anymore” and informed each of them that she had many pills she intended to take and end her life. District personnel scrambled to figure out where Student was. Police went to the home Student was at, and Student was taken to a hospital. Three days later, District held an IEP meeting and again offered to conduct a mental health services assessment to increase the amount and types of counseling support for Student. Mother consented to the assessment. Student was evaluated and determined to be eligible for mental health services counseling. At the end of January 2014, Student’s IEP was amended to add 45 minutes per week of mental health services counseling with a licensed clinical therapist, in addition to the 40 minutes per week of counseling she had been receiving with the school psychologist.

12. One month after mental health services counseling was added to Student’s IEP, another manifestation determination meeting was held because Student had been suspended for seven days during the school year for verbal altercations with students and staff, physical altercations with students, physical aggression towards staff, and online verbal attacks against another student, known as cyber-bullying. In addition to having a Positive Behavior Support Plan and being placed in the Positive Behavior Support Program for three of her four academic classes, Student had been on a behavior contract and had been assigned a temporary one-to-one aide to assist her behavior. A one-to-one aide escorted Student from class to class to support her in attending class, arriving to class on time, and avoiding conflict and confrontations while

walking on campus between classes and during breaks. But Student's impulsivity and anger continued to affect Student's progress and harm others. District did not have any additional services, supports, or resources that it could provide Student at Santa Monica High. District again recommended that Student be placed at the Off Campus Learning Center, believing that the smaller campus and more adult attention available there would allow Student to make progress. Student wanted to remain at Santa Monica High, and Father said he would discuss the Off Campus Learning Center offer with Mother, who did not attend the manifestation determination/amendment IEP meeting.

ASSESSMENTS FOR THE MARCH 31, 2014 IEP

13. In preparation for the March 31, 2014 annual and triennial IEP, District conducted a Functional Behavioral Assessment conducted by a psychology intern under the supervision of the school psychologist, standardized academic testing administered by Student's Positive Behavior Support Program special education teacher, and a psycho-educational assessment conducted by the school psychologist.

14. The behavior assessment reviewed the prior interventions that had been used to address Student's behaviors and their levels of efficacy. Student had been assigned a one-to-one aide for a month or two before the behavior assessment was conducted, and despite having that increased level of supervision, her inappropriate verbal outbursts, off-task/inattentive behaviors, and physical aggression decreased only slightly. Student was suspended twice after she was assigned a one-to-one aide. Student had been placed on a behavior contract on January 15, 2014, about a month and a half before the behavior assessment was conducted, and she broke the contract multiple times and was suspended twice after the contract was put in place. Student's Positive Behavior Support Plan had been in place for about eight school months when the behavior assessment was conducted, and Student demonstrated a minimal reduction in the target behaviors and continued to engage in kicking, hitting, and

making threats to or yelling profanities at other students when upset. Student also continued to be defiant and not follow school or classroom rules, by doing things such as going to areas she was not supposed to go, being late to class, being out of her seat or assigned area during inappropriate times, walking out of the classroom, running away from adults, talking during inappropriate times, and engaging in off-topic conversations.

15. Student's inappropriate verbal outbursts included speaking out of turn, screaming across the room, yelling profanities at peers and staff, aggressive name calling, and arguing. One teacher reported Student's outbursts occurred "upwards of 10-15 times during any given class period." Her outbursts occurred on average 20 times per 30 minute interval during observation for the behavior assessment.

16. Student's off-task/inattentive behaviors included engaging in side conversations with peers, putting her head on her desk, looking at herself in a mirror, playing or fidgeting with an object such as a pencil, picking her nails, shouting across the classroom, ignoring teacher prompts, being out of her seat, and "spacing out." Her off-task/inattentive behavior occurred on average 46 percent of the time per 30 minute interval during observation for the behavior assessment, with the behavior lasting between 20 seconds and eight minutes per occurrence.

17. Student's physical aggression included punching, pushing, hitting, kicking, slapping, and elbowing. Serious physical aggression resulting in suspension had occurred three times between August 2013 and the March 2014 behavior assessment. Although the behavior was infrequent, when it occurred it was severe and had the potential to cause serious danger to Student and to others involved. Student's physical aggression mostly occurred outside of the classroom, during lunch, while passing between classes, or after school, and occurred following inappropriate verbal outbursts and following a disagreement or argument with peers.

18. Student's attendance between August 2013 and March 2014 was variable and poor. She missed first period more than the others, attending only 62.5 percent of the time. She was frequently absent from third and sixth period, attending only 74.8 percent and 72.6 percent of those classes, respectively. She was frequently absent in other periods, too, attending fifth, second and fourth periods 80.6 percent, 82 percent and 82 percent of the time, respectively. Student seemed to pick and choose which classes she would attend throughout a day, attending class during one period, missing class the next period, and then attending class the period after that. When she did attend class, she was tardy almost 11 percent of the time in first, fifth, and sixth periods, 3.6 percent of the time in third period, but rarely tardy in the classes she attended most frequently, second and fourth periods. Student's tardiness and elopement decreased after she was assigned a one-to-one aide to escort her between classes, and the data above include approximately two months during which Student had improved timeliness to class and attendance because of the aide support.

19. Student's grades for the fall semester were a B+ in Dance, C's in Health and Math, a C- in Yoga, a D in English, and a D- in Tutorial. At the end of March 2014, her grades were a B in Dance, C-'s in Health and Yoga, a D in English, a D- in Tutorial, and an F in Math.

20. The standardized academic testing confirmed prior findings that Student had average cognitive abilities. She performed in the average range in basic reading, written expression, and math problem solving. She performed in the below average range in oral expression, listening comprehension, and reading comprehension. And she performed in the far below average range in numerical operations, although she had previously performed in the average range in this sub-category and a second instrument used to re-test Student in this category to confirm or contradict her far-below-average score indicated Student performed in the average range with math computation skills.

21. Student's social/emotional functioning was very challenged. She displayed inappropriate behaviors that ranged from merely disruptive to violent, and had difficulty following classroom and school rules and building or maintaining satisfactory relationships with peers or adults. She had difficulty sitting still, remaining in her seat, concentrating during lectures, refraining from talking inappropriately, and she acted before thinking. Depending on the particular environmental setting and combination of other students present, home factors, and her emotional stability on any particular day, Student's behavior was inconsistent. Although at the time of the mental health services assessment in January 2014 Student was completing 25 to 35 percent of her work, at the time of the March 31, 2014 IEP, she was completing only 15 percent of her school work because she had problems managing her emotions in the classroom.

22. In her English, Health, and Tutorial classes within the Positive Behavior Support Program special day class, Student actively participated when she enjoyed the subject matter. But when Student found the subject matter difficult, she would not stay on task and would stare at something not functionally related to the academic task, or be disruptive and distracting by making off-topic or inappropriate remarks, getting out of her seat and engaging in disruptive behavior such as dancing in a style known as "twerking," or having inappropriate physical contact with her classmates. Student had difficulty remaining on task for more than five minutes without engaging in some inappropriate behavior. She had severe difficulty remaining focused and on task in class as the day progressed. When prompted or redirected, Student became agitated and either refused to work by shutting down and putting her head down, feigning sickness, or asking to go to the nurse, to the school psychologist, or to call her parents. Student sometimes walked out of class and later was found to be in a physical altercation on campus or to be disrupting the instruction of other students on campus. Student's

inability to attend to task in classes and her disruptive behavior impacted her ability to progress academically.

23. In her Yoga class, a general education class, Student demonstrated good body awareness and assimilated course content quickly, when she came to class and when she focused. But her behavior fluctuated and she was sometimes confrontational. Student needed to be isolated away from her friends and other social students. She attempted to escape work and sometimes left class. During a 30 minute classroom observation for the psycho-educational assessment, Student shouted out six times while the teacher was giving instruction to the class. Although Student's questions and comments were relevant, her behavior was inappropriate and disruptive. It took her 12 minutes to begin work after the teacher provided instructions and gave several verbal prompts. Student stared at herself in a mirror for five minutes. Within the 30 minute observation, Student was off task 62 percent of the time.

24. In her Dance class, a general education class, Student worked hard and interacted well with other students. However, she sometimes wandered around before and during class, and required prompting to remain on task. She was absent often. Student's Dance teacher believed the behavior aides that had been escorting Student to class had been helpful, and he noticed "a sharp increase in positive elements when they were around."

25. In her Math class, a special day class, Student was able to complete the work assigned to her when given multiple prompts. She teased her classmates and placed her hands on other students or tapped them. She required prompting every one to two minutes to be positive with her peers. Although Student did well with math calculations and reasoning, she struggled with her social behavior with peers, tardiness, and absences.

26. Based on Student's academic testing results, interviews of Father and Student, rating scales completed by Student, rating scale results and reports from Student's teachers, the school nurse's report, and classroom observation by the school psychologist, the school psychologist recommended that Student again be found eligible for special education and related services due to an emotional disturbance. These symptoms and behaviors had existed for a long period of time, to a marked degree, and adversely affected her educational performance.

27. The school psychologist also recommended that Student be found eligible for special education and related services under the category of other health impairment because Student had limited alertness in the educational environment due to a chronic or acute health problem such as attention deficit disorder or attention deficit hyperactivity disorder, adversely affecting Student's educational performance. Student had significant difficulty with staying in her seat, concentrating during lectures, refraining from talking inappropriately, and acting before thinking.

28. The special education teacher for Student's Positive Behavior Support Program classes made several recommendations based upon her own familiarity with and observation of Student, as well as based on Student's academic testing, the reports of Student's other special education teacher, and the reports of two general education teachers. She opined that Student would benefit academically and behaviorally if she received her education at a smaller school setting that would provide the behavioral support and intervention Student needed, as well as limited opportunities to transition to differing locations.

THE MARCH 31, 2014 IEP MEETING

29. At the IEP meeting on March 31, 2014, all required District personnel attended and District presented the results of the behavior assessment, academic testing, and psycho-educational assessment to Student and both of her parents. Father

participated in the meeting by sharing information based on his experiences with Student. Mother participated by blaming teachers and staff for Student's situation and by stating her opinions about how Student would improve with more time and if people would focus on the positive rather than the negative. Mother asked many questions and was repeatedly put at ease by District staff, although she sometimes refused to discuss an issue or took a "my way or the highway" stance.

30. Student's prior goals were discussed and although there had been some progress, she did not meet any of her goals. New goals were created in the areas of behavior to address compliance with adult directives, behavior/impulsivity to address remaining on task during academic work, and social/emotional functioning to address anger recognition and anger management strategies and to address work completion that was affected by emotional disruptions. At hearing, no evidence was presented disputing the appropriateness of these goals. Student's related service of counseling was continued at a total of 85 minutes per week. At hearing, no evidence was presented disputing the appropriateness of this related service.

31. A one-to-one aide for Student was discussed. Student did not like having an aide, and had complained about every aide assigned to her bothering her, annoying her, and being "rude." Student had pushed one of her aides, an older woman much smaller than Student. Mother objected to any aide ever touching Student, even to block Student's physical aggression, and Father wanted to have an aide only on a limited basis. District staff explained that the aide was keeping Student and other students safe because Student could not control her behavior and was sometimes aggressive. The week before the IEP meeting, there had been a fight at lunch that did not involve Student, but Student walked to the fight and the aide had to block Student from getting involved. Father asked how not to have an aide for the next school year, which led back to another discussion of placement.

32. District staff repeated the opinion that Student was not accessing her education at Santa Monica High because she missed so much instructional time due to her behavior and for disciplinary reasons. District recommended that because Student was not meeting her academic and behavioral goals at the large Santa Monica High campus, she should attend a smaller school setting, like that of a nonpublic school. Mother did not want Student to go to a school outside of Santa Monica, and she insisted that Student continue at Santa Monica High for the remainder of the school year. She also insisted that Student attend Santa Monica High for tenth grade. Mother wanted Student to go to the Off Campus Learning Center during future suspensions “as a means to scare her into doing the right thing.”

33. The school psychologist was very familiar with Student; she had been the school psychologist at Student’s middle school and worked with and counseled Student during seventh grade, and then had transferred to Santa Monica High and worked with and counseled Student during ninth grade. Although District had recommended and offered placement at the Off Campus Learning Center in the past, the school psychologist believed that after all the incidents that had happened during Student’s ninth grade year, even the Off Campus Learning Center would not be an appropriate placement for Student because it would not provide enough supervision of Student for her to access her education. Because there was no other district program that could meet Student’s needs and enable her to make progress in her education, District recommended a nonpublic school.

34. Student’s special education teacher in the Positive Behavior Support Program believed a nonpublic school could provide Student the type of one-to-one behavioral support Student needed and could provide the mental health services Student needed embedded in the programming, and in a smaller environment.

35. The school psychologist did not believe a residential treatment center was appropriate for Student at the time of the March 31, 2014 IEP because the less restrictive environment of a nonpublic school had not been tried yet. She thought a residential treatment center might at some point be the appropriate next step for Student, but she wanted to first see if a nonpublic school could make a positive change for Student.

36. District's written offer listed specialized academic instruction at both public and nonpublic schools, although at the IEP meeting District's recommendation and offer was only for a nonpublic school. However, no specific nonpublic school was named. District's explanation for the nonpublic school offer was that Student needed to be placed at a smaller specialized school to access her education and make progress toward her academic and behavioral goals. District's written offer regarding services indicated that transportation was not offered, although the IEP meeting notes reflected that District's offer was a nonpublic school with transportation provided. Parents did not consent to the IEP because Mother wanted Student to remain at Santa Monica High, and Student remained there.

DISTRICT REPEATED ITS OFFER OF NONPUBLIC SCHOOL PLACEMENT IN JUNE 2014

37. On June 9, 2014, another manifestation determination meeting was held to determine whether Student's five-day suspension on June 2, 2014, was a result of her disability. In connection with five students having submitted written complaints to Student's Dance teacher about Student's threats towards, harassment and intimidation of, and injury to them during the rehearsal for and performance at the dance recital, Student punched a peer and knocked her unconscious on a public street corner just off campus. A neighbor witnessed the fight and identified Student as the aggressor. Mother again blamed school staff and other students for Student's situation. Although District had stopped recommending that Student attend the Off Campus Learning Center,

Mother stated she would not allow Student to attend the Off Campus Learning Center. District explained that District was not proposing that Student attend the Off Campus Learning Center, but had offered placement at a smaller, nonpublic, school. The team at Santa Monica High had done what it could to support Student's progress, but could not meet her needs. Mother again insisted Student attend Santa Monica High for tenth grade and refused placement in a nonpublic school.

STUDENT'S TENTH GRADE YEAR, 2014-2015

38. Student began tenth grade at Santa Monica High in August 2014. As of the date of the due process hearing, Student was not consistently attending school, or was tardy, sometimes arriving around 1:00 p.m. She had only attended first period three or four times. She had missed five or six sessions with the school psychologist. Although in past years Student had been trying and wanted to do well but had been unable to control her behaviors, in the current school year, Student was not worried about her attendance or her grades, and did not seem to want to do well. Student's behaviors were not improving, she was unmotivated, and she was disinterested in school.

DISTRICT SENT PRIOR WRITTEN NOTICES NAMING A SPECIFIC NONPUBLIC SCHOOL AND CORRECTING WRITTEN OFFER

39. On September 2, 2014, District's special education coordinator mailed Mother and Father each a Prior Written Notice proposing to place Student at Linden Center, a nonpublic school located at 812 Fairfax Boulevard in Los Angeles. District proposed this action because Student required a nonpublic school setting to access her education and make progress on her goals and objectives. District considered continuing Student's placement at Santa Monica High, but rejected that option because of Student's lack of academic and behavioral progress. District's prior written notice informed Parents that District had sent a copy of Student's records to Linden Center

with all identifying information removed and that Linden Center had said it would consider Student for placement, and that the next step in the process was for Parents to arrange an interview with the school. Parents were instructed to call Linden Center at a provided telephone number to arrange an interview. Parents were also informed that if, after interviewing at Linden Center, they wanted to consider a different nonpublic school, Vista del Mar, located at 3200 Motor Avenue in Los Angeles, was willing to interview and consider Student for their program. Neither Mother nor Father responded to the September 2, 2014 Prior Written Notice.

40. On September 18, 2014, District's special education coordinator mailed Mother and Father each another Prior Written Notice proposing to change the March 31, 2014 IEP to accurately reflect the written offer to be placement at a nonpublic school, 85 minutes per week of individual counseling at a nonpublic school, and transportation to and from school. District enclosed a revised copy of the written offer of services page of the March 31, 2014 IEP document. District repeated the instruction to Parents to call Linden Center at the telephone number provided to set up an interview. Neither Mother nor Father responded to the September 18, 2014 Prior Written Notice.

41. District selected and offered Linden Center as the specific nonpublic school placement because it was designed to work with students who were eligible for special education because of emotional disturbance and other health impairments due to difficulty with attention. Students who attended Linden Center were academically on par with grade-level peers. Linden Center had a structured emotional intervention system that was used throughout the day. There was a therapist on campus daily. Staff were available to intervene if a conflict arose, and could address conflict in the moment to immediately come to a resolution with students. Linden Center was a single, two-story building and provided meal service on campus, so there was no need for students

to leave campus throughout the day. Linden Center educated students of all ages; at the time of the due process hearing there were 30 students, the majority of whom were high-school-aged, and some of whom were middle-school-aged. Students could attend Linden Center for a period of time and if they were successful and a student's IEP team believed the student could transfer the skills to a public school environment, the IEP team could recommend that the student return to public school. Students who were placed at Linden Center by District could receive a regular high school diploma issued by District.

42. Linden Center was located on Fairfax Boulevard near Santa Monica Boulevard, in a neighborhood of Los Angeles known as the Fairfax District. District offered Student transportation to and from school. District contracted with a taxi company to provide round trip door-to-door transportation between students' homes and their nonpublic schools. Typically, a specific driver was assigned to a student and the same driver transported a student every day, except if the driver was ill. District's students aged three through 22 had been successfully transported by taxi to attend school. In six years, there had not been any reports of harmful events occurring to District's students during taxi transport. District's Director of Special Education, who was responsible for all transportation issues except school buses, believed Student was capable and mature enough to ride in a District-provided taxi.

MOTHER'S TESTIMONY AT DUE PROCESS HEARING

43. Mother, through her participation throughout the hearing and especially during her testimony, communicated a true love for her daughter and a desire to protect her from harm, both real and imagined. However, Mother continually denied that she had knowledge of events for which there was documentation to prove she had been not only informed, but in which she had actively participated. For example, at the due process hearing, Mother was outraged to "learn" that District had conducted a

mental health assessment of Student; but it was Mother who had signed consent on the mental health assessment plan form when she attended the IEP meeting after Student's suicide threat in October 2013. Mother wanted Student to stay at Santa Monica High because Student liked her teachers and administrators. Mother offered no evidence to refute District's evidence that despite all the programs, supports, and interventions District had provided Student in a public school environment, Student was not making adequate academic, social/emotional, or behavioral progress. Also, Mother demonstrated that she did not understand District's nonpublic school offer. Through her questioning of District's witnesses, Mother repeatedly insinuated she had gone to see the Off Campus Learning Center on the Olympic High campus and had been disgusted to see people there smoking and doing drugs and having sex. Her testimony revealed she incorrectly believed Linden Center nonpublic school in the Fairfax District of Los Angeles was the program known as the Off Campus Learning Center on the campus of Olympic High in Santa Monica. Her only reason for opposing Linden Center was because she believed she had seen bad things there, although it became clear she had never been to the real Linden Center. Mother's questioning of a District witness also suggested that she objected to Student being transported to school by taxi because she believed taxi drivers were predators and/or were involved in human trafficking.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it.

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

(20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) ³ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services have also been called "designated instruction and services"].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and

³ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals (Ninth Circuit) has held that despite legislative changes to special education laws since *Rowley*, 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 the 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.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the

issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, District, as the complaining party, bears the burden of proof.

DISTRICT HAS DEMONSTRATED THAT NONPUBLIC SCHOOL IS THE LEAST
RESTRICTIVE ENVIRONMENT IN WHICH STUDENT CAN RECEIVE A FAPE

5. The sole issue in this case is whether District offered Student a FAPE in the March 31, 2014 IEP, as clarified in the Prior Written Notices of September 2 and 18, 2014. Student did not dispute the procedural aspects of the IEP's development, and Student did not contest the adequacy of most components of the offer. The controversy focused on District's offer of placement at Linden Center nonpublic school. Student insisted she should remain at Santa Monica High in her special day class program and general education classes.

6. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

7. The IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating

in the regular education environment; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about available resources; someone who can interpret the instructional implications of assessment results; and, at the discretion of the parent or school district, other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

8. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

9. An IEP should include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum, and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's

other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included, and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

10. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

11. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195

F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

12. If a child's behavior interferes with her learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (2006); Ed. Code, § 56341.1, subd. (b)(1).)

13. School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56031.)

14. 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 least restrictive environment; 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 least restrictive environment, 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 (2006).)

15. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit 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 Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

16. If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment 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., 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; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction or instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

17. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It

also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d. 431, 459-460.) However, a school district is not required to specify the exact location of the educational placement. (*T.Y. v. New York City Dept. of Educ.* (2nd Cir. 2009) 584 F.3d 412, 420; *Deer Valley Unified School Dist. v. L.P. ex rel. Schripsema* (D.Ariz. 2013) 942 F.Supp.2d 880, 889.)

18. If a district determines that a proposed special education program component to which a parent does not consent is necessary to provide a FAPE, the district shall initiate a due process hearing. (Ed. Code, § 56346, subd. (f).)

19. District complied with the procedural requirements of IDEA and California law in developing the March 31, 2014 IEP. Student, Mother, and Father attended the IEP meeting and were provided with the opportunity to participate in the development of Student's IEP. Mother and Father participated in and assisted with the development of Student's present levels of performance, goals, educational program, related services, and discussion of the continuum of placement options. Parents expressed their opinions and disagreements. Parents did not dispute the appropriateness of Student's proposed goals or counseling program. The IEP team, comprised of the necessary participants, developed an IEP which comported with the procedural requirements of IDEA and California law including a statement of present levels of performance, measurable goals, education program, and services. In developing the IEP, the IEP team considered Student's strengths, Parents' concerns, the results of the most recent assessments, and Student's academic, developmental, and functional needs.

20. Although District's March 31, 2014 written offer of placement and services was not unambiguous, the IEP meeting notes confirm that what was discussed at the meeting was District's offer of placement in a nonpublic school, with transportation.

Parents were part of the discussion about placement at a nonpublic school and Mother adamantly rejected it. District reiterated the nonpublic school placement offer at the manifestation determination/amendment IEP meeting in June 2014, and Mother again rejected it. District provided written notice of District's intent to place Student at a specific nonpublic school, Linden Center, early in the 2014-2015 school year via a prior written notice dated September 2, 2014. Although District had not previously specified in writing which nonpublic school it recommended, doing so at the March 31, 2014, and June 9, 2014 meetings would have been pointless given Mother's vocal and persistent objection to any placement outside of Santa Monica High. On September 18, 2014, District provided a clear, written offer of placement and services. Taken together, District's March 31, 2014 IEP offer and the September 2 and 18, 2014 Prior Written Notice letters satisfied the requirement of a formal, written offer that clearly identified the proposed program of specialized academic instruction and counseling at a nonpublic school, Linden Center, with transportation to and from school.

21. District also met its burden of showing that the March 31, 2014 IEP, as clarified by the September 2 and 18, 2014 Prior Written Notices, offered Student a FAPE in the least restrictive environment. In determining whether District offered Student placement in the least restrictive environment, many factors indicate that nonpublic school would have been the least restrictive environment in which Student could receive a FAPE on and after March 31, 2014. For many years, Student had attended the school she would have attended if she were non-disabled, and her home school of Santa Monica High could not meet her significant needs. Applying the four factor test from *Rachel H.* shows that general education was not appropriate. First, the educational benefit of placement full-time in a general education class would have been very low. Student's academic achievement was hampered by her behaviors and outbursts, and

Student consistently was unable to achieve at her cognitive level. Second, Student's mental health and behavioral needs interfered with her obtaining non-educational benefit in general education. Rather than supporting inclusion, the evidence showed that Student's needs caused her to be in active verbal and physical conflict with her peers. Third, placement on a comprehensive high school campus was highly disruptive to other students and teachers. Student's inappropriate behaviors at school were severe, and she exhibited clinically significant levels of inattention, hyperactivity, and conduct problems including verbal and physical aggression and elopement. She broke rules, disobeyed, defied, intentionally annoyed others, was vulgar, lost her temper, threatened, and disrupted others. Although Student had made progress on not exhibiting physical aggression, largely due to the assignment of a one-to-one behavioral aide, other inappropriate, aggressive behaviors occurred at school regularly. Finally, neither party produced evidence that cost was a consideration in the placement decision. Because a full-time general education placement was not appropriate for Student, the focus must be on what placement was appropriate on the continuum of placement options.

22. For several years Student had been placed in a special day class with a high adult-to-student ratio designed to support and improve Student's behavior. Over the years, Student's behaviors escalated and her attention to academics declined. District had provided Student school-based and intensive counseling services, a behavior support plan, a behavior contract, and a one-to-one aide, all with little benefit to help Student access her education. District had no other placements, supports, or services to offer Student within the public school environment that would allow Student to make academic, social/emotional, or behavioral progress. District's offer of nonpublic school was therefore the least restrictive environment in which Student could receive a FAPE.

23. On the basis of all the information including discipline reports, report

cards, assessments, and observation, Student required a more restrictive program that could serve students with emotional and behavioral problems, like Linden Center.

24. Linden Center, with its small campus, low enrollment, and low student-to-teacher ratio with extra support from on-site therapists, was reasonably calculated to help Student get her behavior under control. Student would have fewer distractions and fewer opportunities to get in trouble while away from adult supervision. Student would be able to immediately receive adult attention and conflict resolution services, in a program specifically geared toward helping students improve their behavior. Linden Center could provide Student with a small class size, the individualized curriculum she was capable of working on, and an environment in which she could interact with similarly situated peers. Student's academic, social, and behavioral needs made this therapeutic placement appropriate. The assessment data supported District's decision to offer Linden Center. In evaluating placement options, District offered Linden Center after considering the restrictiveness of the placement and its suitability to implement Student's IEP, and the academic and non-academic benefits of the placement.

25. District met its burden of demonstrating that its offer of placement and services in the March 31, 2014 IEP, as supplemented by the specification of Linden Center as the placement location in the September 2 and 18, 2014 prior written notices, was appropriate. Accordingly, District may implement the IEP without parental consent to the placement.

ORDER

1. District's March 31, 2014 IEP, as supplemented by the specification of Linden Center as the placement location in the September 2 and 18, 2014 prior written notices, offered Student a FAPE.

2. Should Parent continue to have Student enrolled within District during the 2014-2015 school year, District may implement the March 31, 2014 IEP without parental consent.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: November 24, 2014

/s/

KARA K. HATFIELD

Administrative Law Judge

Office of Administrative Hearings