

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

BARSTOW UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017040083

DECISION

Barstow Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on April 3, 2017, naming Student. On April 24, 2017, OAH granted District's motion to amend its complaint. The matter was continued for good cause on May 22, 2017, June 13, 2017 and August 9, 2017.

Administrative Law Judge Rommel Cruz heard this matter in Barstow, California, on September 19 and 20, 2017.

Vivian Billups, Attorney at Law, represented District. Joni James, Director II of Pupil Services attended the hearing on behalf of District. Denise Edge, Due Process Program Manager attended the hearing on behalf of Desert/Mountain Special Education Local Plan Area.<sup>1</sup>

Mother and Student did not attend the hearing.<sup>2</sup>

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<sup>1</sup> Stephanie Hedberg, Program Specialist for SELPA attended part of the first day of hearing to assist Attorney Billups.

<sup>2</sup> On September 11, 2017, OAH made multiple attempts to contact Mother for the telephonic prehearing conference, but was unable to reach Mother or leave her a voice

A continuance was granted for the parties to file written closing arguments and the record remained open until October 4, 2017. Upon timely receipt of District's written closing argument, the record was closed and the matter was submitted for decision.<sup>3</sup>

## ISSUE

Did District's April 13, 2017 individualized education program offer, with placement at a residential treatment center and related services, provide Student with a free appropriate public education in the least restrictive environment?

## SUMMARY OF DECISION

This Decision holds that District's April 13, 2017 individualized education program's proposed instruction, goals, services and supports, with placement at a residential treatment center offered Student a free and appropriate public education in the least restrictive environment. Academically, Student was performing at a second to third grade level. He failed to consistently take his prescribed medication to help manage his attention deficit hyperactivity disorder and anxiety. Student was highly unpredictable, disruptive, combative, and physically aggressive to peers, school

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message. The PHC proceeded without Mother's appearance. The Order Following Prehearing Conference, containing the date, time, and location of hearing was served on Mother on September 12, 2017.

<sup>3</sup> On September 21, 2017, OAH attempted, but was unable, to reach Mother by phone to advise her of the instructions related to the written closing briefs. On September 27, 2017, OAH left a message for Mother with a family member advising Mother to contact OAH for details in filing a written closing brief. Mother did not contact OAH and no closing brief was filed on behalf of Student.

personnel, and members of the community. His behaviors led to consistent and frequent elopements from class, campus and school transportation, being restrained by school staff, school suspensions, incarceration in juvenile hall, and hospitalizations due concerns of harm to self and others. Student's behaviors impeded his ability to access his education. The IEP was tailored to meet Student's academic and behavioral needs and was reasonably calculated to enable Student to receive an educational benefit.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was 16 years old at the time of hearing. He resided with Mother within District's boundaries at all relevant times, and was eligible for special education under the categories of emotional disturbance and other health impairment. Student was diagnosed with attention deficit hyperactivity disorder, found to be intellectually disabled, and had visual and auditory processing difficulties. Student's medical providers prescribed him three medications to be taken daily. The medications assisted him in managing his attention deficit hyperactivity disorder and anxiety.

2. Student had a long-standing history of defiant and disruptive behavior. During the 2012-2013 school year, District placed him in a SUCCESS class at Montara Elementary School. The SUCCESS class was a program designed for students with emotional disturbance or other health impairments. District placed Student in this class due to his inability to function in the general education classroom with supports and a behavior intervention plan.

3. That school year, Student's behaviors escalated to more aggressive levels, prompting District to consider a non-public school placement. In March and April of 2013, Student's Montara Elementary School teacher and school principal wrote letters expressing their concerns about Student's behaviors. Their letters were in support of the

IEP team's recommendation for a more restrictive setting for Student. District's school psychologist, James Janke, also wrote a letter in support of the recommendation, explaining that Student was "unable to control his behavior at this point and demonstrates a need for high level of care." All three noted concerning behaviors that involved destroying property, threatening and attacking peers and staff, and running off campus. District initiated a non-public school referral in May 2013. However, Student was incarcerated in juvenile hall in May through June 2013, and therefore, a non-public school did not become available until the following school year.

4. In August 2013, Student began attending Bright Futures Academy, a non-public school. Student was transported to and from school on a bus/van, with a commute time for Student that was anywhere from one to two hours each way. Bright Futures implemented a behavior support plan in December 2013 to address Student's elopement and physical aggression towards peers and staff. However, Student's aggression towards peers and staff worsened, and he continued to elope, damaged cars in the school parking lot, and ran into on-coming traffic. The behavior support plan was then modified on March 11, 2014, to include functional communication training for Student. The training called for Student to learn to express himself in ways such as, "I need a break" or "I need help" to ease his frustration and encourage him to remain in class.

5. Also on March 11, 2014, District proposed to assess Student for an educationally related residential placement. District provided an assessment<sup>4</sup> plan to Mother and she consented to the assessment on March 12, 2014. However, that assessment was never conducted due to Mother's lack of follow through.

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<sup>4</sup> The terms "assessment" and "evaluation" and "assessor" and "evaluator" are synonyms and are used interchangeably in this Decision. (Ed. Code, § 56302.5.)

6. Inland Regional Center began providing services to Student on May 15, 2014.<sup>5</sup> Student was eligible for services due to his diagnosis of mild intellectual disability and received counseling every other week.

7. Student's behavior support plan was unsuccessful and his behaviors reached a point that Bright Futures was no longer able to meet Student's needs. Student was transferred to another non-public school, Mountain View Non-Public School, and began attending in August 2014. Student remained at Mountain View until August 2016. At Mountain View, Student was suspended approximately three to four times. He was hospitalized pursuant to California Welfare and Institutions Code section 5150 on three occasions.<sup>6</sup> Student was also incarcerated on three occasions during the 2014-2015 school year.

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<sup>5</sup> Inland Regional Center is a nonprofit public benefit corporation and social services agency under contract with the California Department of Developmental Services. It coordinates services for and assisted individuals with a developmental disability as defined in California Welfare & Institutions Code section 4512 and Title 17 of the California Code of Regulations, sections 54000, et seq., who reside in San Bernardino and Riverside Counties.

<sup>6</sup> Welfare and Institutions Code section 5150(a) states that "[w]hen a person, as a result of a mental health disorder, was a danger to others, or to himself or herself, or gravely disabled, a peace officer ... or professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment."

8. On September 4, 2014, Mr. Janke administered a Conners 3 assessment of Student, which used rating scales to gather information regarding Student's behaviors and feelings. The ratings scales questionnaire was provided to Mother. In the areas of Student's inattention, hyperactivity/impulsivity, executive functioning, peer relations, and defiance/aggression, Mother rated these as areas of no concern. The only area of concern Mother noted were learning problems relating to learning and/or understanding academic materials that involve reading, writing, or math skills. Mr. Janke found the area of learning problems to be very elevated, suggesting Student to have a specific learning disability. On September 15, 2014, Mr. Janke administered a Woodcock-Johnson III Normative Update Tests of Achievement assessment of Student which revealed his reading, writing, and math to be at first to second grade level.

9. During a brief period in the 2014-2015 school year, Student made some progress and his behavior stabilized to a certain extent. A less restrictive placement was considered. At the January 2015 annual IEP review, the IEP team determined that he could return to public school and be placed in a SUCCESS class at Barstow Junior High School for a 20-day trial period, starting February 2, 2015.

10. On March 12, 2015, the IEP team convened to discuss the trial placement at Barstow Junior High. The trial was not successful, as Student's elopement, aggression, and defiance returned to previous levels. Concerns about the consistency of Student's medication compliance were discussed. District offered to administer medication to Student on days when Student failed to take his medication. Mother verbally agreed. District provided Mother the necessary consent and authorization forms. However, Mother never returned the forms to District. In light of Mother's verbal agreement to allow District to administer Student's medication, and to see if Student could stabilize through regular medication and the use of a behavior intervention plan, the IEP team recommended giving Student more time at Barstow Junior High.

11. Student's behavior did not improve. The IEP team reconvened on May 21, 2015 and determined that Student would return to a non-public school. Mother consented to the IEP revision on June 5, 2015.

12. On June 17, 2015, Student was charged with violating California Penal Code section 245, subdivision (a)(1), assault with a deadly weapon. He was 14 years old at the time. Juvenile Court found him to be mentally incompetent to stand trial and he was released to Mother on January 27, 2016. While in juvenile hall, Student earned 10 credits towards graduation. At the IEP team meeting on February 11, 2016, the team noted that Student's reading had improved to the fifth grade level. His behaviors and elopement remained a problem and the IEP team agreed to send Student back to Mountain View/Altus Academy.<sup>7</sup> However, in May 2016, Altus Academy determined it no longer could serve Student's needs due to his behaviors and another placement needed to be considered.

13. On August 1, 2016, Inland Regional Center authorized wraparound services for the family through Uplift Family Services. Attempts to provide those services were made but were subsequently terminated due to excessive cancellations by Mother.

#### 2016-2017 SCHOOL YEAR IEP TEAM MEETINGS

14. The IEP team convened on August 16, 2016, to discuss Student's placement for the 2016-2017 school year. Among those in attendance were Mother, Student, District's Director II of Pupil Services and the local education agency representative Joni James, SELPA school psychologist and non-public school coordinator Glenn Low, SELPA Children's Center program manager Cheryl Goldberg-Diaz, and social worker Monica Tolliver with the San Bernardino County Department of Behavioral Health.

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<sup>7</sup> Mountain View changed ownership and was renamed Altus Academy.

15. As Director II of Pupil Services, Ms. James was also District's Director of Special Education and Director of Child Welfare & Attendance. Prior to joining District, Ms. James was principal of Silver Valley Unified School District's Alternative Education Center. From 1997 to 2008, she was principal at Silver Valley's Fort Irwin Middle School. Ms. James had a bachelor's degree in elementary education/early childhood, a master's degree in education administration, and a Clear Administrative Services Credential.

16. Student had spent time in juvenile hall in August 2016, just prior to the IEP team meeting, due to an incident in the community that involved a knife. This was his fourth stay at juvenile hall. The charges were dropped because he lacked the competency to stand trial. Altus Academy declined to accept Student back due to his behaviors. The team agreed that an educationally related residential assessment would be appropriate. The IEP team determined that Student would return to Bright Futures, with a one-to-one aide at Bright Futures while an educationally related residential placement assessment took place. Mother consented to the assessment plan that day.

17. The IEP team reconvened on November 1, 2016, to review the findings of the educationally related residential assessment. Among those in attendance were Mother, Ms. James, Bright Futures Academy principal Jeffery Le Comte, Ms. Goldberg-Diaz, and SELPA Children's Center therapist Veronica Hay, Ph.D., LMFT.

18. Mr. Le Comte was the Senior Vice President and Principal at Bright Futures Academy. He had 15 years of experience in the field of education, both as a teacher and a principal.

19. Ms. Goldberg-Diaz had been a program manager with Children's Center since 2007. As a program manager, she was responsible for the management, development, and implementation of the behavioral health program. Children's Center provided therapeutic services to children and families, along with residential assessments and case management services. Ms. Goldberg-Diaz had a bachelor's degree



in psychology with an emphasis on human services and a master's degree in social work. She had been a licensed clinical social worker for 25 years. Her experience involved serving as a social worker for over 12 years at Inland Empire Residential Centers providing psychiatric/medication management, case management, and individual, group and family therapy. In the past three years, she conducted approximately 40 educationally related residential assessments. Ms. Goldberg-Diaz presented the October 13, 2016 educationally related residential assessment report to the IEP team.

#### October 13, 2016 Educationally Related Residential Assessment

20. The October 13, 2016 educationally related residential assessment was conducted by Ms. Goldberg-Diaz and Ms. Hay. They reviewed Student's report cards, his 2014 Triennial Evaluation Psychoeducation Report, and his school incident reports. Ms. Goldberg-Diaz also observed Student at school. The assessors interviewed Mother, Student, school staff, and Student's school counselor as well. The report noted the various efforts and interventions District had utilized: use of prompts, redirection, and positive praise; structured settings; school-based counseling services; a behavioral support plan; and a non-public school setting.

21. The assessors opined that Student's limited coping abilities and emotional difficulties appeared to impact his ability to access his academics. Student had limited insight and was very concrete and immature in his thinking. Student was functioning below grade level in all academic areas. The assessment found Student to be confused, frustrated, angry, hurt, unheard, and misunderstood. Student was emotionally volatile, quick to escalate when distressed, and utilized explosive and attention seeking behaviors to avoid tasks. The assessors opined that his behaviors impacted his ability to complete tasks and remain motivated. His behaviors were disruptive and impacted his attendance and ability to receive an education.

22. In the interview, Student shared with Ms. Goldberg-Diaz that he wanted to do better at school, but it was hard for him. He also shared that he did better when he was on his medication, and on the day of the interview, he disclosed he did not take his medication that morning. Ms. Goldberg-Diaz observed Student to be anxious and impulsive. During the classroom observation, Ms. Goldberg-Diaz found him to be easily frustrated and distracted. Student walked out of the classroom without permission. In her interview, Mother shared that Student did fine at home and was properly supervised. She reported that Student was consistent in taking his medication. The interviews with staff and the school counselor revealed the opposite. Staff reported that Student did not take his medication consistently. When not on his medication, he had a far greater challenge managing his behaviors.

23. The assessment found Student to be at his best in a structured, predictable, and controlled environment where he felt safe. He responded well to clear structure, supports and positive reinforcement. The assessors opined that once he developed skills and coping strategies to manage his behaviors, he could then focus on his education. Student wanted to do well, graduate from high school and get a job. The assessors determined that Student would benefit from a program that provided 24-hour supports and intensive treatment, to allow him to heal and improve the trajectory of his life. Ms. Goldberg-Diaz and Ms. Hay recommended Student be considered for educationally related residential placement services, to include individual and group therapy, medication support, case management, and support from the IEP team and community service providers.

24. Ms. Goldberg-Diaz testified at hearing and persuasively established that Student required a residential placement to access his education. Student's elopements, outbursts and aggression remained a constant impediment to his education;

necessitating a need for an around-the-clock structured, supportive environment to meet his academic, behavioral, and postsecondary goals.

25. The November 1, 2016 Addendum/Revision to IEP recommended Student be placed in a residential treatment center. At the November 1, 2016 IEP team meeting, the team considered two residential placements, one in Florida, the other in Texas. Mother did not object to the recommendation for residential placement at that time; however she was reluctant to agree because Student did not want to go. Mother was concerned about his reaction to being away from his family. At the meeting, Ms. Goldberg-Diaz explained to Mother that a secured transport program was utilized to take Student to the residential placement, with Mother as an active participant throughout the process. The transport staff and Student would get to know one another before the trip. Student would be accompanied by two individuals during the travel. District would also provide the family an opportunity to visit Student.

26. Mother did not consent to the revision. Mother informed the IEP team she would speak to Student and get back to the IEP team in a couple of days regarding her decision. Mother failed to get back to District, prompting Ms. James to visit Mother at the home prior to the April 13, 2017 annual IEP team meeting. Mother informed her she would not agree to send Student to a residential placement.

#### APRIL 13, 2017 IEP

##### Student's Present Levels

27. The IEP team convened on April 13, 2017, for Student's annual review. District provided notice of the IEP team meeting to Mother and Mother attended. She was accompanied by a family friend. The other attendees were Ms. James, Mr. Low, Ms. Hay, Mr. Le Comte, District's Attorney Ms. Billups, Consumer Services Coordinator Brenda Martinez with the Inland Regional Center, SELPA Program Director Denise Edge,

SELPA staff Karina Quezada, special education teacher Jim Pollard, general education teacher Alicia Schiele, and Ms. Tolliver, who appeared by phone. Mother was provided a copy and an explanation of her procedural rights. Mother had no questions as to her rights. The team identified Student's eligibility categories to be emotional disturbance and other health impairment.

28. Ms. Martinez shared her February 24, 2017 progress report with the IEP team.<sup>8</sup> The report indicated that Barstow Police Department had 68 service calls involving Student in the past two years and law enforcement viewed Student to be a danger to himself and others. Law enforcement reported Student would often be seen walking the streets and his interactions with police and the community members were becoming more aggressive.

29. The team first discussed Student's strengths and concerns. Student could be polite and showed an ability to follow class rules. He did very well doing campus chores such as cleaning and lunch duty. He was very interested in being gainfully employed and could add and subtract dollars and cents. Though Student showed an ability to follow class rules, be on task and engage classmates appropriately, he still eloped from class and transportation, and remained physically aggressive towards peers and staff.

30. Student read at a second to third grade level, recalled major points from text and made predictions about future events. However, he struggled with comprehension, incorrectly identified central ideas and required consistent staff prompting to accurately identify central ideas. Student could solve basic math problems of addition and subtraction. He could complete multiplication problems using a

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<sup>8</sup> The progress report was prepared pursuant to a court order and addressed to the Honorable Pamela King, Superior Court of California, County of San Bernardino.

multiplication chart or calculator. He understood the value of money and could add and subtract money values that include dollars and cents. However, Student struggled with multi-step equations and solving for a single unknown variable.

31. Student required small group instruction with consistent staff attention to make educational progress. He required social skills training that included role play and practice. Student struggled with peer interaction and impulse control, impeding his ability to complete tasks and avoid negative peer interactions. Thus, mainstreaming activities for Student were not appropriate. Reading, writing, math, coping skills and his behavior were identified as areas of need.

#### IEP Goals

32. Student's special education teacher, James Pollard, provided telephonic testimony at hearing. Mr. Pollard was a special education teacher with Bright Futures Academy since September 2015, working with emotionally disturbed and intellectually delayed students grades six to 12. He received his special education mild/moderate teaching credential in 1998. He worked in residential settings from 1991 through 1997, assisting psychiatrically and emotionally disturbed children and adults. He had been Student's teacher since the start of the 2016-2017 school year and was very familiar with Student's academic and behavioral needs. Mr. Pollard was knowledgeable about Student's present levels of academic performance, educational needs, and behaviors, and provided credible testimony as to Student's areas of need.

33. Student independently read instructional level text at a second to third grade level. After reading short passages of three to four paragraphs, Student could answer comprehension questions in writing with less than 50 percent accuracy in three out of four attempts. Student could write a couple of paragraphs but would stray from the topic. His writing lacked transitions, correct spelling, punctuations, and appropriate grammar. When asked to respond in writing from a text reading, Student could write a

paragraph that included an introduction, three supporting sentences, and a conclusion at less than 50 percent accuracy, three out of four opportunities. As for math, Student could solve multiplication problems using a multiplication chart or calculator. He was working on problem solving for the unknown variables in one to two step equations. He required guidance and support to solve one-variable linear equations.

#### MATH

34. Student's prior math goal was to generate equivalent numerical expressions based on the properties of integer exponents. Student was expected to be at least 80 percent accurate in three opportunities. Mr. Pollard testified that as of the date of hearing, this goal had been met. The April 13, 2017 IEP's new math goal asked Student to solve five one-step equations, such as  $x + 3 = 5$ , using positive integers and one-variable using a problem-solving checklist. This was to be accomplished with 80 percent accuracy in four out of five trials for one continuous week. These goals were measured using teacher made tests, observations, and work samples.

#### READING

35. The prior reading goal asked Student to determine a central idea of a text and provide an objective summary of the text, analyzing its development over the course of the text, including how it emerges and was shaped and refined by specific details. At the time of hearing, this goal had not been met. The April 13, 2017 IEP goal asked Student to write two to three sentences in response to a short-answer question after reading second to third grade level informational text. Student had to justify his response with 80 percent accuracy in three out of four attempts.

## WRITING

36. The prior writing goal required Student to produce clear and coherent writing in which the development, organization, and style were appropriate to task, purpose, and audience. Student had not met this goal as of the time of hearing. The April 13, 2017 IEP writing goal required Student to use a graphic organizer to list key details and compose a five sentence paragraph, with one topic sentence, three sentences of supporting details, and a conclusion sentence that directly support his opinion. He was expected to achieve 80 percent accuracy in three out of four attempts. These goals were measured using teacher made tests, observations, and work samples.

## BEHAVIOR

37. Prior behavior goals called for Student to remain on task and refrain from threatening peers and staff and engaging in inappropriate verbal behavior; to remain in class and to ask for assistance or a break, rather than leaving class and/or campus; and to identify appropriate social strategies, such as asking for help or disagreeing appropriately when angry, disappointed, or frustrated. At the time of the IEP meeting, these goals were partially met and remained partially met at the time of hearing.

38. Student' behavior continued to present a challenge. He often disrupted class. He provoked classmates, used profanity and acted out with inappropriate outbursts. He continued to elope from the classroom approximately three to four times a day, for as short as a minute to as long as an entire class period. It was difficult for Student to take "no" for an answer or to understand the consequences of his actions. This led to arguments, threats and physical aggression on his part. Less than half the time, he was able to accept a "no" appropriately by remaining calm, looking at the person and saying "ok". The IEP noted that in a three month period, Student was physically aggressive to staff and peers on five occasions.

39. At the IEP team meeting, Mother shared a different view of Student. She disclosed that Student had been taking his medication consistently since March 2017 and opined that Student was no longer the person described by the team. At the meeting, Mr. Le Comte and Ms. James shared that Students' behavior had improved in the past few weeks. Mr. Le Comte reported there had not been any incidents of elopement in the month of April 2017.

40. Though Mother was responsible for providing Student with his medication, she failed to ensure Student actually took the medication consistently. There were times that Mother simply left the medication on a table for Student to take in the morning as he got himself ready for school. Although Mother reported to school staff that Student took his medication regularly, on occasion, Student would disclose to school staff that he did not take his medication. Additionally, school staff observed Student to be spacey, giggly, and making inappropriate comments; indications that he was not under medication.

41. Student was quiet, polite, helpful, on task, and compliant when under medication. Though there were times that Student was still disruptive and challenging under medication, the weight of the evidence firmly established that when on medication, Student was better able to focus on his academics, remain on task, less aggressive and better able to de-escalate from confrontation. The problem was that Student often did not take his medication and Mother would not consent to District administering it. Therefore, there were significant amounts of time when Student's behaviors significantly impeded his ability to access his education. Student was highly unpredictable, disruptive, combative, and physically aggressive to peers, school personnel, and members of the community. These alarming behaviors were a daily concern to those around him. Student was a danger to himself and others, and the risks only escalated as Student got older. From August 30, 2016, to April 13, 2017, student



had 36 unexcused absences from school, with eight days of suspension due to physical aggression towards staff and/or peers. Student, too often, was either disruptive in class, out of class, left campus grounds, or removed from class and/or sent home due to his behaviors.

42. In response to Student' ongoing behaviors, five behavior goals were developed in the April 13, 2017 IEP. Student was required to remain on task and in class for four out of five academic class periods. This was to be accomplished 90 percent of the time during the school day requiring no more than two verbal prompts. Student would also learn to accept "no" for an answer without complaining or arguing. The goal was to have Student refrain from arguing or whining within one minute, with only two redirections in four out of five observed situations in a school day. Student was also to refrain from making threats, hitting, kicking or any other act of physical aggression towards peers and staff. This was expected to apply for the entire five school periods, with Student being given only two verbal prompts.

#### Education, Related Services, Supplemental Aides and Supports

43. The IEP team determined that general education was not an appropriate setting for Student due to his behaviors and no mainstreaming opportunities would be available with a non-public school placement. District's April 13, 2017 IEP offered the following instruction, related services, and supplementary supports and aides: 360 minutes of daily specialized academic instruction, curb-to-curb transportation to and from school with a one-to-one aide; a one-to-one aide during school; 30 minutes of weekly individual counseling, 30 minutes per month for each of the following: employment, transition, college and career awareness services; extended school year, and on campus work related activities. The IEP provided for 330 minutes per day for Student to spend in small, structured classrooms. Staff would receive 60 minutes a year of crisis intervention training on verbal de-escalation. Student would receive 15 minutes

of daily modified work assignments, 60 minutes per week of small group/individualized instruction, 60 minutes per week of work related activities on campus and 30 minutes of daily positive reinforcement. The projected start date of instruction and services was April 13, 2017. The IEP meeting notes reflect the services and supports were to be provided in a residential treatment center. At the meeting, Mother had no questions as to the services, aides, and supports.

#### Behavior Intervention Plan

44. The team developed a behavior intervention plan. It noted that Student struggled with verbal instigations with peers and being told "no". He had difficulty handling unfavorable consequences, transitioning between activities, group activities, and following group activity rules. The presence of certain classmates was a trigger. Activities that required being seated for group work lasting more than 15 minutes was challenging for him.

45. The behavior intervention plan identified Student required seating near staff and extra attention during transitions for redirection and prompting of appropriate behavior. Delivery of negative consequences needed to be coupled with positive statements or reminders of when the next preferred task would occur or item be given. Also, staff was to immediately redirect inappropriate comments to avoid escalation. Student benefitted when given choices and a schedule to provide him with an awareness of what was expected. Structured group activities were to be incorporated to facilitate appropriate peer relationships. Student required close staff supervision when engaged in hands-on activities that involved movement from space to space.

46. The IEP team recognized Student sought attention by making inappropriate comments to peers. The behavior was reinforced when peers engaged him. He avoided tasks or negative consequences by leaving an area he was assigned to. In response, the behavior intervention plan sought to educate Student to refrain from

inappropriate peer interaction that will get him negative attention. Instead, Student would strive to be a positive role model or class leader. When confronted with an issue with a peer, he would be expected to request a break or speak to staff to stay busy or resolve the issue with a peer.

47. The behavior intervention plan called for techniques and strategies to include storytelling, where Student was given a relevant story to describe a social scenario with the desired, positive outcome and expectations of appropriate behavior. Also, the plan asked Student to play out replacement behaviors/social skills, after which Student was given feedback about benefits of engagement in desirable social skills. Additional strategies included the use of verbal and visual prompts to keep Student on task and to manage transitions, incorporation of social skills teaching into the context of an academic lesson, a breakdown of replacement skills into small steps and each step to be mastered, and the use of a point system where Student would lose points with maladaptive behavior and some points would be recovered when Student applied appropriate replacement behaviors.

48. The behavior intervention plan's behavior goals aimed for Student to interact with peers and staff without threatening, hitting, kicking or any other act of physical aggression five out of five school periods with two verbal prompts. Student was also asked to take a break or speak to staff when angry with a peer with only two redirections/prompts in four out of five observed situations. Daily Behavior Sheets were to be sent home with Student each day for a parent to review and sign. These sheets included completed assignments, behavior scores, and other important information, along with a section for parent feedback. The signed sheets would be returned to staff the next day.

## Transition Services and Postsecondary Goals

49. Student had previously expressed an interest in attending a community college to study marketing and sales. Student's prior postsecondary goals consisted of obtaining a driver's license, enrolling in a school for credit recovery or earning credits concurrently for junior college, researching enrollment requirements for Barstow College and exploring courses of study that appealed to Student that he could manage, and researching the scope and jobs available in marketing and looking into salaries and earnings in the field. At the IEP team meeting, Student had not met any of his postsecondary goals. Student made no effort to recover credits and Student's 2016-2017 first semester grades were all "F"s. Mr. Pollard testified that as of the hearing, Student had still not met any of his postsecondary goals.

50. The April 13, 2017 IEP noted Student's primary postsecondary goal was to be employed full-time and to support himself. Student had great interest in working. He showed a strong ability to work on assigned chores and tasks. He also completed a resume. Student was able to use a computer to research. He was able to accomplish this at 100 percent with the assistance of staff and a written guide to follow. However, without the assistance, he was less than 50 percent successful. Student was also unable to complete a job application without assistance.

51. New postsecondary goals in the April 13, 2017 IEP were designed to help Student achieve his goal of becoming employed full-time. The training goal asked Student to research and identify two possible vocational schools or programs that match his needs by listing the name and location of the school, the degree/certificate that lead to his career of interest, commuting/travel plans, and the cost of the colleges. Staff was to compile the information of resources for Student to review and research.

52. As for employment, Student was required, using his own resume as a reference to complete the applications, to complete one job application with the

information, spelling, punctuation, capitalization, and grammar being 100 percent accurate. To assist Student, staff would give him two completed job applications as samples.

53. An annual goal for community involvement asked Student to highlight and sort-out information from community support services provided by staff that would assist him and create a list of agencies, a minimum of three, with the community he had identified. A portfolio and standardized tests were used to measure this goal.

54. An annual goal for independent living/daily living skills required Student to learn to disagree appropriately using the following steps: 1) look at the person, 2) use a pleasant voice, 3) say, "I understand how you feel", 4) state why you feel differently, 5) provide a reason, and 6) listen to the other person without engaging in further challenging behavior. Student was expected to comply 80 percent of the time. This goal was to be measured using observations and charts.

#### Extended School Year

55. The IEP team determined that Student's academic and behavioral skills significantly regressed, and behaviors escalated, during extended school breaks. Therefore, the IEP called for the same level of services and supports to continue during the extended school year.

#### Residential Treatment Center

56. The IEP proposed placing Student at a non-public school, residential treatment center. District proposed two centers for the team to consider, the same two it had proposed earlier. One was located in Florida and the other in Texas. At hearing, Ms. Goldberg-Diaz testified that District's recommendation for a residential treatment center remained appropriate. No information had come to light since the November 1,

2016 IEP team meeting that would change the recommendation to a less restrictive placement.

57. Mother again expressed reservation with sending Student to a residential treatment center. To ease Mother's concerns, District offered to pay for her to travel and tour the facilities. The IEP team also discussed family reunification visits, to occur every three months. District would pay for transportation, lodging, and meals for Mother and another person to visit Student at the residential facility. It was also contemplated that the family reunification visits could evolve where Student would be traveling home for visits.

58. At the IEP team meeting, Mr. Pollard explained to Mother that a residential treatment center would provide Student with consistent medication, supervision, and vocational training. Student would be given regular psychiatric care, with monthly appointments to review the effectiveness of the medications, and whether adjustments to his medications were warranted. Student could be weaned off medications if he could demonstrate his ability to manage his behaviors without medication. Mr. Pollard shared his experiences working in residential treatment centers and the quick progress students made in short periods of time.

59. Mr. Low testified at hearing. He was SELPA's school psychologist and non-public school coordinator for the past 11 years. Mr. Low's duties as a non-public school coordinator involved reviewing, observing, and consulting with residential treatment centers and non-public schools regarding compliance and corrective action. He also facilitated residential treatments services. As a school psychologist, he administered standardized and alternative assessment instruments to evaluate student's cognitive and behavioral levels and prepared comprehensive psycho-education/multi-disciplinary reports. Mr. Low also conducted behavior assessments and developed behavior support plans. Prior to joining SELPA, Mr. Low was a school psychologist for seven years and a

school counselor for about a year with Silver Valley Unified School District. He had a bachelor's degree in social science, a master's degree in school counseling and guidance, and a Pupil Personnel Services Credential in School Psychology. He came to know Student quite well since Student's placement in non-public school. Mr. Low provided credible testimony. His responses were detailed, thoughtful, and consistent with the testimony and documentary evidence.

60. Mr. Low visited the Florida residential center the week prior to hearing. At hearing, he described the center as a secured facility, providing 24-hour supervision. The educational, therapeutic and residential components were closely coordinated. Mr. Low opined a secured facility was critical to Student's success due to his propensity to elope from difficult situations and conflicts, and engage in dangerous behavior in the community. He explained that California's most restrictive treatment centers were not secured, allowing residents to come and go at will. Therefore, there were no residential treatment centers in California that could meet Student's needs.

61. The Florida center's special education teachers were credentialed and the student-to-staff classroom ratio quite small. Mr. Low observed one class to consist of six students, one teacher, and two aides. The center provided a continuity of care with behavior plans implemented across the board, at all times. He opined this to be a key improvement from the less restrictive non-public school setting where Student received one set of rules and expectations and a different set of rules and expectations at home. Mr. Low explained the continuity of care to be especially helpful for Student. Student could take coping skills he learned and apply them throughout the day, across environments, improving his ability to retain those skills. Mr. Low also testified that Student was highly motivated to get a job and earn a living. The center's vocational training would suit Student nicely, providing him an opportunity to learn skills he

enjoyed and in which he could do well. District gave Mother a copy of the April 13, 2017 IEP. As of the hearing, Mother had not consented to any portion of it.

### STUDENT'S BEHAVIORS AFTER THE APRIL 13, 2017 IEP TEAM MEETING

62. Student's behaviors did not subside after the April 2017 IEP team meeting. Mr. Low and Mr. Pollard testified to several incidents which occurred at the start of the 2017-2018 school year. One incident involved Student slapping and hitting a security guard at Bright Futures. Another incident involved Student inappropriately touching a female staff member at school. A further incident occurred during transportation where Student made a suicidal comment to the driver. Before the van could stop near his home, Student attempted to jump out of the van. Once out of the van, instead of going home, he started walking down the street. Mother was contacted and she informed staff to let him walk.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>9</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, 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)<sup>10</sup> 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 free appropriate public education

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<sup>9</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>10</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, 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.) "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 general, an individualized education program 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 participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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.)

4. 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 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. 951, fn. 10.)

5. In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstance.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “[t]his standard is markedly more demanding than the ‘merely more than de minimis’ test .... [¶] The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.)

6. 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) & (f); 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).) 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, 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].) Here, District requested the hearing in this matter, and therefore, District had the burden of proof related to the issue for hearing.

ISSUE: DID DISTRICT'S APRIL 13, 2017 IEP, WITH PLACEMENT AT A RESIDENTIAL TREATMENT CENTER WITH RELATED SERVICES, CONSTITUTE A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

7. District contended that the April 13, 2017 IEP team meeting was conducted in accordance with the IDEA's procedural requirements. It further contended that its IEP of the same date contained all legally required information and was calculated to enable Student to receive an educational benefit. District argued that an educationally related residential placement with related services was necessary to meet Student's educational needs. Therefore, District contends it should be permitted to implement the IEP without parental consent if Student seeks to receive special education from District.

8. 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 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 school district offered 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 *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

### Procedural Compliance

9. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (458 U.S. at pp 205-206.) Among the most important procedural safeguards are those that protect the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) 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 a free appropriate public education to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.)

10. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) 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, supra* at p. 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].)

11. The IEP team is required to include as part of the team 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; and 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).)

12. The April 13, 2017 IEP team meeting was attended by all required team members. Mother attended along with a family friend. Mother was provided a copy and an explanation of her procedural safeguards and rights. She was an active and welcome participant at the meeting. She shared her impressions of Student's behavior and her concerns regarding out-of-state residential treatment center placement. The IEP team considered her input and concerns and responded by explaining to her the necessity and benefits of residential treatment for Student. Mother was afforded an opportunity to meaningfully participate in the development of Student's IEP. Hence, the IEP team meeting was conducted in accordance with the IDEA's procedural requirements.

#### Contents of the IEP

13. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) It is the "modus operandi" of the IDEA, "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and

related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

14. 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).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

15. An IEP is a written document for each child with a disability that includes 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. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must also include 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)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

16. Additionally, the IEP must contain statements of how the child's goals will be measured and 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)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).) It must also contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and activities, as well as a statement of any individual appropriate accommodations necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(V), (VI); 34 C.F.R. § 300.320(a)(5), (6); Ed. Code, § 56345, subd. (a)(5), (6).)

17. Furthermore, the IEP must contain the 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).) For a child 16 years of age or older, the IEP must contain appropriate measurable postsecondary goals and provide transition services needed to assist the child in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b); Ed. Code § 56345, subd. (a)(8).) The postsecondary goals must be based on age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills. (*Ibid.*).

18. Here, District's written IEP offer was comprehensive and contained all required information. The IEP team considered Student's strengths. Student could read second to third grade level instructional text independently, provide a written response on a subject containing a few sentences on a subject chosen by a teacher and a few paragraphs on a subject of Student's choosing. He could be polite and had shown the ability to follow class rules. Student did very well doing campus chores such as cleaning and lunch duty. He was highly interested in being gainfully employed and could count dollars and cents, up to several hundreds of dollars.

19. The IEP also noted areas of concern. Student struggled with reading comprehension, producing a fluid paragraph with proper punctuation, capitalization, spelling and grammar. Socially, Student continued to have problems engaging peers and staff appropriately. His behavior was of considerable concern to the IEP team as it would often result in verbal and physical altercations and him choosing to leave, or staff removing him from, class and campus.

20. The IEP properly identified Student's areas of need to be reading, writing, math, coping skills, and behavior. Student's present levels of performance in each of those areas were clearly explained in the IEP. Academically, Student was performing at a second to third grade level. He continued to struggle with managing his frustrations and anger, and had little to no coping skills.

#### MEASURABLE ANNUAL GOALS

21. The IEP also provided appropriate measureable annual goals in the areas of postsecondary, academics and behavior. The IEP's postsecondary goals asked Student to research vocational schools and community support services, correctly complete job applications, and learn to disagree appropriately with peers and adults as a part of his daily life. These goals were appropriately measured through a portfolio of Student's research into vocational programs, community support services, and completed resume/job applications. Student's interactions with peers and adults were to be monitored through observations and charts, with Student's interactions expected to be appropriate 80 percent of the time.

22. Academically, Student's annual goals sought to improve his writing by asking Student to produce two to three sentences that appropriately responded to a short-answer question, to strengthen his reading comprehension by reading a second to third grade level article and listing key details of the article and producing a five sentence paragraph. As for math, the focus was to improve Student's ability to complete



one-step equations. The IEP provided these goals to be measured through teacher observations, tests, and work samples. The goals were an appropriate means of tracking progress in those areas of Student's needs. They were measurable in that Student was required to successfully perform the reading and writing goal with 80 percent accuracy in three out of four opportunities, and to consistently perform the math goal with 80 percent accuracy four out of five trials for one continuous week.

23. Behaviorally, Student's annual goals required to Student to remain on task and in class for four out of five academic class periods, and to learn to accept "no" for an answer without complaining or arguing. He was also required to avoid making threats, hitting, kicking or any other act of physical aggression towards peers and staff during all five school periods with two verbal prompts. Student's progress was to be measured through observations, incident charts, data, and point sheets. These goals were an appropriate means of tracking improvements in Student's behavior. The goals were measurable by monitoring Student's behaviors throughout the school day and documenting his level of compliance.

#### Appropriateness of Related Services and Accommodations

24. 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 were 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).)

25. 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.

26. 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).)

27. The April 13, 2017 IEP’s proposed instruction, services and supports are appropriate in light of Student unique needs and tailored to benefit Student

educationally. The IEP described the academic instruction, related services and supports; setting forth the projected start date, length, frequency, and duration of instruction, services, and supports. The IEP provided an appropriate level of specialized instruction of six hours a day to achieve his academic goals and 30 minutes a week of individual counseling to assist him in benefiting from his education. The IEP also provided for a one-to-one aide in school and during transportation, to provide Student with consistent supervision and support. Additionally, the IEP provided monthly work experience, career awareness, and transition services to assist Student for life after school.

28. Student's behavior was a significant barrier to his education, and an impediment to the education of his peers. His behavior intervention plan was properly designed to significantly improve his behavior. The behavior intervention plan proposed techniques and strategies such as storytelling, role playing, the use of visual and verbal prompts to keep student on task and manage transitions, a point system, breaking down replacement skills into manageable steps, and incorporating social skills into the academic lesson. After episodes of outburst or aggression, the plan also called for positive conversations to problem solve and allow Student to express his ideas, emotions and perspective. These approaches were designed to eliminate the eloping, classroom disruptions and aggression towards peers and staff.

#### Placement in the Least Restrictive Environment

29. 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 was 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); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1.) The IDEA also requires, to the maximum extent

appropriate, that a child with a disability must be educated with children who are not disabled. (*Ibid.*)

30. 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.)

31. The Ninth Circuit has stated a four factor evaluation to determine whether a placement is in the least restrictive environment. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*)). The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect the child will have on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Ibid.*)

32. Residential placement is, by its nature, considerably more restrictive than day school. (See *Kerkam by Kerkam v. Superintendent, D.C. Public Schools* (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.* (3d Cir. 1995) 62 F.3d 520, 534 (*Scott P.*)). Placement of a student with disabilities in a residential setting complies with the least restrictive environment mandate in only those circumstances where a student with severe

disabilities is unable to receive a FAPE in a less restrictive environment. (See *Scott P.*, *supra*, 62 F.3d at p. 523.)

33. District did not contend that the cost of mainstreaming Student in a regular classroom factored into their recommendation for a residential treatment center. However, an analysis of the other three *Rachel H.* factors established that a regular classroom environment was not an appropriate setting for Student. Student was far behind in all academic areas, performing at second to third grade level across the board. He required small group instruction. He struggled with peer interactions and engaging in group activities. He had great difficulty remaining on task, was disruptive in class, provoked his classmates, and was physically aggressive towards staff and peers. Even with supports and behavior intervention plans, Student still struggled in both a general education classroom and more restrictive classrooms. The weight of the evidence established that Student would receive little to no educational and non-academic benefit in a regular classroom. Furthermore, his presence in a regular classroom would have a negative impact on teachers and other students. Therefore, a regular classroom is not an appropriate placement for Student.

34. For the past four years, Student's behaviors at school and in the community have consistently remained highly disruptive, dangerous, and unpredictable. Since 2013, Student's behaviors have impeded his ability to access his education. Elopements from class and campus, suspensions, and extended disruptions from studies due to incarcerations and hospitalizations all stem from Student's lack of insight, low frustration tolerance, the absence of coping skills, impulsivity, and aggression. District had exhausted the continuum of available educational settings, services and supports, short of residential placement, without success. Non-public school placements at Bright Futures and Altus Academy had not succeeded. Student made no progress in those schools. A secured, highly structured and supportive setting was necessary to address

Student's elopement and aggression, and the lack of appropriate placements in California necessitated placement in an out-of-state residential treatment center.

35. District's proposed residential treatment centers offered Student an opportunity to access his instruction and services. Student was able to find some success when he was placed in juvenile hall; a structured, predictable, and controlled environment where he felt safe. He responded well to clear structure, supports and positive reinforcement. A residential treatment center can provide the same level of structure and predictability, but with more supports. The centers' secured setting provided 24-hour supervision. This was a necessary measure to prevent Student from eloping from class or campus. Medication management was also crucial for Student, and these centers could better ensure consistent medication compliance and monitoring with on-site psychiatrists and staff. The centers' classrooms were staffed with credentialed special education teachers with small staff-to-student ratios. Additionally, vocational training was available to allow Student to access training in a career suitable for his skills.

36. District has met its burden of demonstrating that at the time of the April 13, 2017 IEP team meeting, a residential placement was the least restrictive educational placement for Student. District has also met its burden of demonstrating that Student's behaviors continued between the time of the April 13, 2017 IEP team meeting and the hearing, such that he continues to require a residential placement.

37. District complied with the IDEA procedural requirements in developing the April 13, 2017 IEP and the IEP itself was designed to meet Student's unique needs. It was reasonably calculated to enable Student to receive an educational benefit. Therefore, District met its burden in establishing that the April 13, 2017 IEP offered Student a FAPE in the least restrictive environment. District also established that Student continued to require a residential placement as of the time of the hearing.

## ORDER

District may implement the April 13, 2017 IEP without parental consent if Student seeks to receive special education and related services from District.

## PREVAILING PARTY

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

## RIGHT TO APPEAL

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: October 17, 2017

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

ROMMEL P. CRUZ

Administrative Law Judge

Office of Administrative Hearings