

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

COLTON JOINT UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018010001

DECISION

Colton Joint Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on December 29, 2017, naming Student.

Administrative Law Judge Rommel Cruz heard this matter in Bloomington, California on January 18 and 23, 2018.

Jim Sanft, Attorney at Law, represented District. Debra Cesario, Co-Counsel, attended the hearing on the first day. Janet Nickell, Director of Pupil Personnel Services, attended the hearing on behalf of District on all days. Rick Homutoff, Program Manager, attended the hearing on behalf of East Valley Special Education Local Plan Area on all days.

Mother and Student did not attend the hearing.<sup>1</sup>

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<sup>1</sup> Communications between OAH and District on January 10, 2018, established that the contact information OAH had for Mother was then-current. For the January 12,

A continuance was granted for the parties to file written closing arguments and the record remained open until February 12, 2018. Upon timely receipt of District's written closing argument, the record was closed and the matter was submitted for

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2018 prehearing conference, OAH contacted Mother and left two voice messages, one at 1 p.m. and another around 1:15 p.m. with instructions if Parent wished to participate in the telephonic prehearing conference. Parent did not respond. The January 12, 2018 PHC Order was overnight mailed to Mother's then-current address. On January 18, 2018, the scheduled day of the hearing, OAH was able to contact Mother on her cellphone. Mother notified OAH that she was currently represented by counsel. However, Mother did not voice any request to OAH to continue the hearing, nor had any Notice of Representation been filed from any attorney on Student's behalf. On January 18, 2018, at approximately 9:24 a.m., Mother left District's counsel a voice message indicating her wish to continue the hearing. She indicated in her message to District that she had hired an attorney and they would need additional time to prepare for hearing. She provided a number to be reached. Multiple attempts were made by OAH, District representative, and the ALJ to reach Mother that morning. Several voice messages were left at the number she provided and a number was provided in the messages for her to call to participate in the hearing. The hearing was postponed 45 minutes to allow Mother to call the number provided in the messages. Mother did not respond. As Mother had received actual notice of the hearing, had never advised OAH of any request for a continuance, and no Notice of Representation had been filed with OAH on behalf of Student, the hearing proceeded in Mother's absence.

decision.<sup>2</sup>

## ISSUES

1. Did District's December 11, 2017 individualized education program, with placement at a nonpublic school and related services, offer Student a free appropriate public education in the least restrictive environment?<sup>3</sup>

2. Is District entitled to assess Student pursuant to the April 11, 2017, and August 15, 2017, proposed assessments plans without parental consent?

## SUMMARY OF DECISION

This Decision holds that District's December 11, 2017 IEP offer of nonpublic school placement with related services provided Student a free appropriate public education in the least restrictive environment. Student struggled academically. He was failing his classes and was below grade level in math and writing. His disruptive and defiant behaviors were of considerable concern. He was verbally insulting and aggressive towards peers and staff, resulting in frequent classroom removals and suspensions. His behaviors impeded his ability to learn and the ability of his peers to access their education. District's proposed nonpublic school offered a smaller, more structured setting, with behavior management and counseling services embedded into

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<sup>2</sup> On January 24, 2018, OAH contacted Mother and advised her of the instructions for written closing arguments and the deadline for filing. No written closing argument was filed on behalf of Student.

<sup>3</sup> The Order Following Prehearing Conference dated January 12, 2018, erroneously noted the April 11, 2017 IEP as to Issue 1. However, District's request for due process hearing clearly identified the IEP at issue as the December 11, 2017 IEP.

the program to support Student's increasing needs. The IEP was tailored to meet Student's academic and behavioral needs and reasonably calculated to enable Student to receive an educational benefit.

This Decision further holds that District met its burden of proof as to its right and legal obligation to assess Student pursuant to the assessment plans dated April 11, 2017 and August 15, 2017. District's assessment plans were appropriate, its proposed assessors qualified and the assessments necessary to obtain information regarding Student's present levels of academic achievement, functional performance, and educational needs. District may assess Student pursuant to its proposed assessment plans without parental consent.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was a 13-year-old eighth grader at Terrace Hills Middle School 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 category of emotional disturbance.

2. Terrace Hills was a comprehensive middle school, serving students in the seventh and eighth grades. It had a resource specialist program and a special day class. Terrace Hills had an average ratio of one teacher to 30 students in the general education classrooms and a ratio of one teacher for every 16 to 17 students in the special day classes.

3. Scott Boggs was the principal at Terrace Hills for the past three years. He possessed a bachelor's degree in political science and a master's degree in social studies education and educational administration. He was a credentialed general education teacher for 23 years and familiar with Terrace Hill's general education curriculum. Mr.

Boggs estimated having attended 150 to 200 IEP team meetings.

4. Mr. Boggs first met Student when Student was in the fourth grade. Mr. Boggs was District's Coordinator of Mental Health for Special Education at the time. He attended numerous IEP team meetings for Student. Student's behaviors during the fourth grade were of considerable concern, as he increasingly directed aggressive behavior towards peers and staff, resulting in suspensions. Student bounced around several elementary schools and experienced a number of teacher changes. At the latter part of his fourth grade year, the IEP team placed Student at Bright Futures Academy, a nonpublic school. Student remained at Bright Futures through the end of his fifth grade year.

5. Georgene Dixon was District's Coordinator of Mental Health Services for Special Education. She supervised District's Educationally Related Mental Health Services (ERMHS) counselors and resource specialist program teachers. She had been employed with District for over 18 years, having held several positions that included a program specialist/behavior specialist, special day class teacher, and resource specialist program teacher. Ms. Dixon possessed a bachelor's degree in liberal studies and a master's degree in special education. She had an administrative leadership credential and a mild to moderate credential in special education. In her career, she estimated having attended over a 1000 IEP team meetings.

6. Ms. Dixon had known Student since 2010 and regularly attended his IEP reviews. When she first began working with Student, Ms. Dixon was a behavior specialist who worked closely with his teachers to develop his behavior intervention plans.

7. Both Mr. Boggs and Ms. Dixon opined that Student did well at Bright Futures. He completed his work and earned grades of "B's" and "C's". His behavior improved. As District's Coordinator of Mental Health Services for Special Education, Mr. Boggs coordinated District's nonpublic school placements. He visited Bright Futures a

number of times and observed Student. Bright Futures was a small campus, with fewer than 100 students. The classroom sizes were smaller, with eight to 10 students in each class, allowing for more individualized attention for each student. Counseling services were on-site. As a result of his progress, Student returned to public school for sixth grade.

#### SEPTEMBER 2016 TRIENNIAL ASSESSMENT

8. In August 2016, Student transitioned to Terrace Hills for his seventh grade year. As a part of his Triennial IEP review, District conducted a psychoeducational assessment of Student on September 27, 2016. District school psychologist Elysse Mendez conducted the assessment. Ms. Mendez relied on the following sources of information: Student's educational records, previous assessments, input from Student and teachers, interviews, an observation of Student, and the results of a Behavior Assessment System for Children, Third Edition (BASC-3). The BASC-3 is an integrated system used to evaluate the behavior and self-perceptions of children and young adults ages 2 through 25 years. The BASC-3 utilized ratings scales completed by Mother, Student's math, history, science, band, physical education, and elective course teachers. The ratings scales demonstrated that Student had difficulty maintaining attention, completing school work, making friends, and joining group activities. His adaptive skills were in the average range, but the ratings from some of his teachers indicated difficulty adapting to changing situations and recovering from difficult situations. The psychoeducational assessment concluded that Student continued to qualify for special education services under the category of emotional disturbance.

#### OCTOBER 2016 IEP

9. On October 2, 2016, an IEP team meeting was convened for Student's Triennial IEP review. Mother and Student were present. Findings from the September

2016 psychoeducational assessment were discussed. Student showed significant improvements in his behavior but continued to struggle with school attendance and completing assignments. Behaviorally, Student was not acting out, but was simply nonresponsive. Student refused assistance from the resource specialist. The IEP team identified task completion, school attendance, and writing as areas of need. Three annual goals were developed, one for each area of need. The IEP offered a general education placement, with accommodations including shortened and modified assignments and staff collaboration. The services offered consisted of 30 minutes a month of specialized academic instruction to be provided by a resource specialist on a consultation basis. On October 4, 2016, Mother consented to the IEP with the exception of the task completion and attendance goals.

10. Academically, Student did very poorly and was failing most of his classes for the first semester. His grades consisted of "F's" in math, English, history, life science, and social studies. He earned an "A-" in general band and "D+" in co-ed physical education. He did not do the work, despite being allowed additional time to turn in assignments. Student continued to refuse to speak or meet with the resource specialist; directing profanity at the resource specialist when the specialist would go to his class to pull him out for instruction. His attendance began to slip, and in February 2017, Student stopped attending school. No explanation was provided to District for the absence, but Mother requested Student be provided home hospital instruction as recommended by Student's private therapist. In response, District scheduled an IEP team meeting to discuss home hospital placement and other placement options.

#### APRIL 2017 IEP AMENDMENT

11. On April 11, 2017, the IEP team met to discuss placement options for Student. Mother attended the meeting. District provided Mother with her procedural safeguards and rights. Mother shared that Student was shutting down more often. His

tantrums were more frequent, averaging two to three episodes per week. She also shared that Student was anxious about attending school, was not comfortable at school, having trouble transferring lessons from the board, and had frequent fevers that impacted his attendance. According to Mother, Student's therapist opined that Student was simply going through the motions in school but was not engaged.

12. District IEP team members shared that Student was failing all his classes. Student was capable of doing the school work; when given assignments and quizzes, he demonstrated the ability to complete the tasks 100 percent of the time. The IEP was amended to modify the goals in the areas of task completion and attendance and added a behavior goal to address compliance with staff instruction. The IEP was also amended to change Student's placement to a special day class for four of his courses: math, math support, English language arts, and English support. Individual counseling for 60 minutes each month was also added to the IEP. Mother consented to the all parts of the amended IEP and placement on April 11, 2017.

#### APRIL 11, 2017 ASSESSMENT PLAN

13. In response to the concerns Mother shared at the April 11, 2017 IEP team meeting, and Student's declining emotional state and lack of school attendance, the IEP team determined that further assessments for Student in the areas of academic, processing skills, and social-emotional functioning were necessary. Additionally, an ERMHS assessment and a functional behavior assessment were deemed necessary. District provided Mother with a Notice of Referral and Plan to Assess and a proposed assessment plan. The proposed assessment plan was prepared by District's school psychologist at the time, Elysse Mendez.

14. The April 11, 2017 assessment plan proposed to assess Student in the following areas: academic achievement, cognitive development/learning ability, perception/processing/memory, social/emotional/behavioral development, and self-



help/adaptive. The proposed assessment plan also sought to conduct observations and interviews concerning Student's academic and behavioral functioning, an ERMHS assessment and a functional behavior assessment.

15. The proposed assessment plan was written in English. The plan was written clearly and in terms understandable by the general public. The proposed assessment plan identified the professionals assigned to conduct the assessment for each area. The primary professional identified to conduct the assessments was the school psychologist, assisted by the resource specialist in administering academic assessments and conducting interviews and observations. The plan explained that the tests and procedures may include pupil observations in a group setting, an interview with the parent, and a review of any reports the parent authorized District to request. The plan further explained that the assessments were selected and administered so as not to be racially, culturally, or sexually discriminatory. The plan advised that no IEP would result from the assessment without parental consent. On April 11, 2017, Mother consented to the assessment plan.

16. Student did not return to school after the April 11, 2017 IEP team meeting. Student refused to attend school and was not made available for assessments. Homework and assignments were sent home to Student; Mother would pick up the assignments on a weekly basis. Student did not return any completed take-home assignments to District.

17. In response, District, through its attorney, mailed and emailed a letter to Mother on April 24, 2017, informing her of District's intent to file a request for due process if Student did not return to school by May 1, 2017. District explained that despite Mother's consent to the April 11, 2017 amended IEP and the assessment plan of the same date, Student had not returned to school to participate in his program or in his assessments.

18. Student never returned to school for the remainder of the 2016-2017 school year. By June 2017, Student received a failing grade in all his classes. On May 12, 2017, District filed a request for due process hearing naming Student.

19. That due process matter against Student was resolved through a settlement agreement dated August 15, 2017. District and Mother, on behalf of Student, agreed that the annual IEP review to be held in October 2017 would be continued until District's assessments and Student's private assessment were completed. The parties further agreed to an additional assessment plan, to conduct a health assessment to determine how Student's health affected his school performance. The August 15, 2017 assessment plan was written in English and identified the school nurse as the examiner. The assessment plan advised that tests and procedures may include, but were not limited to, classroom observations, rating scales, interviews, record review, one-on-one testing, or some other types or combination of tests. The assessment plan was written in English. Mother consented to the assessment plan on August 15, 2017. Mother also agreed to make Student available for assessments pursuant to the April 11, 2017 and August 15, 2017 assessment plans.

#### 2017-2018 SCHOOL YEAR

20. Student returned to school for the 2017-2018 school year. He spent four periods a day in a special day class; first and second periods in math and math support, and fifth and sixth periods in English language arts and English support. He spent the remainder of the school day in general education.

21. Jiji Mathew was a special education teacher in Terrace Hill's special day class. He had been a teacher for three years, spending the last two years at Terrace Hills. He possessed a post graduate diploma in rural development. Mr. Mathew earned a multi-subject clear credential in 2015. He was credentialed to teach students with mild to moderate disabilities and taught math and science to seventh and eighth grade

students. Mr. Mathew estimated having participated in approximately 50 IEP team meetings.

22. Mr. Mathew was Student's math teacher for the 2017-2018 school year. There were 16 students in Student's math class, with two adults, Mr. Mathew and a teacher's aide. At hearing, Mr. Mathew described Student as being capable of doing the school work; however, his behavior often got in the way of his ability to focus and follow through with assignments. He was often disruptive in the classroom, unwilling to listen to authority and set on doing things his own way. As a result, Student got very little work done in class.

23. Cheryl Watson was a special education teacher at Terrace Hills for 13 years. She possessed a bachelor's degree in liberal studies and was clear credentialed in multi-subjects and special education. She estimated having attended more than 400 IEP team meetings.

24. Ms. Watson was Student's English language arts and English support teacher. Aside from being his special education teacher, she was also his case carrier. As a case carrier, Ms. Watson oversaw his IEP, monitored the goals, assessed his progress, and communicated with Mother. As Student's IEP point person, Ms. Watson provided Mother with weekly updates on his class performance and participation, behaviors, and grades from all his classes. The weekly updates were emailed to Mother, and Mother would respond from time to time to comment and express her concerns.

25. One concern Mother expressed was her belief that Student was being treated unfairly and his behaviors were being held to a higher standard than that of other students. In response, Ms. Watson and Mr. Mathew arranged a meeting with Mother to discuss her concerns. Mother canceled the meeting, and when it was rescheduled, she failed to appear.

26. John Lunt was a general education teacher for 22 years at Terrace Hills and

taught United States history. He possessed a bachelor's degree in finance. He estimated having attended 120 IEP team meetings.

27. Student was in Mr. Lunt's seventh period class. Mr. Lunt described Student as bright, with good potential, but not very motivated. Student was very capable of doing the assignments, having earned a high "B" grade in two out of three tests Mr. Lunt administered. However, Student would often be off task, not wanting to do the classroom assignments. He would often be in a "dream state," looking out with a blank stare. Mr. Lunt would encourage Student and attempt to motivate him, but Student was not responsive. When he did do the work, he received good grades. However, due to the lack of completed assignments turned in, he was failing history class. Mr. Lunt saw no progress in Student for the entire semester he taught Student at Terrace Hills.

#### Efforts to Assess Student

28. Brenda Kalberg was District's Lead School Psychologist. She had been a school psychologist with District for nearly three years and assumed the lead role in August 2017. As a lead school psychologist, Ms. Kalberg supervised newer school psychologists and reviewed their psychoeducational, ERMHS and functional behavior assessment reports. She also provided individual and group counseling. Ms. Kalberg possessed a bachelor's degree in psychology and business administration, a master's degree in school psychology, and was working towards a master's degree in applied behavior analysis, with an expected completion date of December 2018. She also possessed a Pupil Personnel Services credential. She estimated having attended between 250 to 300 IEP team meetings.

29. Ms. Kalberg estimated conducting between 250 and 300 psychoeducational assessments, 30 ERMHS assessments, and 10 functional behavior assessments. She had assisted in data collection and observations for numerous assessments, with over 500 assessment observations conducted during her time as a

school psychologist. Additionally, Ms. Kalberg had developed over 300 assessment plans.

30. In August 2017, Ms. Kalberg began the process of assessing Student. Pursuant to the April and August 2017 assessment plans, Ms. Kalberg planned to conduct a psychoeducational assessment, an ERMHS assessment, and a functional behavior assessment. In preparation, she reviewed Student's past IEPs, past psychoeducational assessments, his pupil personnel file, and educational records.

31. Student refused to be assessed. When Ms. Kalberg requested to pull Student out of class for assessments, Student refused and was verbally aggressive towards her, explaining to her that he would not participate and she was not to pull him out of class. Of all the assessments District sought to conduct, only the functional behavior assessment was completed, as it required no direct engagement by Student. Furthermore, Student refused to be screened for vision, hearing, and dental.

#### STUDENT'S BEHAVIOR DURING 2017-2018 SCHOOL YEAR

32. Ms. Dixon received frequent and regular reports from staff that Student used profanity, disrupted class, walked out of class, refused to attend individual counseling, and defied staff directives. She also received reports of his physical altercations with other students, threatening his peers, and not complying with campus rules involving riding bikes on school sidewalks and parking lots. Student's disruptive and defiant behavior in classroom was constant, and worsened as the school year went on.

33. Behaviorally, Student struggled the most in his math classes. In his two math classes, Student would intimidate and call his peers vulgar names, and direct profanity at the adults and classmates. His behaviors occurred almost daily, lasting from several minutes to hours. Mr. Mathew would often break from the instruction to respond to Student's behaviors, taking away instruction time from other students.

Student would often distract other students during class, and at times other students would act out and mimic Student's behavior.

34. Student's behavior was less of a challenge for Ms. Watson. They got along, and she described their relationship as "good." Similarly, Student was respectful to Mr. Lunt. Both Ms. Watson and Mr. Lunt observed Student to keep to himself for the most part. However, Student was less respectful when dealing with others he did not like. He would direct profanity at them.

35. Student's behavior worsened as the school year progressed. In the month of September 2017, Student was suspended for the day after being involved in a physical altercation with a peer. In November 2017, he was suspended for a class period after calling a peer and the teacher a "dumb ass." The following day, Student's inappropriate behavior continued, which resulted in a suspension for the day. A few weeks later, Student was suspended for two days after putting his arms around another student's neck and then refusing to be escorted to the office. In early December 2017, he was again suspended for two days for repeated use of profanity in class and refusing to be escorted out of the classroom to the office.

36. On September 22, 2017, District mailed to Mother a notice of an IEP team meeting scheduled for October 2, 2017 at 8:30 A.M. The notice noted the purpose of the meeting was to review Student's annual progress, his behavior, to discuss a change of placement and to review the progress of assessments.

#### OCTOBER 2, 2017 IEP TEAM MEETING

37. On October 2, 2017, the IEP team met for Student's annual IEP review. Ms. Dixon, Ms. Kalberg, Ms. Watson, Mr. Boggs, school psychologist Katelyn McDonald, District's attorney, a school nurse, and a school counselor attended the meeting. Mother and Student also attended the meeting. Mother was provided a copy of her procedural safeguards and rights.

38. The IEP team discussed Student's behavior and the status of assessments. Student's noncompliant and disruptive behavior was escalating, and he was failing his classes. No assessments were completed at that time. Student also refused to attend individual counseling. Mother did not want Student pulled out of class to be assessed. The IEP team agreed to hold assessments after school. Student also did not want to be pulled from his math class. This was his reason for refusing to attend individual counseling. Ms. Watson agreed to excuse him from her English language arts class instead, and Student would not be penalized for missed assignments. Mother and Student agreed to this arrangement. The IEP team agreed to reconvene the meeting at a later date.

39. After the IEP team meeting, Student did not cooperate with assessments or counseling. Ms. McDonald, Terrace Hill's school psychologist continued her attempts to provide counseling to Student, but he refused to attend.

40. Ms. Kalberg made further arrangements with Mother to assess Student after school, at a local high school where Mother worked. On October 19, 2017, Student met Ms. Kalberg at the high school. Student began the assessment, but soon disengaged. Ms. Kalberg only got through 10 subtest questions before Student refused to go any further. Ms. Kalberg attempted to administer a different subtest, but Student still refused. He got upset and directed profanity at Ms. Kalberg. She and Mother attempted to encourage him, with no success. Following the failed effort, Ms. Kalberg and Mother exchanged a few communications about resuming the assessments. However, no follow-up appointment could be scheduled with Mother.

41. On November 2, 2017, District mailed Mother a notice to hold an IEP team meeting scheduled for November 14, 2017, at 1:30 p.m. Mother requested to reschedule that meeting. In response, District proposed three dates and times for the IEP team meeting. Mother agreed to December 11, 2017, at 8:30 a.m. On November 29, 2017,

District mailed Mother another notice to hold an IEP team meeting with the agreed upon date and time. The notice noted the purpose of the meeting was to again to review Student's annual progress, his behavior, to discuss a change of placement and to review the progress of assessments.

#### DISTRICT'S NOVEMBER 14, 2017 FUNCTIONAL BEHAVIOR ASSESSMENT

42. District completed a functional behavior assessment of Student, with an assessment report prepared on November 14, 2017. The following District personnel contributed to the evaluation: Ms. Kalberg, Mr. Mathew, Ms. Watson, Mr. Lunt, Ms. McDonald, program specialist and board certified behavior analyst Stephanie Lin, and Student's physical science and physical education teachers. Ms. Kalberg authored the report. Data was collected over a period of four days, from September 14, 2017 through November 7, 2017. The assessment relied on teacher interviews; observations of Student on three occasions, in his math, history, and English classes; and a review of Student's health, discipline, and attendance records, along with his previous IEPs and assessments.

43. The assessment report noted that Student engaged in disruptive and defiant behavior, most notably during his first and second periods with Mr. Mathew. Disruptive behavior was defined as any instance of verbal refusal of teacher/school staff requests that may include use of foul language directed at staff members or peers. Defiant behavior was defined as any instance of refusal to comply with teacher and/or school staff directives and may include elopement, refusal to complete assigned tasks, refusal to accompany school staff to another location and/or participate in services agreed upon in an IEP.

44. The assessment report found Student engaged in verbal disruptive behaviors and off task behaviors that distracted his peers and limited the amount of classroom assignments Student could complete, which negatively impacted his grades. Despite the availability of individual counseling, a behavior support plan and staff's



weekly updates emailed to Mother, Student continued to defy adult instructions and refused to attend individual counseling. The assessment report hypothesized that Student behaved the way he did to get attention and to avoid tasks and aversive situations. The assessment report concluded that Student's frequent and lasting behaviors warranted that his current behavior intervention plan be amended to decrease his behaviors, to be monitored through a new or amended IEP.

### BEHAVIOR INTERVENTION PLAN

45. A behavior intervention plan was developed in October 2017 and amended in light of the findings and recommendations in the November 14, 2017 functional behavior assessment. The behavior intervention plan called for Student to be taught appropriate ways to express his frustration and anger. He was to be provided time to calm down before discussing his behavior. His teachers would report his daily interactions and concerns to his case carrier. Those reports would be emailed to Mother. Student would be given three class work options to complete in the order he preferred. After completing 50 percent of his assignment, he would be allowed to take a break. Student would also be allowed to speak to a staff member about any incident and would be given time to cool down in an alternative setting and then return to class when compliant.

46. Teaching strategies to be used included positive reinforcement for compliant behavior, modeling appropriate behavior, and choices in activities. When Student began to manifest inappropriate behaviors, staff would offer help and remind Student of his options to speak to an adult, to request a cooling off period, or to work on another assignment. If the behavior continued, Student would be redirected by staff, go for a short walk, or move to another location if his behavior escalated. At the end of the behavior, staff were to discuss the behavior and ways to better handle it.

47. The goal of the behavior intervention plan was to have Student respond

appropriately to adults when given requests and directions, at least 90 percent of the time. This applied to all school related activities, with compliance to be measured and noted by school staff.

#### DECEMBER 11, 2017 IEP

48. The IEP team reconvened on December 11, 2017, to hold Student's annual IEP review. Mother and Student attended the meeting. District IEP team members in attendance were District administrative designee Ms. Dixon, Ms. McDonald, Ms. Kalberg, Ms. Watson, Mr. Mathew, and Mr. Boggs, who attended in the role as a general education teacher and could speak to the general education curriculum.

49. The IEP team reviewed Student's progress in his annual goals. He had four goals in his prior IEP in the areas of task completion, school attendance, writing, and behavior. Student did not meet any of his goals. Though his attendance improved compared to the prior school year, his absences increased as the 2017-2018 school year went on. He was failing all his classes, largely due to his absences and the lack of assignments turned in.

#### Present Levels of Academic and Functional Performance

50. The IEP team discussed Student's present levels of performance. At hearing, Ms. Watson opined Student's reading comprehension to be at or above grade level based on assessments and classwork samples she collected. She explained that early in the school year, students were asked to choose one of two paragraphs and to answer a set of five questions for each paragraph. Student read both paragraphs and answered both sets of questions with 100 percent accuracy. Ms. Watson described Student as a fluent reader, with good reading comprehension skills. Accordingly, reading was not identified as an area of need.

51. Similarly, speech and communication was not an area of need as Student

was able to express his needs and wants clearly and appropriately. His fine and gross motor skills were developmentally appropriate and his self-help and daily livings skills were not a concern. Student was diagnosed with attention deficit hyperactivity disorder which required a medication patch to be applied. Student refused to be screened for hearing, vision, and dental. No other health concerns were noted by the IEP team.

52. The IEP team identified math, writing, behavior, counseling and school attendance as areas of need. At the meeting, Student reiterated his refusal to attend counseling. At hearing, Ms. Kalberg explained the purpose of counseling was to help decrease Student's refusal behavior and improve his interactions with others.

53. As to math, Mr. Mathew could identify Student's performance level though the limited assignments and quizzes Student completed. Student could add and subtract with regrouping, and could multiple and divide integers using same and different sign with the use of a calculator. He knew the formulas to determine the circumference and areas of a circle and a rectangle. Student could write and solve simple equations to find the unknown angle in a figure. Mr. Mathew explained that Student was at sixth to seventh grade level in math. Student was not able to perform all required math grade level tasks.

54. In the area of written expression, Student's writing abilities were assessed using a four-point expository writing rubric from the California Assessment of Student Performance and Progress. At hearing, Ms. Watson explained Student's scores on the rubric fluctuated between two and three, which Ms. Watson opined to be below grade level. Student could only produce a single-paragraph composition. Additionally, Student required assistance editing and structuring a paragraph. Additional support was needed to expand his writing from single to multi-paragraph compositions.

55. Ms. Kalberg presented the findings of the November 14, 2017 functional behavior assessment. Based on the findings, Student's behavior intervention plan was

amended to decrease his target behaviors and support his use of appropriate verbal communications. In the areas of behavior and attendance, the IEP described Student as polite, respectful, quiet, and prepared for class at times. On other occasions, he was talkative, defiant, disrespectful to adults and peers, and disobedient. He could be challenging and verbally aggressive to school staff when redirected, asked to do something non-preferred or approached by staff at a time inconvenient for him. Student avoided taking responsibility for his actions. He refused to attend individual counseling. At hearing, Ms. Watson described Student as capable of doing the work and grasping the concepts presented to him. However, he didn't complete his homework or turn in make-up assignments. His school attendance was declining. From August 7, 2017, to December 11, 2017, Student had 67 unverified class period absences. Student was attending about 79 percent of the time. At the meeting, Mother disagreed with the present levels presented, opining Student was more capable than what was described.

#### Annual Goals

56. The December 2017 IEP offered six annual goals in the areas of math, writing, school attendance, responsibility, behavior, and counseling, with a target date of October 2, 2018. For each goal, the IEP offered two benchmark objectives, one for February 2, 2018, and the other for June 2, 2018.

57. The first goal was in the area of mathematics. Student was asked to solve linear equations in one linear variable with at least 100 percent accuracy in three out of four trials within a 10 week period. The first benchmark objective required 100 percent accuracy in one out of four trials, and the second benchmark objective required Student to accomplish the task in two out of four trials. The special education teacher was responsible for implementing the goal using teacher made tests, classwork and homework data.

58. The second goal was in the area of writing. Student was expected to

develop and strengthen his writing by planning, revising, editing, rewriting, or trying a new approach. He would be provided some guidance and support from peers and adults and could utilize a dictionary and thesaurus. He was expected to accomplish this goal by writing a multi-paragraph composition that scored a three or better on a California Assessment of Student Performance and Progress four-point writing rubric. At hearing, Ms. Watson explained this goal would allow Student to progress appropriately from single paragraph writing to full page composition, which was grade level work. In each benchmark objective, Student was expected to accomplish the goal in two out of three trials. The special education teacher was responsible for implementing the writing goal utilizing the rubric to measure progress.

59. The third goal addressed school attendance. Student was expected to review District's policy as outlined in his school planner and discuss the consequences of poor school attendance with his case carrier. The goal required Student to increase his school attendance to 100 percent by attending all classes as scheduled, only missing school for qualifying reasons such as illness, medical appointments, and the like. The special education teacher was responsible for implementing this goal, utilizing attendance records to measure progress. Each benchmark objective sought 100 percent attendance.

60. The fourth goal was in the area of behavior, with a focus on being responsible. Student was failing most of his core classes due to refusal to collect and complete make-up assignments resulting from his absences. As a goal, Student was expected to be responsible and ask his teachers for any make-up work following each and every absence, with reminders from his case carrier. The special education teacher was responsible for implementing this goal, utilizing data recorded in the teacher grade book. Student was expected to accomplish this goal for each benchmark objective.

61. The fifth goal was also in the area of behavior, specifically cooperation.

Student was expected to comply with teacher and staff directions on tasks to increase his compliance with completing tasks such as academic assignments and speaking with adults. Student would be given verbal prompts, visual cues, and reminders. This goal would be accomplished if Student was 100 percent compliant in eight out of 10 opportunities. The first benchmark objective expected Student to be 100 percent compliant in four out of 10 opportunities. The second benchmark objective raised the bar to six out of 10 opportunities. The special education teacher was responsible for implementing this goal, utilizing teacher made tests, and data collection. Ms. Kalberg opined the goal to be in line with the functional behavior assessment and behavior intervention plan, geared to address Student's disruptive and defiant behavior.

62. The sixth goal addressed Student's refusal to participate in individual counseling. Student was expected to engage in counseling services by discussing events or situations that caused him to become frustrated or noncompliant with tasks. This goal would be met if Student engaged in counseling services as required in seven out of 10 counseling sessions. The first benchmark objective required three out of 10 sessions. The second benchmark objective required five out of 10 sessions. The counselor was responsible for implementing the goal using teacher made tests and data collected. At hearing, Ms. Kalberg shared the goal of counseling was intended to help Student express his wants and needs and to respond appropriately to others.

#### Placement

63. The IEP team discussed the continuum of placement options for Student. At hearing, District IEP team members testified persuasively of the necessity of placing Student in a nonpublic school. Bright Futures Academy was proposed, however, at a different campus than the one previously attended to by Student a few years prior. Placement in a general education class with resource specialist program support had not worked. Placement in a special day class for four periods was also failing. His defiant and

disruptive behaviors were pervasive. The IEP team considered an alternative site within District. However, the self-contained classroom at the alternative site did not have the same level of structure and behavior management support that Student needed. He could continue to refuse counseling and ignore adult directives. The nonpublic school classes had a smaller adult-to-student ratio and behavior supports embedded into the program. Board Certified Behavior Analysts and counselors, better trained to respond to Student's behaviors were readily available. Also, Student's behavior intervention plan could be tweaked and implemented to better suit him in the program. The more structured setting of a nonpublic school could improve Student's compliance to adult directives.

64. Though the IEP had a typographical error noting no transportation would be provided, Ms. Dixon testified that was an oversight and students placed outside of their home school receive transportation, door-to-door as a part of their IEPs. She testified that an offer of transportation goes "hand-in-hand" with an offer of nonpublic school placement.

#### Accommodations, Supports and Services

65. The December 2017 IEP offered three accommodations, to start on December 11, 2017 and end on December 11, 2018. Student would receive shortened and modified assignments for 30 minutes a week. Staff would collaborate for 20 minutes each month, and Student would receive weekly reminders, for five minutes, to pick up make-up assignments from absences.

66. The December 2017 IEP offered the following services: daily specialized academic instruction for 314 minutes and 600 minutes of yearly individual counseling. The individual counseling offered was a more intensive form of ERMHS counseling, referred to as Tier II counseling. Tier II counseling was an intensive one-on-one, sometimes group, counseling, for more severe/escalated behaviors to be provided by

mental health counselors. The IEP noted the services were to start on October 2, 2017, and end on October 2, 2018.

67. Mother expressed concern about Student's safety at the nonpublic school. The meeting ended abruptly after the recommendation for nonpublic school placement was raised. Mother did not consent to the December 11, 2017 IEP.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</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>5</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 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

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

<sup>5</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



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.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.” (*Id.* at p. 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].) District requested the hearing in this matter, and therefore District has the burden of proof related to the issues for hearing.

ISSUE 1: DID THE DECEMBER 11, 2017 IEP, WITH PLACEMENT AT A NONPUBLIC SCHOOL WITH RELATED SERVICES, CONSTITUTE A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

7. District contends that the December 11, 2017 IEP team meeting was conducted in accordance with the IDEA's procedural requirements. It further contends that the IEP of the same date contained all legally required information and was calculated to enable Student to receive a meaningful educational benefit. District argues that a nonpublic school placement with related services was necessary to meet Student's unique 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. (*Rowley*, 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 October 2, 2017 IEP team meeting, which was continued to December 11, 2017, was attended by all required team members, including Mother and Student. Mother was provided a copy of her procedural safeguards and rights. She was an active and welcome participant at the meeting. She shared her impressions of Student's present levels of performance, behavior and her concerns regarding Student's safety at a nonpublic school. The IEP team considered her input and concerns. 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. 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).)

14. 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).) 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).)

15. 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].)

16. 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.)

17. Here, District's written IEP offer was comprehensive and contained all required information. The IEP team considered Student's strengths. Student could read at or above grade level. He was a fluent reader with good reading comprehension skills. There were no concerns regarding Student's communication skills, fine and gross motor skills, and daily living skills. He could be polite, funny and respectful at times.

18. The IEP also noted areas of concern. Student was below grade level in writing and math. 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 altercations, and at times led to physical altercations with peers. He could be challenging and disrespectful to adults and peers, often using foul language. Student would often refuse adult instructions when he did not like the person or did not want to do something, such as attending individual counseling.

19. The IEP properly identified Student's areas of need to be math, writing, behavior, counseling, and school attendance. Student's present levels of performance in each of those areas were clearly explained in the IEP. Academically, Student was failing all his class, with the exceptions of co-ed physical education and English language arts

where he was earning a "D" and a "D-" respectively. Behaviorally, he continued to struggle with managing his frustrations, continued to challenge staff and remained defiant and disruptive. His school attendance was poor and worsening. When he did attend, he refused to participate in individual counseling.

#### MEASURABLE ANNUAL GOALS

20. The IEP also provided appropriate measurable annual goals in the areas of academics, behavior, school attendance, and counseling. Academically, Student's annual goals sought to strengthen his writing abilities by asking Student to improve his writing from single paragraph to multi-paragraph composition. The IEP provided these goals to be measured through teacher tests, work samples, and a writing rubric to measure his writing progress. They were measurable in that Student was expected to improve his score on the California Assessment of Student Performance and Progress four-point writing rubric and accomplish his math goal in three out of four trials within a 10 week period, with 100 percent accuracy. The goals were an appropriate means of tracking progress in those areas of need.

21. The goals for school attendance and individual counseling sought to increase Student's participation, with the expectation that Student would attend school 100 percent of the time and only miss school for qualifying reasons. Student was also expected to attend and engage in individual counseling by discussing events and situations that caused him to become frustrated and noncompliant, in seven out of 10 counseling sessions. The goals were an appropriate means of measuring Student's school attendance and engagement in individual counseling, and could be appropriately measured through attendance records, data collection and teacher made tests.

22. Behaviorally, Student's annual goals required Student to comply with teacher and staff directions and be responsible for collecting make-up assignments. He was expected to increase his compliance with completing assignments and speaking



with adults, with a goal of 100 percent compliance in eight out of 10 opportunities. The goal was measurable through the use of teacher made tests and data collection. That goal was an appropriate means of tracking improvements in Student's disruptive and defiant behavior. For each and every day he missed class, Student was also expected to act responsibly and ask his teachers for any make-up work. This goal was measurable through the use of data collected in teacher grade books.

#### Appropriateness of Related Services and Accommodations

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.) 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).) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but 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. The December 11, 2017 IEP's proposed instruction, services and supports were appropriate in light of Student's 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 314 minutes a day to achieve his academic goals and 600 minutes a year of intensive Tier II counseling to assist him in benefiting from his education. Although stated in the IEP through inadvertence, District acknowledged its obligation to provide transportation to a nonpublic school.

27. 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 positive reinforcement for compliant behavior, modeling appropriate behavior and giving Student choices in activities. Student would be provided a cooling off period, and given a choice to work on a different assignment. He could go on a short walk or move to a different area if his behavior persists. After he calmed down, staff would discuss with him his behavior and better ways to handle his frustration and anger. These approaches were designed to eliminate defiant and disruptive behaviors that manifest when Students sought attention or avoided tasks and aversive situations.

## Placement in the Least Restrictive Environment

28. 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 cannot 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.*)

29. 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.)

30. 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.*)

31. District did not contend that the cost of mainstreaming Student in a regular classroom factored into their recommendation for a nonpublic school. 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 struggling academically, performing below grade level in math and writing, and failing his classes due to his behavior and absences. He had great difficulty remaining on task, was disruptive in class, provoked his classmates, and verbally aggressive towards staff and peers. Even with supports and a behavior intervention plan, Student still struggled in both a general education classroom and the special day class. The weight of the evidence established that Student would receive little educational and non-academic benefit in a regular classroom. Furthermore, his presence in a regular classroom would have a significant negative impact on teachers and other students. Therefore, a regular classroom was not an appropriate placement for Student.

32. For nearly the past four years, Student's behaviors at public schools have been challenging. His behaviors escalated in the fourth grade, necessitating his placement in a nonpublic school. That move turned out to be beneficial for Student, as his behaviors and academic performance improved. However, the transition to middle school proved difficult for Student, as his concerning behaviors resurfaced. District had exhausted the continuum of available educational settings, services and supports, short of nonpublic school, without success. General education with resource specialist program support, followed by special day class for a majority of the school day, had not succeeded. Student made no progress, his behaviors escalated and his grades remained abysmal. A more structured and supportive setting was necessary to address Student's disruptive and defiant behaviors.

33. District's proposed nonpublic school offered Student an opportunity to access his instruction and services. Student found success when he was placed at a

nonpublic school just a few years prior. He responded well to the smaller class size and more structured setting. The nonpublic school offered the same class size, structure, and support. Embedded in the program were behavior supports and counseling services readily available to Student throughout the school day, to be implemented by qualified staff on-site. Student had attended the same nonpublic school program just three years prior and did well. It was reasonable to conclude it would succeed again.

34. District met its burden of demonstrating that at the time of the December 11, 2017 IEP team meeting, a nonpublic school was the least restrictive educational placement for Student.

35. District complied with the IDEA procedural requirements in developing the December 11, 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 proved by a preponderance of the evidence that the December 11, 2017 IEP offered Student a FAPE in the least restrictive environment.

## ISSUE 2: MAY DISTRICT ASSESS STUDENT PURSUANT TO THE APRIL 11, 2017, AND AUGUST 15, 2017, ASSESSMENTS PLANS WITHOUT PARENTAL CONSENT?

36. District contends that it has the right and obligation to assess Student pursuant to the April 2017 and August 2017 assessment plans when they were consented to by Mother, but Mother failed to make Student available for assessments and Student refused to participate in assessments.

### Was the Assessment of Student Warranted?

37. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd.

(a)(2).) A reassessment must also be conducted if the local educational agency “determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment.” (20 U.S.C. §1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

38. If the parents do not consent to a reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

39. Parents who want their children to receive special education services must allow reassessment by the district. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

40. District’s requests to assess Student were wholly warranted. District’s proposed assessment plans dated April 11, 2017 and August 15, 2017, were in response to Student’s declining behavior and school performance. At the April 11, 2017 IEP team meeting, Mother shared Student’s struggles with tantrums, shutting down, and his high level of anxiety with attending school. She also shared Student was not comfortable at school, was having trouble transferring lessons from the board, and had frequent fevers that impacted his attendance. The IEP team determined that Student’s difficulties at school warranted further assessments. District appropriately responded by providing Mother with an assessment plan for her review, input, and consent. Mother consented to the assessment plan on April 11, 2017, and to the additional health assessment on August 15, 2017. However, Student was never made available for assessments prior to the 2017-2018 school year, and only participated very briefly in one session the following school year before declining to cooperate any further. The functional behavior assessment was the only assessment completed since it did not require Student’s

cooperation.

41. Additionally, Student's last assessments were conducted in September 2016 for his triennial IEP review. However, his behaviors had worsened and his school performance deteriorated since then. Compounding the problem was Student's absence from school, never returning to school for the 2016-2017 school year after he stopped attending in February 2017. During that entire period, District had no opportunity to observe and work with Student.

42. The assessments would have provided valuable information as to Student's present levels of academic achievement, functional performance, and educational needs. It would allow District to better identify the appropriate services, accommodations, and other supports needed by Student to address his tantrums, anxiety, and shut downs. Without the assessments, developing a more tailored IEP for Student was impossible. Therefore, District met its burden of persuasion in establishing the need to assess Student.

#### Were the Assessment Notices Proper?

43. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign

and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

44. At the April 11, 2017 IEP team meeting, District provided Mother with a copy of her procedural safeguards and the April 2017 assessment plan. Both the assessment plan and the procedural safeguards were written in English, Mother's native language. Mother consented to the assessment plan that day.

45. On August 15, 2017, District proposed a second assessment plan to Mother for her review and consent. The second assessment plan called for a health assessment of Student, in addition to the assessments outlined in the April 2017 assessment plan. The August 2017 assessment plan was also in English. Mother consented to that assessment plan that day.

46. The proposed assessment plans outlined the areas to be evaluated and identified the titles of the examiners. The plan described the possible tests and procedures that may be conducted. It also explained the information being sought through the evaluation of the various areas. The plan was written clearly and in terms understandable by the general public. The plan was clear in that no special education services would be provided to Student without parental written consent. All statutory requirements of notice were met, and the assessment plan itself complied with the applicable statutes.

#### Will the Proposed Assessments be Conducted by Competent Persons?

47. Reassessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any psychological assessments of pupils shall be made in accordance with Education Code section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).)



48. All the assessments proposed by District would be conducted by persons competent to conduct them. In April 11, 2017, District school psychologist Ms. Mendez, was tasked with conducting the assessments, with the assistance of a resource specialist to help with interviews, observations, and administration of academic assessments. From August 2017 on, Ms. Kalberg assumed the responsibility. Ms. Kalberg was District's lead school psychologist, with extensive experience in developing assessment plans and conducting psychoeducational, ERMHS, and functional behavior assessments. Furthermore, the school nurse was expected to conduct the health assessment.

49. District proved that the April 11, 2017, and August 15, 2017 assessment plans complied with all applicable statutory requirements regarding form, function, and notice. District also established that assessments were warranted and its assessors competent to perform them. The unwillingness and unavailability of Student to participate in the remaining assessments rendered Mother's consent meaningless. Therefore, District may assess Student without parental consent.

## ORDER

1. District may implement the December 11, 2017 IEP, with the addition of transportation to the non-public school, without parental consent if Student seeks to receive special education and related services from District.

2. District may assess Student pursuant to the April 11, 2017, and August 15, 2017 assessment plans 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 issues 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: March 07, 2018

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/s/

ROMMEL P. CRUZ

Administrative Law Judge

Office of Administrative Hearings