

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

SNOWLINE JOINT UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2014090176

SNOWLINE JOINT UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2014100294

DECISION

Parents on behalf of Student (jointly referred to herein as "Student") filed a due process hearing request (Student's complaint) with the Office of Administrative Hearings, State of California (OAH), on September 3, 2014, naming Snowline Joint Unified School District (District). District filed a due process hearing request (District's complaint) with OAH on October 3, 2014, naming Student. The cases were consolidated on October 16, 2014. The 45-day timeline for issuance of the decision in the consolidated cases was based upon OAH case number 2014090176, the primary case.

Administrative Law Judge Marian H. Tully, Office of Administrative Hearings, State of California, heard this matter on December 8, 9, 10, 11, and 15, 2014, in Phelan, California.

Attorney Connie Chu appeared on behalf of Student. Mother attended the hearing.

Attorney Vivian E. Billups appeared on behalf of Snowline Joint Unified School District (District). Diane Hannett, District's Director of Student Support Services, and Denise Edge, Desert Mountain Special Education Local Plan Area administrator, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until January 7, 2015. Upon timely receipt of written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

DISTRICT'S ISSUE

1. Did District offer Student a free appropriate public education (FAPE) in the least restrictive environment in the individualized education program dated September 19, 2014?

STUDENT'S ISSUES

1. Did District deny Student a FAPE during the 2012-2013, 2013-2014, and 2014-2015 school years because his IEP's were not reasonably calculated to provide Student educational benefit and meet his unique needs in the areas of behavior support and social skills?

¹ Both parties withdrew some of the issues alleged in their complaints before the hearing and on the first day of the hearing. Accordingly, the issues pled in each party's complaint have been combined, reorganized and rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) To the extent Student's closing brief argued issues concerning the implementation of Student's IEP's or the failure to provide services, those issues were not pled in the due process hearing request, and are not addressed in this decision. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

2. Did District deny Student a FAPE for the 2012-2013, 2013-2014 and 2014-2015 school years by failing to offer Student a placement in the least restrictive environment?

SUMMARY OF DECISION

In this consolidated matter, the parties agree Student should be in school but disagree about whether an out of state residential placement is the least restrictive environment. Student contends, with appropriate levels of behavior support, that Student's needs can be met in a special day class in a general education environment. However, no public or non-public school existed within District boundaries that could provide the level of intensive mental health support, medication management, and behavior interventions that Student required. Each of Student's IEP's within the statute of limitations was reasonably calculated to provide educational benefit to Student and offered placement in the least restrictive environment on the continuum of available options. Each IEP included behavior interventions and sufficient related services in the areas of speech and language, occupational therapy and counseling to provide Student a basic floor of opportunity given the nature of his challenges. The IEP team met regularly to review placements and services and revised Student's IEP's to address Student's ongoing needs. District tried a number of increasingly restrictive placements without success. A therapeutic residential program at Provo Canyon School in Utah was the only educational environment where Student made progress on any of his goals, controlling his emotions and behaviors, and developing some social skills. Based on the above, District prevailed on all issues.

FACTUAL FINDINGS

1. Student was first determined to be eligible for special education and provided an IEP on December 17, 2008, at the age of four. At the time of hearing,

Student was almost 10 years old and lived with his Parents within District's boundaries. Student was eligible for special education under the primary category of emotional disturbance and a secondary eligibility of autism. Student's school of residence was Phelan Elementary School.

2. District is located in a rural area and serves approximately 7,500 students. There are two non-public schools within a reasonable distance from Student's residence that serve special education students within District, one now known as Bright Futures Academy and Mountain View School (Mountain View).

3. Student was very intelligent. However, because of his behaviors due to his disabilities and multiple challenges in the areas of concentration, attention deficit hyperactivity disorder, sensory processing, verbal and physical aggression with adults and peers, he was a danger to himself and others and disruptive in class. District provided Student a behavior support plan on November 4, 2011. In January 2012 District completed an Occupational Therapy Initial Evaluation to address suspected sensory processing issues, a functional analysis assessment to address behaviors, and provided Student a Positive Behavior Intervention Plan. A comprehensive residential placement assessment was completed in 2012. Student met all criteria for educationally related residential services.

4. Over the years Student attended a general education classroom at Phelan Elementary with a one to one aide, a special academic instruction classroom with a one to one aide, the non-public school now known as Bright Futures Academy, a county

special education program,² and an independent study school.³ None of these placements could safely address Student's unique behavior and social skills needs.

5. On February 2, 2012, the IEP team agreed to change Student's placement to Mountain View. Mountain View was a non-public school with middle and high school classes. Mountain View staff was trained to manage behaviors and had appropriate restraint training. Due to his anger and uncontrollable behavior, Student's grade level instruction was provided in a vacant classroom with a dedicated aide under the supervision of a credentialed teacher. From March 19, 2012, through May 29, 2012, Mountain View documented seven incidents of physical assault or aggression, four incidents of verbal assault or aggression, five incidents of defiance, two incidents of spitting, four attempts to leave classroom or refusing to return to classroom. As the result of these behaviors, Student was taken home and/or suspended and missed instruction on more than six occasions.

6. The IEP team met on June 1, 2012, to discuss the results of the residential placement assessment. The IEP team reviewed Student's history of interventions, placements, medications and current progress.

SEPTEMBER 20, 2012, AND DECEMBER 19, 2012, REVISIONS TO FEBRUARY 2, 2012 IEP

7. The IEP team met on September 20, 2012, to discuss occupational therapy, speech and language services, and Student's progress at Mountain View. The team also

² Parents unilaterally removed Student from the non-public school after two weeks and from the county school after eight weeks because they thought Student was being mistreated.

³ Parents enrolled Student in an independent school for three weeks.

discussed an incident on September 19, 2012, in which Student tried to jump out of a Mountain View van while it was moving and that Mother had discontinued counseling and occupational therapy. Student's program included instruction in an isolated classroom with a one to one aide under a teacher's supervision, positive behavior interventions, modifications, and accommodations, a modified curriculum, frequent breaks, and transition activities. Mountain View implemented Student's behavior support plan. Initially Student was the only student in the class. District later included a second student for a half day. Mountain View reported Student's present levels of performance. Student satisfactorily performed academic tasks at grade level. Student made some progress on behavior, speech, and occupational therapy goals. Sensory issues continued to impact Student's behavior. Parents reported improvement from the preceding year, but were concerned about exposure to profanity, negativity and bullying at school. The IEP team revised Student's goals for speech and occupational therapy and made no changes to accommodations, services or placement.

8. At the September 20, 2012 IEP meeting, Mountain View reported that Student continued to throw things at staff and peers but that he was not kicking, punching and spitting. However, between August 13, 2012, and December 5, 2012, Mountain View documented five incidents of physical assault or aggression, four incidents of verbal assault or aggression, and four incidents of defiance. The reported incidents of physical assault or aggression included kicking a student, trying to bite a teacher, jumping on another student, hitting, and fighting. As the result of these incidents, physical restraint or containment was used four times and Student was taken home and/or suspended and missed instruction on more than four occasions. As of December 3, 2012, Student had not made sufficient progress to meet his behavior goals by the target date.

9. The IEP team met December 19, 2012, to discuss Student's placement at Mountain View. The meeting was held after an incident at Mountain View in which Student started a fight with a high school student in the lunch area and fought with staff. The team discussed Student's safety, violent behaviors and physical contact issues with other students, and Student's failure to complete his work due to distractibility in that environment. Mother preferred that Student attend a special school for autism. District informed Mother there was no school of that kind geographically close to District. Mother and a behavior specialist informed District that Student did not have the behavior issues he has at school at home. Mother provided a doctor's note dated December 18, 2012, recommending home hospital placement for three months. The IEP team discussed home occupational therapy but Mother informed District that occupational therapy services were not needed in the home. The IEP team changed Student's placement from Mountain View to home instruction.

JANUARY 24, 2013 ANNUAL IEP AND REVISIONS

10. Student's annual IEP team meeting was held on January 24, 2013, and February 1, 2013. At that time, Student's primary eligibility for special education was emotional disturbance and his secondary eligibility was other health impairment, with a language delay in pragmatic social skills. Student had been diagnosed with attention deficit hyper-activity disorder by Desert Mountain SELPA Children's Center (SELPA Children's Center), and Asperger's disorder (a form of autism) by Student's neurologist. Mother provided a second note from Student's physician authorizing home hospital placement for a period of three months. The team determined, due to anger and uncontrollable behavior in the school setting, the least restrictive environment was at home with related services provided in the home and at Phelan Elementary. The IEP team, with Mother's consent, provided 30 minutes of speech therapy twice a week, 30 minutes of occupational therapy 8 times per year and 15 minutes per week of

specialized academic instruction consultation/collaboration with the general education teacher for independent study. Desert Mountain Counseling Center provided 30 minutes of counseling 3 times per month. Student was placed on independent study until such time as a credentialed teacher was available. On February 1, 2013, District informed Mother that a teacher had been secured. Mother declined the teacher's service because her schedule did not meet Mother's needs.

11. On February 15, 2013, the IEP team revised the January 24, 2013 IEP changing Student's placement from independent study, with 15 minutes per week of collaboration with a teacher, to home hospital with 300 minutes per week of instruction provided in the home by a credentialed teacher. Occupational therapy and speech services would be provided at Phelan Elementary. Home hospital instruction began on February 19, 2013.

12. The IEP team met on April 19, 2013. The purpose of the meeting was to discuss a recent assessment for adaptive physical education and Mother's concerns. Mother was happy with the home hospital teacher but the teacher was not providing five hours per week of instruction. Mother was concerned that Mother's medical issues would make it difficult for her to be responsible for most of Student's school work. Mother agreed to have two teachers provide instruction at home.

13. The California Department of Education Diagnostic Center (Diagnostic Center) conducted an assessment the week of May 13, 2013. Student was evaluated by an interdisciplinary team including an education specialist, a school psychologist, speech-language pathologist, a pediatric clinical geneticist, and a clinical psychologist. The team employed formal and informal assessments, Mother and school interviews, observations in a variety of environments including school, and reviewed developmental, medical, family and educational histories.

14. Student began the 2013-2014 school year in the home placement. On August 21, 2013, the IEP team met to address Mother's concerns and discuss services for the current school year. All required IEP team members were present, including Director of Special Services Diane Hannett, Children's Center Program Manager Cheryl Goldberg-Diaz, and Mother. The IEP team discussed Student's progress and the persistence of his challenging behaviors. Mother was concerned Student would be at risk for abuse at a residential facility and Mother was skeptical about what programs were offered. The IEP team agreed that Student's needs were not met in public school or non-public school and that home placement for an extended period of time did not address Student's social-emotional needs or functional behavior. Mother informed the team that she and her husband recognized Student needed to be in a residential school to meet his needs. The entire IEP team agreed that the least restrictive environment that would meet Student's needs was a residential placement with a school. The IEP team continued home placement based on a second note from Student's physician. The IEP team agreed to meet again to discuss the Diagnostic Center assessment results.

15. On August 23, 2014, Ms. Goldberg-Diaz went to Student's home to interview Parents and visit with Student. Parents were concerned about Student's behaviors and changes in the home environment. Due to life situations, they had no heat, hot water, or propane. These circumstances affected sleeping, cooking, daily routines, and Student's stress levels. Sometimes there were additional children in the home. Mother declined in-home services. Previous attempts to "teach the parent" in-home behavior strategies had not been successful. These strategies included: 1) developing a morning routine for timeframe, hygiene, breakfast, and getting to school on time; 2) what language to use and how to redirect Student; 3) how to assist Student to communicate using stop and think, and choices and consequences; 4) vehicle safety; 5) consistent medication management; 6) cool down, and disengage when Student was

deregulated; and 7) maintaining consistency in implementation of sensory diet and predictable environment.

16. On August 26, 2013, District sent Desert Mountain SELPA a referral for non-public school placement associated with a residential treatment center. District enclosed Student's January 24, 2013 IEP and revisions; the SELPA Children's Center assessment dated March 2, 2012; a neuropsychological evaluation dated May 2, 2012; a multidisciplinary report dated September 29, 2010; and Parents' authorization.

17. On September 20, 2013, the Diagnostic Center sent District a comprehensive report of the May 2013 evaluation. The Diagnostic Center took note of Student's diagnostic history including ADHD, reactive attachment disorder, post-traumatic stress disorder, autism, and a recommendation from Student's neurologist for an evaluation for bipolar disorder. The Diagnostic Center also noted a history of encopresis (voluntary or involuntary fecal soiling), and that Student had not been seen by a pediatric gastroenterologist. The Diagnostic Center concluded Student exhibited some characteristics of all these diagnoses but the overall "constellation of challenges" was most consistent with a mood disorder and Student presented many symptoms consistent with juvenile bipolar disorder and intermittent explosive disorder.

18. Student's young age made it difficult to determine whether his issues were neurochemical or neurological. Student needed an extensive inpatient evaluation. Behavior strategies may be somewhat effective but without constant adult structure and supervision for the safety of Student and others, and appropriate medication, there would be only minimal progress in an academic setting. The Diagnostic Center concluded Student needed to be enrolled in an intensive therapeutic environment, with a comprehensive program of mental health and intensive behavior supports with collaboration between all service providers. Behavior supports alone would not provide enough support for Student if his medication and mental health needs were not

addressed in a cohesive program. The Diagnostic Center recommended an inpatient psychiatric evaluation and a gastro-intestinal evaluation for management of encopresis. Recommended school-based services included social skills training, and providing a behavior interventionist and a mentor.

OCTOBER 10, 2013 ANNUAL-TRIENNIAL IEP

19. District held Student's combination annual and triennial IEP team meeting on October 10, 2013. The IEP team agreed that the Diagnostic Center assessment fulfilled triennial assessment requirements. The IEP team found Student eligible for special education under the primary category of emotional disturbance and secondary category of other health impairment, and adopted the Diagnostic Center's description of Student's other disabilities and mental health needs. The IEP team discussed Student's strengths and present levels of performance. Student was at or above grade level when he was focused but his behavior impacted his academic scores. Student made progress towards his social skills goals. The IEP team developed goals to address Student's ongoing difficulties with pragmatic language, sensory input, following adult directions, emotional regulation, coping skills, social communication, and identifying and expressing feelings. Although Mother had terminated SELPA Children's Center counseling service, Mother was concerned about Student's behavior and informed the team that Student needed continuing counseling. The IEP team adopted most of the recommendations in the Diagnostic Center report. The IEP included a detailed list of testing accommodations. The IEP team, including Mother, agreed upon home placement with speech and occupational therapy until he was enrolled in an intensive therapeutic environment as recommended by the Diagnostic Center.

20. Provo Canyon School in Utah admitted Student on October 23, 2013. On admission, a Provo Canyon psychiatrist assessed Student's global level of functioning. Student's global assessment of functioning showed "major impairment." Levi J.

Schomas, a licensed clinical social worker with approximately seven years of clinical experience working with children and adolescents, was Student's primary therapist during Student's stay. Mr. Schomas, who has a bachelor's degree in psychology and a master's degree in social work, developed a Master Treatment Plan and an Individual Treatment Plan when Student was admitted. The Individual Treatment Plan set criteria for discharge or transition to a lesser level of care. Mr. Schomas prepared monthly treatment plans. Student received individual and family therapy for 50 minutes each per week and as needed. His program included group therapy twice weekly and recreation therapy twice a month. A psychiatrist saw him regularly. Student's medications were changed and monitored. His medications included a mood stabilizer and two medications for ADHD. Sensory issues continued to impact Student's behavior.

21. The IEP team met on December 5, 2013, to review Student's placement. Parents, Provo Canyon administrator and teacher KathiJo Smith, Mr. Schomas, SELPA Children's Center, and Ms. Hannett participated. Student was acclimating to the program. They discussed Student's progress on his behaviors. Provo Canyon was implementing Student's occupational and speech therapy. The team, including Parents, agreed to continue the placement.

22. On January 21, 2014, Student became agitated and argued with staff and peers. Staff attempted to redirect Student and used verbal de-escalation techniques to help Student calm down. Student's behavior continued to escalate and he began kicking things and shoving peers. Student was physically aggressive and struggled with staff when staff tried to guide Student away from his peers and to the time-out room. Student repeatedly slammed the door of the time-out room on staff. Student verbally threatened staff, peers, and to harm himself while he was in the time-out room. Student eventually calmed down and the seclusion ended. In a debriefing session following the

incident Student blamed staff and peers for making him angry and struggled with taking responsibility for his actions.

23. Mark Turco was Student's primary academic teacher. He has a bachelor's degree in science and an elementary teaching credential in Utah. He began working at Provo in 2007 as a residential team coach and began teaching in 2012. Classes at Provo Canyon had about 8 to 12 students. Many, but not all, students had IEP's. Behavior strategies were embedded in the program and consistently applied by trained staff in the education and residential environments. Behavior interventions contained in Student's behavior support plan and behavior intervention plan and a sensory diet were part of the overall program at Provo Canyon. Student Enrichment Teams met frequently, approximately twice a month, to discuss what was working and what was not. The Student Enrichment Team included KathiJo Smith, teachers, therapists, student life coaches, recreation and occupational therapists. Mr. Turco and Student's other teachers, used a computer program to track strategies and record their observations on a daily basis. On January 29, 2014, Mr. Turco noted Student seemed to be doing a better job handling his emotions.

24. Student's academic grades were good. He made a friend and socialized with peers who enjoyed video games. He told Mr. Schomas that he liked school.

25. On April 14, 2014, staff observed Student refusing to obey school area rules, instigating peers, and yelling. Staff attempted to redirect Student and used verbal de-escalation techniques to help Student calm down. Staff asked Student to return to the residential area where he would be given a safe place to calm down. Student refused to listen and continued to escalate. Student pushed staff and swung his arms around. Trained staff used physical restraint, according to the Handle with Care Behavior Management System, and escorted Student to the time-out room. Student kicked and tried to trip staff as he was being escorted. Once in the time-out room, he quickly

committed to not harming himself or others, calmed down and was released. During debriefing, Student told staff that another student provoked him and called him names.

26. On April 27, 2014, Student struggled to follow staff directions, had difficulties with his peers, was emotionally unstable, and periodically yelled at and threatened his peers. Staff attempted to help Student verbalize what was bothering him and to help him express his emotions. Student refused to participate in that process. Staff unsuccessfully attempted verbal de-escalation multiple times. The situation continued to escalate. Student was yelling and threatening. Student got out of his chair, walked over to a peer who was sitting in a chair and kicked the chair. Staff attempted to escort Student to the time-out room. Student did not cooperate. Staff placed Student in a Handle with Care hold against a wall to check for items Student could use to harm himself in the time-out room. There was a light switch where the wall hold was used. Student was placed in the time out room where he calmed down and was released after a short time.

27. Student told his aunt about the incident in a telephone call that evening. He was very upset and told her that he had bruises. Mother learned about the incident from the aunt. She called Provo Canyon to assure herself that Student was not harmed and to determine what happened. A nurse examined Student and reported a bruise that appeared to be from the light switch and other bruises which the nurse concluded were not recent. Mother felt that Provo Canyon was not responding to her concerns appropriately. Mr. Schomas spoke to Mother during that time. He described Mother as irate. Parents felt that Provo Canyon staff were not properly caring for Student, and removed Student from Provo Canyon on April 28, 2014.

28. Student was discharged from Provo Canyon against medical advice. Student's global assessment of functioning when he was discharged was within the "serious" range, which indicated Student continued to require residential placement. Mr.

Schomas prepared a discharge report and met with Parents when they came to remove Student. Student had made academic, behavioral and emotional progress but he was not ready to return to the home environment. Student did not meet any of the discharge, or transition to a lesser level of care, criteria.

29. Provo Canyon supervisor Ryan Smith was in charge of staff monitoring. Mr. Smith reviewed the video and conducted an investigation of the wall hold. Student was placed in two other Handle with Care holds previously that day that did not result in injury. Mr. Ryan concluded staff used proper techniques and it was appropriate to use a wall hold when the patient was out of control. However, the wall could have been used more effectively to avoid the light switch and he retrained the staff member.

30. The IEP team met on May 13, 2014, to discuss the incident that caused Parents to remove Student and to discuss Student's placement following his removal from Provo Canyon. Parents would not consider any placement other than a public school setting with Student living at home. District explained that Student's needs could not be met in that environment. Parents then requested placement at a District on-line school. District disagreed because the services available through District's on-line school would not meet Student's needs.

SEPTEMBER 19, 2014 ANNUAL IEP

31. Student's next annual IEP team meeting began on September 4, 2014. District provided notice of the IEP team meeting to Parents and Parents attended. Ms. Hannett, Ms. Goldberg-Diaz, school psychologist Glen Low, and all other required participants attended. Ms. Smith, and one of Student's therapists from Provo attended via telephone. Attorney Billups attended for District and Attorney Chu attended for Parents. The IEP team confirmed Student's primary eligibility category to be emotional disturbance, and changed his secondary eligibility category to autism.

32. Provo Canyon staff reported his progress from October 23, 2013, through April 28, 2014. Student participated in a full-time academic 4th/5th grade program with good academic skills. His behavior and off-task behavior continued to impede his access to the curriculum because he frequently had to be removed from class. He also participated in individual and family counseling, recreational therapy, and he had visits with his Parents. Student was, with prompts, developing some coping skills and increased functioning. He worked with his therapist on increasing emotional regulation, anger management skills, decreasing anxiety and depression, improving peer relations, improving problem solving skills, and improving family relations. Student was not able to participate in group therapy but his therapist recommended that group therapy be added when Student acquired sufficient skills in conflict resolution and de-escalation. Although Student struggled with compliance and following rules, he was able to do so some of the time with prompts. Student responded well to the school structure. He showed some anxiety and depression related to his inability to have visits with his Parents as often as he wanted.

33. Parents and their attorney asked about occupational therapy to address Student's sensory needs, and inquired what sensory strategies were used at Provo Canyon. The team discussed the Provo Canyon's therapist's work with Student in this area, what was being provided, and what seemed to work best for Student. The occupational therapist recommended some changes in the program. The Provo Canyon speech therapist discussed Student's progress and his continuing struggles with respecting others, turn taking, listening, understanding the needs of others and expressing his own needs. When he was angry he was unable to use the skills he learned. Mother reported that Student's speech skills had regressed since he no longer had speech therapy.

34. The IEP team considered Student's present levels of performance as of April 28, 2014, the last day Student attended an educational program. Student met one of six previous goals. The IEP team reviewed and summarized Student's strengths and concerns in reading, written expression, math, communication, gross and fine motor, social/emotional, behavior, career/vocational, community participation, and daily living skills. The most significant areas of need continued to be social/emotional, behavior, speech pragmatics, self-regulation, impulsivity, aggression, and attention.

35. The IEP team developed measurable goals in the areas of regulating sensory input, appropriate turn taking in conversation, listening to peers, coping skills, recognizing other's feelings and needs, regulating emotions, identify and express feelings to reduce acting out, pro-social communication, and following adult directions. The goals were developed to be measured based upon the percentage of success over a defined period of time. The goals and measurable objectives were sufficient to determine whether Student was making progress.

36. District's general education teacher described the fifth grade general education classroom. Typically the class had 33 students without an aide. She had no students in her current classroom with a one to one aide. The class changed activities and environments several times a day. Students worked in groups. The noise level could be loud. The structure in the other fifth grade classrooms was the same.

37. Student's attorney inquired whether a behavior support plan could be developed that the general education teacher could implement, contending that appropriate behavior interventions had not yet been attempted in a less restrictive environment. Parents and their attorney agreed to meet again to discuss placement after District had an opportunity to consider her concerns.

38. Glen Low was a school psychologist and the Non-public School Coordinator for SELPA. In response to the questions posed at the September 4, 2014,

meeting, he investigated the interventions that were in place at Mountain View and prepared a summary of the teaching strategies, curriculum and materials needed to comply with Student's behavior support plan while at Mountain View. As part of his responsibilities as Non-public School Coordinator, he was the Residential Placement Case Manager. Mr. Low regularly visited and met with the staff of the contracted residential treatment facilities, including Provo Canyon.

39. The IEP team met again on September 18, 2014. The same team members participated with the exception of the occupational therapist, who was excused. Student's Provo Canyon therapist Levi Schomas attended via telephone. During the time between meetings, District interviewed staff and collected data from previous placements to determine whether Student's behavior interventions were known and followed in Student's previous placements. Mr. Low passed out his information and reviewed the information with the IEP team.

40. The IEP team considered the functional analysis assessment, the positive behavior intervention plan, and the behavior support plan. District confirmed that the interventions had been implemented in Student's previous placements. Parents disagreed. District addressed numerous questions from Parents and their attorney. The team discussed the Diagnostic Center report. Provo Canyon staff confirmed Student had the same issues when he was discharged as he did at the time the report was made. The general education teacher informed the IEP team that Student's needs could not be met in a general education classroom. The only contrary information available to the IEP team at that time was Mother's opinion, based upon her experience with Student at home, that Student's needs could be met in a general education setting. Mother was not an educator. The IEP team considered Student's young age and the potential harmful effects of an out of state placement.

41. The IEP included the percentage of time Student would spend in the general education environment. The IEP also included a detailed list of the supplementary aids, supports, and accommodations to be provided to enable Student to attain his goals, be involved in the general curriculum, participate in extracurricular activities, and participate with non-disabled peers.

42. District's September 19, 2014 IEP offered placement in an educationally related residential facility and nonpublic school. The September 19, 2014 IEP included the following related services: speech collaboration, occupational therapy consult, individual and group counseling, telephonic parent counseling, extended school year, transportation to and from the facility and family reunification visits every three months or as recommended by the facility. At Parents' request District agreed to include a mentor as proposed by the Diagnostic Center. Residential monitoring was to be provided by the SELPA Children's Center four times per year. Parents, except for residential placement, consented to the IEP.

STUDENT'S EXPERT

43. Nancy J. Franklin testified as Student's expert. Ms. Franklin has a master's degree in Elementary Education with a specialty in early childhood, a Learning Handicapped Credential, Tier I and II Administrative Credentials, and Board Certification in Behavior Analysis. She was employed by Los Angeles Unified School District from 1987 through August 2013, rising in the ranks from Least Restrictive Environment Behavior Specialist to Director, Least Restrictive Environment/Professional Development Division of Special Education. Ms. Franklin reviewed Student's records, met with Student three times for two to three hours per session and prepared a report dated November 28, 2014.

44. Ms. Franklin conducted an academic and behavioral assessment of Student in his home on September 12, 2014, October 16, 2014, and October 23, 2014. The

sessions consisted of a series of academic and art projects. Ms. Franklin noted from Student's records that Student disliked writing assignments and used avoidance and aggressive behaviors to avoid non-preferred activities. Ms. Franklin, in the third session, employed her wealth of experience in working with young children to help Student successfully complete a multi-step writing assignment by the use of scaffolding techniques. Student did not use the kinds of challenging behaviors previously reported by others when he did not get his way with Ms. Franklin or when Ms. Franklin asked him to participate in a non-preferred activity. Ms. Franklin asked Student about his school experiences and wrote his responses verbatim in her report. He told her the school part of Provo Canyon "was a dream. Everything was very calm. The teachers were really nice."

45. Ms. Franklin spoke to Ms. Hannett and Mr. Low. She did not speak to any of Student's occupational therapists, speech pathologists, or psychologists and did not speak with anyone from Provo Canyon, the Diagnostic Center or SELPA.

46. Ms. Franklin did not observe Student in any environment other than his home. She visited Mountain View on October 23, 2014, with Mr. Low. The tour lasted about 30 minutes. She asked questions about demographics, classes and student/teacher ratios. They did not discuss Student. She toured Phelan Elementary with Ms. Hannett. The tour lasted about 30 minutes. They did not talk about Student.

47. Ms. Franklin agreed with many of the recommendations and strategies contained in the Diagnostic Center report. However, based on her review of Student's records and her work with Student in his home, Ms. Franklin concluded Student should be placed in a special day class on a general education campus with behavior support and related services.

48. Ms. Franklin had no opinion whether the Mountain View placement during the 2012 - 2013 school year was the least restrictive environment. In Ms. Franklin's opinion, the January 24, 2013, annual IEP did not meet Student's needs. She believed

Student's behavior goals could not be addressed in a home placement because there was a lack of variables in the home setting and a difference between small group participation and one to one inter-action with an adult. Student needed to be taught how to work in small groups and get along in a classroom. He needed a variety of people in order to learn coping skills. She believed that Student needed consistency across all settings. At home, Student would not be able to generalize skills, learn from peer models with IEP's or from typical peers.

49. Ms. Franklin was critical of the positive behavior intervention plan, the behavior support plan, District's functional analysis assessment and functional behavior assessments, data collection, and that a Board Certification in Behavior Analyst was not on Student's IEP team. For these reasons, in her opinion, none of Student's IEP's offered Student a FAPE. According to Ms. Franklin, a therapeutic program was very important but Student did not require placement in a residential treatment center in order to provide an appropriate environment.

DISTRICT'S WITNESSES

50. Cheryl Goldberg-Diaz and Ms. Hannett did not agree with Student's expert, Ms. Franklin. They disagreed with the validity of her assessment and her conclusion that Student's needs could be met in a less restrictive environment.

51. Ms. Goldberg-Diaz conducted the comprehensive residential placement assessment in April 2012. Ms. Goldberg-Diaz is a Licensed Clinical Social Worker with 25 years of experience, including most recently seven years as Program Manager for SELPA Children's Center and five years providing clinic based services for special education and Medi-Cal eligible students. She had known Student since 2009, when Head Start referred him to her for assessment. She was aware of Student's birth history, including exposure to alcohol, drugs and neglect. She believed that Student's emotional health and behavior issues in 2012 could be based on the impact of that exposure on brain

development. Student needed a highly structured educational program, 24 hour a day "awake supervision" to ensure his safety, and appropriate staff to intervene to protect Student and others from his violent behavior. Ms. Goldberg-Diaz did not believe Student was ready to be on a public school campus. She was concerned about the validity of Ms. Franklin's assessment because it was exclusively a one to one situation with an adult and Ms. Franklin did not know what medications were prescribed at the time or whether Student had taken any medication at the time of the assessment.

52. Ms. Hannett has a bachelor of science degree in psychology, a master's of education degree in school psychology, psychological specialist. She also has Administrative Services, and Pupil Personnel Services - School Psychology credentials. She began her career as a school psychologist in 1990. She was a Program Specialist with SELPA from 1997 through August 2011, the Coordinator of Special Education with Bear Valley Unified School District from September 2011 through May 2013, and became Director Student Support Services with District in June 2013. She has extensive experience in training school wide positive behavior interventions. In Ms. Hannett's opinion, Student was neuro-compromised. Student could not have been successfully placed in any program within District because the necessary level of in school psychological support was not available within District and behavior support alone would not be successful. Although group and individual therapy could be provided on an out-patient basis, that would not be effective with this Student. In her opinion, everything that could be done for Student was being done at Provo Canyon.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)⁵ 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))

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*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 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, 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, § 56505, 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. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; 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 consolidated matter, Student had the burden of proof on Student's Issues and District had the burden of proof on District's issue.

DISTRICT'S ISSUE AND PART OF STUDENT'S ISSUES ONE AND TWO REGARDING SEPTEMBER 19, 2014 IEP OFFER

5. District contends the residential placement offered in the September 19, 2014 IEP offered Student a FAPE. Student contends the offer is not in the least restrictive environment. Student contends the least restrictive for Student would be a special day class on a general education campus with intensive supports. The argument was based upon Mother's testimony and the testimony of Student's expert. Based on Ms. Franklin's assessment, Student maintains the September 19, 2014 IEP did not offer Student a FAPE in the least restrictive environment for the 2014-2015 school year. Because resolution of District's Issue requires an analysis of the IEP offer as a whole, District's Issue and Student's Issue One and Issue Two, to the extent they challenge placement and related services for the 2014-2015 school year, will be addressed together.

6. If the parent or guardian of a child with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) Accordingly, District filed and has the burden of proof on this issue.

7. When a school district seeks to demonstrate that it offered a FAPE, there are two parts to the legal analysis. 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 reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031,1041.)

Procedural Compliance

8. The IEP team is required to include as part of the team: 1) one or both of the student's parents or their representative, 2) a regular education teacher if a student is, or may be, participating in the regular education environment, 3) a special education teacher, and 4) 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. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

9. An IEP is a written document for each child with a disability that includes: 1) 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 2) 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.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) 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).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), 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) & (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 result of the most recent evaluation 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 developing the September 19, 2014 IEP, the District complied with the procedural requirements of the IDEA and California law. It provided Parents with notice and an opportunity to participate in the development of Student's IEP. The IEP team was comprised of the necessary participants. Ms. Smith, a therapist, and Mr. Schomas from Provo Canyon participated via telephone. The meeting was held over two sessions in order to address Parents' questions that arose during the first session. Parents fully participated in the development of Student's present levels, goals, educational program, related services and discussion of the continuum of placement options. Parent expressed opinions and disagreements. The IEP included a statement of present levels

of performance, goals, education program, services, and delineated Student's level of interaction with non-disabled peers.

Least Restrictive Environment

12. School districts are required to provide each special education student with a program in the least restrictive environment, 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.) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56342.)

13. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) 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 in the home, hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

14. The Ninth Circuit follows a four-part test on the question of whether a placement is in the least restrictive environment. The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child will have on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Sacramento City Unified School*

Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R., supra*, 874 F.2d 1036, 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 least restrictive environment for an aggressive and disruptive student with ADHD and Tourette's Syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048.) If it is determined 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 pp. 1048-1050.)

15. Residential placement is, by its nature, considerably more restrictive than day school. (See *Kerkam by Kerkam v. Superintendent, D.C. Pub. Sch.* (D.C. Cir. 1991) 931 F.2d 84, 87; *G.D. v. Westmoreland School Dist* 948 (1st Cir.1991) 930 F.2d 942, 948; *Carlisle Area Sch. v. Scott P. By & Through Bess P.* (3d Cir. 1995) 62 F.3d 520, 534.) The IDEA does not define a therapeutic placement; however, both day schools and residential facilities can qualify as therapeutic placements. By their very nature, therapeutic placements require a student's removal from the general education environment. As a result, a therapeutic placement is one of the most restrictive placements on the least restrictive environments continuum. (34 C.F.R. § 300.115.) Given their restrictive nature, removal of a student with disabilities to a residential setting complies with the least restrictive environment mandate in only extremely limited situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area School Dist. v. Scott P., supra*, 62 F.3d at p. 523.)

16. Given the severity of Student's needs in September 2014, the parties agreed Student could not be educated in a general education environment, regardless of the level of support provided. Ms. Franklin recommended a special day class with intensive supports and accommodations and District offered residential placement. Accordingly, it is not necessary to undertake a detailed analysis of the *Rachel H.* factors as they relate to general education. Instead, the appropriate analysis is whether District offered an appropriate placement in the least restrictive environment possible other than general education. District demonstrated by a preponderance of the evidence that the September 19, 2014 IEP offered Student a FAPE in the least restrictive environment when it offered Student residential placement.

17. Student had, over the course of his young life, progressed through a continuum of available educational options without success. The continuum of options in this case was; Phelan Elementary special day class, Phelan Elementary special day class with a one to one aide, county special education program, two non-public schools, one with an isolated individual classroom with one to one supervised instruction, home instruction with a credentialed teacher with related services at Phelan Elementary, independent study, and the residential treatment center. District was cautious about placing such a young child out of state. Before making the September 19, 2014, offer of residential placement, when asked whether an appropriate behavior support plan could be implemented by a general education teacher, District reviewed the Mountain View placement, collected data, and the IEP team meeting was reconvened. The results were shared with Parents and discussed at the meeting. District listened and responded to Parents' concerns.

18. District had closely monitored Student during his stay at Provo Canyon. At the time the September 19, 2014 IEP was offered Student had mental, emotional, behavioral, and medical challenges that could not be met in any placement other than

residential treatment of the kind provided by Provo Canyon. Students' complex challenges, whether psychological or neurological, resulted in violent aggressive behavior that affected the safety of Student, peers and adults working with him. Provo Canyon provided a safe, consistent, predictable environment in which appropriate behavior interventions and a sensory diet could be provided in both the school area and the living area. Although medication could not be required as a condition of attending school (see Ed. Code, sec. 56040.5), Student made some progress on his behavior goals with psychological counseling and under the care of a psychiatrist by addressing his mental health needs, in part, with a medication regimen designed to help Student with mood regulation, ADHD and encopresis.

19. Student made academic and non-academic progress during his stay at Provo Canyon. His grade level academics were good. He made a friend. He was beginning to develop some coping skills and to calm himself. He told both Mr. Schomas and Ms. Franklin that he liked the school.

20. Student's global functioning improved from the time he was admitted but he was not ready for discharge or to transition to a lesser level of care when he was removed. Even in a highly structured classroom with trained staff, low student teacher ratios, and intensive behavior intervention, the unpredictable and explosive nature of Student's behavior required consistent and often constant verbal redirection and de-escalation techniques, as well as a safe way to restrain him when necessary for his own protection and the protection of others. The Handle with Care system and the time out room were appropriate for that purpose. The evidence demonstrated that Student was, albeit inconsistently, learning to calm himself quickly following those incidents that resulted in the use of those techniques.

21. A special day class on a general education campus was not appropriate. Ms. Franklin concluded based on her own assessment, which occurred after the

September 2014 IEP meetings, that Student's needs could be met in a special day class, if he had appropriate behavior support. Her assessment and her ultimate opinions were given little weight because the IEP team did not have the opportunity to review her report before it made its September 19, 2014 IEP offer. (*Adams, supra*, 195 F.3d at p. 1149.) Additionally, at the time of her assessment, Student had not been in an educational setting since April 28, 2014, and she did not observe Student in an educational setting. The most recent information from Provo Canyon was that Student continued to have behaviors that were dangerous for Student and others and too disruptive for a special day class. Ms. Franklin worked with Student one to one primarily on academic activities, not the behavioral challenges that occurred with peers or in an educational environment. There was no dispute Student could perform grade level work when he was focused. The challenges that Student faced in educational settings had to do with behaviors that did not occur while working one on one with a highly skilled and experienced behavior analyst in his most comfortable environment, his home. Because the District's witnesses had more direct contact with Student over a period of time and were familiar with Student's behaviors and performance over a period of several years, their opinions were more persuasive than Ms. Franklin's opinion on the issue of the least restrictive environment.

Appropriateness of Related Services and Accommodations

22. For District to prevail in this case, it must also demonstrate that the related services and accommodations it offered were sufficient to confer some educational benefit within the meaning of *Rowley*. Student's first issue raises a subset of this issue. Student contends the September 19, 2014 IEP was not reasonably calculated to provide educational benefit. This section addresses whether the September 19, 2014 IEP, as a whole, offered related services sufficient to meet the *Rowley* standard.

23. California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.) "Related Services" include transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401.) In California, related services are called designated instruction and services, and must be provided "as may be required to assist an individual with exceptional needs to benefit from special education....". (Ed. Code, § 56363, subd. (a).)

24. Designated instructional services may include the provision of transportation and developmental and mental health services if required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. Smith* (9th Cir. 1994) 15 F.3d. 1519, 1527 (*Union*).) The regulation that defines "mental health services" includes psychotherapy. (Cal. Code Regs., tit. 2, § 60020, subd. (i).) The related service of transportation may, when educationally appropriate, include transportation costs and expenses related to family visits to a distant residential placement.

25. Whenever a child's behavior impedes his learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic

behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

26. Here, the September 19, 2014, offer included speech collaboration, occupational therapy consult, individual and group counseling, telephonic parent counseling, extended school year, transportation to and from the residential facility and for family visits every three months or as recommended by the facility, a mentor, and residential monitoring by the SELPA Children's Center. Mental health services were included at the residential treatment center and provided by a psychiatrist and psychologists. Positive behavior interventions and strategies to address Student's sensory needs were embedded in the residential program and implemented by trained staff in both the educational and residential environments. The Provo Canyon program included monthly treatment plans prepared by the therapist and the Student Enrichment Team met frequently to evaluate and modify Student's progress and adjust his behavioral instruction. This program was designed to produce significant improvement in Student's behavior and Student made some progress during his stay, although he was removed before there was a significant reduction in Student's problem behavior. Therefore, District met its burden of proof as to the provision of related services in the September 19, 2014 IEP.

27. For the above reasons, District proved the September 19, 2014 IEP offered Student a FAPE in the least restrictive environment, and therefore prevailed on this issue. For the same reasons, Student failed to meet his burden of proof that the September 19,

2014, offer was not reasonably calculated to provide Student educational benefit and placement in the least restrictive environment.

STUDENT'S ISSUE 1: STUDENT'S 2012-2013 AND 2013-2014 IEP'S

28. Student contends his IEP's for the 2012-2013 and 2013-2014 school years were not reasonably calculated to provide educational benefit based upon his unique needs because District did not develop an appropriate behavior plan, conduct a behavior assessment when first warranted by Student's behavior, collect data to monitor the effectiveness of Student's behavior support plan and positive behavior intervention plan after the plans were developed, and reconvene the IEP team after emergency interventions were used or Student was suspended. District contends Student's behaviors were assessed, his IEP's included appropriate behavior interventions, and these interventions were implemented at Mountain View and embedded in the Provo Canyon program. District also contends no additional behavior assessments, or additional IEP team meetings, were necessary in order for District to offer a program reasonably calculated to provide educational benefit for Student. For the reasons set forth below, Student failed to prove that Student's IEP's for the 2012-2013 and 2013-2014 school years were not reasonably calculated to provide educational benefit to meet Student's unique needs.

Applicable Law

29. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School 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, the

offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

30. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others.

31. A school district must amend an existing IEP in order to make a change in educational placement for a special needs child. A district may amend an IEP either through agreement with the child's parents or by the IEP team at an IEP meeting. (20 U.S.C. § 1414(d)(3)(F); 34 C.F.R. § 300.324(a)(6)(2006); Ed. Code, § 56380.1, subds. (a), (b).)

32. Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.) *Rowley* requires a school district to provide a disabled child with 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*, 458 U.S. at p. 200.)

Analysis

33. Student's IEP's dated September 20, 2012, and December 19, 2012, are revisions to an IEP dated February 2, 2012. The February 2, 2012 IEP is outside the two year statute of limitations, such that allegations related to its development are outside the statute of limitations. The September 20, 2012, revised revisions adjusted Student's speech and occupational therapy goals but did not change Student's placement. Student's goals were not contested in Student's complaint and therefore are not at issue. The December 19, 2012, revision was in response to the number and severity of

the behavior incidents at Mountain View. The weight of the evidence established that, at that time, the Mountain View placement was no longer appropriate because of Student's behaviors. Temporary home hospital placement for the safety of Student and others was reasonably calculated to provide educational benefit to Student. Therefore, the September 20, 2012 IEP and December 19, 2012 IEP revisions were reasonably calculated to provide educational benefit to Student.

34. The January 20, 2013 IEP offered, at the request of Mother, and as supported by a medical note, home placement for three months with appropriate levels and frequency of speech therapy, occupational therapy, counseling, and in-home instruction. It provided Student a basic floor of opportunity in light of Student's uncontrollable behavior and his doctor's request for home instruction. During that time, the Diagnostic Center assessment was completed. By August 21, 2013, the IEP team, including Parents, agreed Student's needs could not be met with a public or non-public school and that long term home placement was not appropriate. Accordingly, with a second physician's authorization, District's August 21, 2013, offer to extend home placement with the related services was reasonably calculated to provide educational benefit to Student while a referral for residential placement was processed and until the IEP team could review the Diagnostic Center Report.

35. The IEP team reviewed the Diagnostic Center Report on September 20, 2013. The IEP team met for its annual meeting on October 10, 2013. The IEP team adopted most of the Diagnostic Center conclusions and recommendations and incorporated the findings and recommendations, including the recommendation for residential placement in Student's October 10, 2013 IEP. Residential placement was reasonably calculated to provide educational benefit to Student based upon his mental health needs, the continued severity of his behaviors, and his inability to make progress on his goals in every other educational environment that was attempted. Based on what

District knew about Student at the October 10, 2013 IEP team meeting, he continued to need intensive mental health support, intensive around the clock supervision, consistent behavior intervention in all areas and, with that support, he made some progress at Provo Canyon.

36. District was not required to conduct additional behavior assessments during the 2012-2013 and 2013-2014 school years in order to develop IEP's reasonably calculated to provide a basic floor of opportunity because District conducted a functional analysis assessment during November and December 2011, and January 2012. The Diagnostic Center assessment, conducted during May 2013 and reported in September 2013, included extensive assessment of Student's behavioral needs. The parties, on October 10, 2013, agreed that the Diagnostic Center assessment fulfilled triennial assessment requirements. Thus, Student's behavior problems were assessed twice within less than three years. (See 20 U.S.C. § 1414(a)(2); Ed. Code, § 56381, subd. (a)(2).) Accordingly, Student did not demonstrate that District failed to conduct a behavior assessment when first warranted by Student's behavior.

37. Ms. Franklin's criticism of District's behavior assessments, behavior interventions, data collection and behavior strategies was not persuasive and does not affect this analysis. The IEP's must be evaluated in light of what was reasonable and known to the IEP team at the time. Ms. Franklin assessed Student five months after he was removed from Provo Canyon under very different circumstances than Student would face in any educational environment. She agreed with the Diagnostic Center assessment on almost everything except placement in a residential treatment facility. Ms. Hannett and Ms. Goldberg-Diaz were more knowledgeable about Student, and their testimony that Student's mental health needs required residential placement was more persuasive. The testimony of these witnesses, the Diagnostic Center assessment and the weight of the evidence demonstrated that Student's IEP's for the 2012-2013 and 2013-

2014 school years were reasonably calculated to provide some educational benefit within the meaning of *Rowley*.

STUDENT'S ISSUE 2: LEAST RESTRICTIVE ENVIRONMENT

38. Student contends District failed to offer Student a placement in the least restrictive environment during the 2012-2013 and 2013-2014. Student's contention that he was not offered placement in the least restrictive environment for the 2014-2015 school year was addressed above. Student maintains his placement to progressively more restrictive educational environments was due to District's failure to assess his behaviors, implement appropriate behavioral interventions and provide an appropriate behavior support plan. District contends it progressively addressed Student's needs in response to his behaviors in successive environments, including a one to one aide for behavior support, a smaller intensive academic setting, one to one aide/teacher support, community based mental health services, a behavior support plan, positive behavior interventions, social skills training through speech therapy, and a sensory diet monitored by an occupational therapist. District argues Student's limited and inconsistent progress in each of these environments demonstrated that he needed a cohesive environmentally controlled program with intensive mental health services and medication management. According to District, Parents' inconsistent application of behavior and sensory strategies in the home, and a pattern of unilateral withdrawal of Student from schools and termination of related services, disrupted the momentum and consistency necessary for therapeutic treatment.

Applicable Law

39. As discussed above in paragraphs 13 through 15, and incorporated by reference, school districts are required to provide each special education student with a program in the least restrictive environment on a continuum of placements.

40. Home hospital instructional services are part of the continuum of special education placements and programs that must be available to pupils who receive special education. (34 C.F.R. § 300.115(b)(1); see also Ed. Code, §§ 56360, 56361.) Placement in the home is one of the most restrictive placement options for a special education student. Special education provided in the home or hospital is limited to eligible students for whom the IEP team recommends such instruction. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).)

Analysis

41. Student did not demonstrate that District failed to offer Student a placement in the least restrictive environment for the 2012-2013 school year or the 2013-2014 school year. The parties agree that full-time placement in a general education environment was not appropriate even though Student was bright and capable of doing grade level work.

42. Student's IEP's for the 2012-2013 school year provided placement at Mountain View and then in-home instruction. At the time, Mountain View was the least restrictive environment on the continuum of possible placements because all previous placements were not successful. Although Mountain View reported Student had "stopped kicking, punching and spitting," the incident reports are contrary. The isolated classroom and instruction by a supervised one to one aide was a very restrictive environment, however, Mountain View did provide some non-academic benefits because it included some access to peers and could implement Student's IEP. Student's very serious behaviors were disruptive and put Student, and others, at risk of injury even with the dedicated classroom, one to one instruction, and behavior interventions. Ms. Franklin had no opinion whether Mountain View was the least restrictive environment for Student.

43. Following the unsuccessful placement at Mountain View, Student was temporarily placed in home from January 2013 through October 2013. Home is one of the most restrictive environments. District witnesses, Parents and Ms. Franklin agreed home placement was too restrictive an environment for any extended period of time. The non-academic benefits from the home hospital placement were minimal given that there is no peer interaction at all. However, the effect of Student's behavior in any available educational environment would be highly disruptive and unsafe. Therefore, temporary home placement with a credentialed teacher and related services for a short period of time was reasonably calculated to provide educational benefit to Student.

44. Student made academic progress, but minimal, if any, progress on his behavior goals for the 2012-2013 school year. The evidence did not demonstrate that the reason for Student's failure to make progress was due to the lack of appropriate behavior support.

45. Student's IEP's for the 2013-2014 school provided for continued home instruction until such time as he could be placed at Provo Canyon. Temporary home placement was the least restrictive environment from the beginning of the 2013-2014 school year school until he was placed at Provo Canyon on October 23, 2012, for the reasons stated in paragraph 43 above. As of October 23, 2012, Provo Canyon was the least restrictive environment on the continuum of options. Student's behavioral and social needs could not be safely met in the a District school with a one to one aide, a special day class on a general education campus with a one to one aide, Mountain View or any of the other placements District had provided. Provo Canyon provided Student academic and non-academic educational benefits by addressing educationally related mental health needs, including an embedded program of behavior interventions and sensory strategies consistently in both the school and residential environments, and structured opportunity for social interaction with peers.

46. Student failed to prove by a preponderance of the evidence that the IEP's for the 2012-2013 and 2013-2014 school years, failed to offer Student a placement in the least restrictive environment.

ORDER

1. The September 19, 2014 IEP offered Student a FAPE in the least restrictive environment.
2. All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: District prevailed on all issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: January 23, 2015

/s/

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings