

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BURBANK UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2013110175

DECISION

Burbank Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on November 25, 2013, naming Student. The matter was continued for good cause on December 24, 2013.

Administrative Law Judge June R. Lehrman heard this matter in Burbank, California, on April 29 through 30 and May 1, 5 and 6, 2014.

Melissa Hatch, Attorney at Law, represented District. Sunita Batra, Special Education Director, attended the hearing on behalf of District. Student's Mother represented Student. The hearing was interpreted into Spanish.

A continuance was granted for the parties to file written closing arguments and the record remained open until May 23, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE¹

Was District's November 19, 2013 individualized education program (IEP) offer of placement in Five Acres non-public school a free appropriate public education (FAPE) in the

¹ The issue has been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

least restrictive environment, such that District may implement the IEP without parental consent?

SUMMARY OF DECISION

The therapeutic Five Acres non-public school placement provided by the November 19, 2013, IEP offered Student a FAPE in the least restrictive environment, such that District may implement the IEP without parental consent. Student, who is eligible for special education and related services under the eligibility category for autism, has been socially and academically unsuccessful in his current placement at Village Glen. The Village Glen program's applied behavior analysis model of behavioral intervention has not sufficiently modified Student's behavior to allow him to access the curriculum there. Student's behavior problems in the school setting have been clinically significant, and involve significant levels of aggression and sexualized misconduct. The opinions of the professional educators who have worked with or assessed Student, in the school setting, are that he has emotional overlays involving anger and control, that impact his behavior more than his autism, and that require a therapeutic setting to address. Student presents differently in the school setting than he does at home and in the community, where he is well-behaved. However, Student's different presentation in the home and community environments cannot alter the legal analysis of whether District's offer was reasonably calculated to provide him with educational benefit. Thus, District has prevailed, and may implement the November 19, 2013, IEP, without parental consent.

FACTUAL FINDINGS

1. Student is a nine-year-old boy who resided in the District at all relevant times and was eligible for special education and related services under the eligibility category of autistic-like behaviors. Since summer 2011, he attended the Beacon program at Village Glen School. Village Glen is a nonpublic school that serves students with social and communicative disabilities, most of whom are on the autism spectrum. Village Glen teaches a standards-based curriculum with a high level of support. The Beacon program is a sub-program within Village Glen that contains more intensive behavioral interventions and supports for students with more intense behavioral needs. The Beacon program contains a higher adult-to-student ratio, a greater emphasis on behavioral interventions such as a token economy with rewards for good behavior and consequences for inappropriate behavior, and rigorous tracking of behavioral data. Village Glen uses a model of behavioral interventions known as applied behavioral analysis. This model identifies antecedents to maladaptive behaviors in a student's environment, and then changes the antecedents in an effort to reduce the reactions. This can be accomplished through environmental changes in the classroom, such as changing a seat, changing the way work is presented, allowing breaks, and changing the times of day certain tasks are undertaken.

2. Student's last agreed-upon IEP was dated October 19, 2011. It provided for continued placement at the Beacon program, group speech language services, parent and individual counseling, and a Behavior Support Plan that targeted defiant behaviors.

3. Student's IEP team met four times for his 2012 annual IEP meeting, on October 17, 2012, December 14, 2012, April 15, 2013, and September 26, 2013.

4. At the October 17, 2012, team meeting, Village Glen staff reported that Student demonstrated an average of three incidents of physical aggression with peers and adults per day, and an average of 22 incidents of noncompliance per day. They also reported concerns about frequent property destruction. A brief discussion ensued about whether Village Glen was the appropriate placement for Student, or whether he required a program designed for more intense behavioral needs. District suggested, and Mother agreed to a functional analysis assessment (FAA).

5. Village Glen conducted the FAA and generated a report dated December 10, 2012. The report tracked Student's verbal and physically aggressive behaviors, including yelling, crying, screaming, scratching, throwing, flipping chairs, destroying property, kicking, and attempting to bite. In October 2012, there were nine days of no such aggressive behaviors and one extreme day of 27 incidents. The daily average for October 2012 was seven incidents per day. In November 2012, there were six days of none or one aggressive behavior, with a daily average for November of 4.2 incidents per day. The FAA also tracked noncompliance, including refusal to work or follow directions, and defiance. In October 2012, there was an average of 30.4 daily instances of noncompliance, with three days averaging over 40 such instances. In November 2012, Student exhibited a daily average of 19 instances of noncompliance per day. The FAA report also tracked other behaviors requiring redirection, stating that Student required maximum prompting to follow rules. These averaged up to 10 times per lesson. Student also growled throughout the day. His oppositional responses to directions could start with growling and then escalate to noncompliance or aggression. The FAA report found that the antecedents to the behaviors were when Student's needs were not met immediately, when work was at a level higher than his ability, or when he was frustrated by transitions or demands. According to the report the functions of the behaviors were task-avoidance and attention-seeking.

6. The IEP team discussed the FAA at the second of the four 2012 IEP meetings, on December 12, 2012, and developed a proposed Behavior Support Plan targeting outbursts, rage and explosive reactions. At that time, Village Glen and District staff stated that they did not believe the placement at Village Glen was meeting Student's academic and behavioral needs. Mother requested additional adult support for Student, but Village Glen stated that the adult-to-student ratio in his class was three adults to every six students, with the teacher or an instructional assistant often serving to provide individual support just for Student. District proposed, and Mother agreed to a multidisciplinary psycho-educational assessment conducted by District staff.

7. District's school psychologist Tamara Schiern, District speech language pathologist Gina Elliott, and Village Glen teacher Katherine Washington assessed Student in January 2013. Student's overall academic level of achievement was in the very low range. Student scored low average in written expression. His reading, math calculation, broad written language and writing scores were in the low range. His scores in broad reading, broad mathematics, and brief mathematics were in the very low range. Student's academic achievement was at around first-grade level, the lowest in his class.

8. Ms. Elliott's speech and language assessment showed Student's receptive understanding of spoken words, and his ability to name objects shown to him, were both average. His ability to process language, or attach meaning to it, was poor. Student's skills using rules governing word forms, word order, and combining words into sentences appeared to be emerging. He demonstrated adequate use of some regular grammatical forms such as plurals, possessives, tenses and prepositions. He had difficulty with more complex or irregular word forms. Student had deficits in pragmatic language skills, or the understanding and use of rules for communication in social contexts, including conversational skills, asking for information, giving and responding to information, and nonverbal communication. Certain skills were not developing at all, including taking turns, asking for permission, apologizing or accepting apologies, responding to requests to make changes in his actions, responding to teasing, responding to anger or disappointment, and responding to verbal and nonverbal cues.

9. Ms. Schiern assessed Student's cognitive and processing abilities, his autistic-like characteristics and his behaviors. Student's cognitive abilities were average. Student's skills in phonological awareness, phonological memory, and rapid naming skills important to developing reading skills, were below average. Student's autistic characteristics placed him in the "Minimal-No-Symptoms of Autism Spectrum Disorder" range, although his score was two points away from the Mild-to-Moderate Symptoms range. However, Ms. Schiern noted that Student did exhibit some signs associated with autism. He exhibited very impaired social understanding, expression and regulation of his emotions. He had difficulties adapting to change and was extremely resistant to controls.

10. Ms. Schiern also assessed Student's behaviors. Student's behavior problems were clinically significant, and he exhibited clinically significant levels of hyperactivity, aggression, conduct problems, and learning problems. Ms. Washington reported that Student exhibited behaviors such as breaking the rules, disobeying adults, defying the teacher, lying, teasing others, arguing, annoying others on purpose, calling other children names, losing his temper, threatening others, disrupting others, having difficulty taking turns and engaging in constant attention-seeking behavior. Student was also scored in the at-risk range for depression, attention problems and withdrawal. However, Mother's ratings and Student's own self-report yielded different results, with no scores in the clinically significant range. Mother reported that Student's behavior was excellent.

11. As part of her assessment, Ms. Schiern also interviewed Mother, Ms. Washington, and Student's school-based counselor. Ms. Washington, in her interview,

reported that Student's behavior had been improving. He had days when he was not physically aggressive, but some sort of aggressive behavior occurred on four out of five days. His physical aggression was typically directed at property not people. Typical behaviors were kicking desks, stomping feet, throwing objects across the room, obstructing other people's access to their things, and breaking things. Student's counselor, who had worked with him in individual school counselling sessions since October 2011, reported that she saw emotional overlays more than autism, with tantrums and aggression triggered when Student did not get his way, or felt he was being treated unfairly. The counsellor's opinion was that Student's behaviors were related to underlying anger and control issues.

12. Ms. Schiern summarized her findings as follows: Student exhibited high levels of oppositional behavior (defiance, refusal to follow adult directions) at school. He also exhibited high levels of hyperactivity, aggression toward property and verbal aggression. He instigated negative interactions with peers. His level of physical aggression had decreased dramatically, although it still appeared in response to emotional triggers. Student had difficulty with emotional regulation and social perspective-taking and was extremely resistant to controls. These characteristics, along with his language impairment, could be interpreted as being autistic-like. However, Student's emotional and behavioral challenges appeared to be triggered much more by emotional challenges and issues of anger and control.

13. The IEP team discussed the psycho-educational assessment at the third 2012 IEP team meeting on April 15, 2013. There, the Village Glen and District members of the team expressed their opinion that although Student had made some recent progress, they did not believe Village Glen would be the appropriate placement for the upcoming 2013-2014 school year, for Student's fourth grade. The concern voiced by the Village Glen staff was that Student presented differently from their normal student profile, and he stood out from the rest. Village Glen's strategy of modifying environments so as not to trigger behaviors, successful for most of their students, was not working for Student. Village Glen believed that Student's behaviors were triggered by his internal emotional state and not by external environmental factors which they could control. District offered Village Glen for the duration of the then-current 2012-2013 school year, but Mother agreed to explore alternate nonpublic school options for the following year.

14. Student's third grade report card from Village Glen at the end of the 2012-2013 school year, in or about June 2013, reflected that he made insufficient progress toward achieving grade level standards, in his core English, math and science subjects, with some exceptions in some sub-areas in which he was noted to be making progress with support. He had met no standards independently in any core subject areas or sub-areas, nor was he making any independent progress toward achieving the standards. Moreover, he did not meet expectations for work habits in any core class. In the elective classes for art, music and physical education, and in one of the sub-areas of his social skills class, he did receive some scores indicating that he was "successful" or "exemplary."

15. Student continued to attend Village Glen into the fourth grade 2013-14 school year.

16. The fourth of the 2012 IEP team amendment meetings took place on September 26, 2013. Village Glen again expressed their opinion that their placement was not meeting Student's needs for the fourth grade. In their opinion, Student did not understand the curriculum, did not even want to do the work he understood, was very distractible and had verbal protests and outbursts. Behavior logs reflected seven verbal outbursts per day and a noncompliance rate of 80% of the time during the academic times for English and math. The Village Glen teacher believed that Student did not understand the concepts being discussed in these classes. There had however been a reduction of physical aggression, which had not been observed since the beginning of the school year. However, a new behavior had emerged of taking items that did not belong to Student, and putting them in his pocket or taking them home. Village Glen's Principal reported that since their program was at grade level curriculum, it was not appropriate for Student's academic needs.

17. At the meeting, District and Mother agreed that District would conduct an occupational therapy assessment in the areas of sensory integration and motor skills, to explore whether Student's behaviors resulted from sensory processing deficits.

18. District made an offer of placement at Five Acres, a therapeutic nonpublic school. Five Acres served students with emotional and behavioral problems with a variety of diagnoses and eligibility categories, including autism, emotional disturbance and other neurological issues such as attention deficit hyperactivity disorder. It provided counselling and behavioral supports, with a therapeutic approach. Five Acres designed their program individually, depending upon the social, behavioral and academic needs of each student.

19. Five Acres' program offered a student to teacher ratio of 4:1, with one teacher and one or two assistants per classroom. There were six kindergarten-to-fifth-grade classrooms with nine students each, two classrooms for seventh and eighth grades with 13 students each, and nine students in the ninth and tenth grade class. Students were grouped by chronological and developmental age as well as academic level and severity of behaviors, rather than by formal eligibility categories. All staff and teachers were trained in behavior intervention and crisis intervention. Staff included mental health clinicians. Students who exhibited significant behaviors received immediate in-class support from teachers and aides. Students were able to take breaks or time-outs and then problem-solve with the teacher to help pinpoint triggers. Extra support was available from a behavior support team made up of four counsellors, who could intervene either outside or inside the classroom. There were quiet areas for time-outs, patios with exercise equipment and a crisis-intervention room. The program was geared toward helping students identify their emotions and get their behavior under control.

20. Academics were taught to the state standards but were highly individualized, and could be modified for students who were below grade level. Academic support was provided with class, small group or individualized instruction. Five Acres used independent

reading, writing and math programs in the classroom so students could work at individual grade level or in small groups with other students at their level. Science and social studies were done with the whole class, but individual work was modified.

21. Students were provided clear behavioral goals. Five Acres utilized a token economy and point system with target behaviors, visual and verbal reminders, clearly defined goals or “levels,” and in-the-moment reminders and consequences. They emphasized clear expectations regarding which behaviors were required to earn which rewards.

22. Village Glen agreed that the Five Acres program description, including their behavior strategies and their ability to modify curriculum, appeared appropriate for Student. Mother did not consent to the offer of placement at Five Acres.

23. On September 30, 2013, Student repeatedly poked a peer who was sitting next to him. On October 1 and 2, 2013, he repeatedly stepped on other students’ feet, and repeatedly touched items on others’ desks. On October 3, 2013, a student at Village Glen was sharing her stuffed toy cat with the class. Student asked her “do you stuff the tail up your butt?” The teacher asked Student to stay in the classroom during lunch while the teacher processed the incident by writing up an incident report. On October 11, 2013, Student called out the words “poop” and “butt” during show and tell, threw his lunch on the roof of the classroom, and said “he called me a fuck,” during class. On October 30, 2013, he stated “your bottle is naked” during music class.

24. District occupational therapy coordinator Greta Binkley conducted an occupational therapy assessment of Student on November 13, 2013. Student exhibited good motor planning and organization for a variety of tasks, such as jumping, hopping, throwing, catching, standing on one foot and the like. He had good postural stability, was neat and artistic, and could perform all self-care skills. Student’s visual perception and hand-eye coordination was strong, and his written work and drawing was neat. Ms. Binkley concluded his visual perception and visual motor integration were areas of strength for Student. Student performed all foundational hand skills satisfactorily. His fine motor skills were an area of strength. Ms. Binkley concluded that Student overall was not over or under sensitive, did not seek or avoid sensory stimuli, and did not exhibit any sensory processing dysfunction. No stimuli bothered him such as light and sound, and he exhibited no spatial anxiety or irritation to touch. She concluded that Student’s behavioral outbursts and aggression were not the result of sensory overload. Her opinion was that sensory therapies would not be successful in helping Student to regulate his arousal or emotions, his behavior, his social deficits or his defiance. She did not find that occupational therapy services were warranted.

November 19, 2013 IEP Meeting

25. District convened Student’s 2013 annual IEP meeting on November 19, 2013. The attendees were District Program Specialist Lisa Loscos, District’s attorney Melissa Hatch, District occupational therapy coordinator Greta Binkley, Regional Center Representative Carmen Jimenez, District speech language pathologist Joseph Camarillo,

Village Glen Principal Melissa King, Village Glen counsellr Rebecca Schneider, Village Glen Teacher Kimberly Schwartz, Mother, a Spanish/English translator, and Mother's advocate Victoria Baca.

26. The IEP included a statement of, and a team discussion about, Student's present levels of academic achievement and functional performance in reading, writing, math, social skills, communication development, behavior and pre-vocational levels, including how his disability affected his involvement and progress in the general education curriculum. His present levels of social skills reflected that he teased and could be physically aggressive with peers, but apologized with multiple prompts from teacher. He tended to move too close to peers when interacting with them. He also made sounds, weird voices, or said inappropriate words such as "poop," "pee," and "butt" to gain peers' attention. He required maximum prompting to use appropriate tone of voice and social boundaries. He did not recognize the impact of his behavior and actions even when explained to him by adult staff. His development of communication skills had been limited due to non-compliant behaviors. He demonstrated frustrations and disinterest by arguing, rolling his eyes, or sighing despite multiple prompts. He was verbally aggressive when not getting what he wanted, and complained about perceived rudeness and unfairness when asked to do a non-preferred task, or when given a consequence for breaking a rule. He also exhibited defiance and refusal by either verbally refusing or putting his head on his desk. He verbally disrupted lessons on a daily basis by interrupting adult staff or by making inappropriate comments or noises. He struggled with regulating and expressing his emotions such as anger, jealousy, frustration, and rejection from peers. He engaged in physically aggressive behaviors towards both students and school staff, including pinching, poking, spanking, and hitting. He exhibited incidents of sexually inappropriate behaviors, including drawing sexually explicit pictures including genitals, looking at peers and invading their personal space while using the bathroom, asking a peer to look at his private parts, spanking peers and staff on the bottom, touching peers' genitals and adults' breasts and behinds, making verbally inappropriate comments in class including making comments about his genitals. He talked about inappropriate play with animals, including a comment in which he described playing with a hamster and said he wanted to "squeeze it really hard."

27. Academically, Student's level was lower than his peers and he required maximum support from both teacher and school staff to assist him in completing classwork, demonstrating compliance with simple one-step directives and interacting appropriately with peers. Village Glen opined at the meeting that their program was not designed to meet Student's current needs. In their opinion he required a more therapeutic component to his program. In their opinion, his behavior impeded the learning of others and was taking up additional resources because even though Student received maximal support, he did not respond.

28. The team considered Mother's observations that the behaviors seen at home were inconsistent with the behaviors exhibited in the academic setting. Student exhibited good social behaviors at his after school program, in the general community and at home.

29. The team discussed Student's progress toward his preexisting goals. Student met only two of the 15 goals from his last agreed upon 2011 IEP. The goals he met were in the areas of math and sentence construction. He did not meet goals in areas of compliance, coping skills, written expression, reading comprehension, social skills regarding peer exchanges and turn-taking, following multiple step instructions and language skills. Student's behavior interfered with his progress in all areas, as he consistently avoided work and failed to comply.

30. The IEP team developed 13 updated measurable annual goals, including academic and functional goals in areas of behavior, pragmatic language, social-emotional skills, math, reading, and writing. Goals one and two addressed labeling of situations or antecedents that triggered emotions of frustration, anger or rejection, instead of acting-out with defiance; Goal six addressed taking turns during conversation, with prompting; Goal seven addressed identifying appropriate or expected and inappropriate or unexpected behaviors; Goal nine addressed demonstrating appropriate personal space with peers, after being prompted; Goals 10 and 12 addressed compliance with teacher requests, with prompting; Goal 11 addressed verbalizing feelings in calm words, after becoming upset or agitated and returning to a calm state. Mother consented to the goals.

31. The IEP offered placement at Five Acres with transportation, one hour per week group speech therapy, one hour per week individual counseling, two hours per month parent counseling, and extended school year services. The team also developed a proposed Behavior Support Plan and a transition plan for the move from Village Glen to Five Acres. Mother did not agree to the offer.

32. Village Glen Assistant Head of Schools Debbie Lazer supervised the Village Glen Sherman Oaks campus. She held a Master's degree in special education, a teaching credential for mild-to-moderate disabilities with an autism authorization, and was a Behavior Intervention Case Manager with specialized training in determining the causes of maladaptive behaviors and designing interventions to extinguish them. She met Student in the fall of 2012, and has seen him daily during his schooling since then. In her opinion, Student's behaviors were different from what was normally presented at the Beacon program, as it contained more direct physical aggression toward property and more overt sexuality. He has been provided with individual counseling and interventions to deal with his behaviors, including those with sexualized content. Village Glen staff has been clear with him that such behaviors are improper, and has monitored and reinforced these instructions. In Ms. Lazer's observations, Student has not responded to these behavior modification efforts. She believed most of the students she served were able to gain a direct understanding of how they were expected to behave at school, and when their misunderstandings of expectations were cleared up, so did their behaviors. Student has not responded to such interventions, leading her to believe that his internal emotional state was dysregulated, such that even though he understood what was expected, he could not comply. She believed a more intensive therapeutic environment was required to regulate Student's behaviors and allow him to access the curriculum.

33. District speech language pathologist Gina Elliott, who performed the speech assessment of Student, had known Student since 2010. She had been licensed as a speech language pathologist since 1991 and had worked at District since 1995. At hearing, she opined the goals proposed, and offer of FAPE made at the IEP, were appropriate. The speech goals addressed pragmatics, social cognition, and conversational skills. In Ms. Elliott's opinion, the recommended offer of 60 minutes per week small group speech services was appropriate to address and make progress toward the goals. In Ms. Elliot's opinion, Student communicated verbally and did not require alternate communication devices or a picture communication system. She did not believe that frustration with language abilities was the source of Student's behaviors. He had the expressive language ability to express his wants and needs, therefore, frustration with language did not, in her opinion, explain his outbursts. She believed his behaviors and noncompliance needed to be addressed with services other than speech language services.

34. Program Specialist Lisa Loscos held a Master's degree in special education and a mild-moderate teaching credential with an added authorization for autism. Prior to serving as a program specialist, she taught special day classes to a population including emotionally disturbed students, students with attention deficit hyperactivity disorder, autism and other disabilities. She has known Student since kindergarten, when he was in a District public school. She has been a member of his IEP team since the first grade. She attended the November 2013 IEP and believed the IEP offered Student a FAPE. Ms. Loscos believed Student required a different program to meet his challenges and behaviors from what Village Glen provided. In her opinion, Student's behaviors were not the typically mild behaviors that responded well to adult redirection and to the applied behavioral analysis model. In her opinion, strategies that identified antecedents, reinforced good behaviors and gave consequences to reduce bad behaviors, have not worked with Student; he continued to protest when redirected and he perceived unfairness and rudeness when corrected. The frequency, as much as 80% of class time per the FAA, and sexualized content of his behaviors made a therapeutic environment more appropriate for him, in her opinion. She believed that the emphasis at Five Acres on verbalizing emotions, developing coping skills, and continuous therapy overseen by mental health professionals, addressed Student's needs.

35. District school psychologist Tamara Schiern held a Master's degree and a pupil personnel services credential. She was a licensed educational psychologist. She had practiced as a school psychologist for 17 years. Based on the observations of Village Glen staff and the results of her psycho-educational assessment, she believed Student required a therapeutic environment with a counseling and mental health component to address his needs. She did not believe Village Glen was appropriate for him because the Village Glen's program was devoted to modifying environmental factors, but could not control for Student's internal emotional states. While certain student profiles respond very well to traditional applied behavioral analysis, Student has not responded well enough. He stood out as different, required more support, and had not responded to many strategies. Village Glen had repeatedly expressed they were unable to serve him.

36. Student presented numerous credible witnesses from his community, after-school programs, and church environments, all of whom described a child who was very different from Student at school. Tutor Robert Lusk has known the family since October of 2013 and tutored Student in reading and other academic subjects. Student cooperated completely with Mr. Lusk. He was polite, quiet, compliant and hardworking. He has never exhibited anger. He was interested in learning. Mr. Lusk believed Student to be very smart, with “amazing” math skills. Student was making great strides toward comprehending second grade written materials. When their sessions began, Student was able to read for ten minutes without losing focus, but this had improved over time to 40 minutes. His phonics, word breakdown and attention span have all improved. Mr. Lusk has witnessed Student interacting with children in the community including Mr. Lusk’s daughter. Student interacted well with the other children, causing no problems. Mr. Lusk believed there must clearly be something amiss in the school setting because of the great strides he has seen Student make in the short time they’ve been working together.

37. Neighbors Sarah Menjivar and Dr. Ruth Rosen, and several members of Student’s extended family, all described Student as a nice, good, and obedient child who is helpful, kind, and who plays well with other children. Dr. Rosen has a six-year old son, with whom Student played games frequently. Student also participated in a weekly family-neighborhood gathering on Sundays at the Rosen household. Student showed no inappropriate behaviors on any occasion. He listened to Dr. Rosen respectfully, was cooperative, friendly, shared toys, and was kind and gentle to the family’s dog and to Dr. Rosen’s son. Dr. Rosen saw Student make great strides in his reading, which she knew from overhearing the boys read together.

38. Student participated in several after-school and weekend activities through the family’s church, the Salvation Army of Burbank. Angelica Figueroa, the Director of Youth and Children’s Services, and Corps Assistant Carlos Figueroa, saw Student at least two or three times weekly in after-school and Sunday-school programs relating to sports, a choir, taking part in the Burbank parade, gardening and volunteering in hospitals and nursing homes. They witnessed Student volunteering as an eager, funny, participatory child who was kind and loving to the elderly, and who interacted appropriately with other children. They have never seen Student exhibit any inappropriate behaviors, nor be mean or rude to anyone. They have never seen Student at school, but have seen him learn words to songs in choir practice, and have seen him read aloud, and express opinions, regarding bible verses, during the ecclesiastical portion of their Sunday school programs. Student’s reading and concentration are equivalent to the other children in the group.

39. Student also participated in programs funded by the Frank D. Lanterman Regional Center for the developmentally disabled. Regional Center Service Coordinator Carmen Jimenez-Wynn had observed Student on two occasions when Student was interacting with peers in the home setting. He was social, appropriate and exhibited no behaviors on those occasions. He participated in a socialization skills training program. In a progress report dated November 15, 2013, Student was reported to have made progress on goals involving problem- solving, compromising, working through disagreements with peers,

asking the opinions of others, and regulating his emotions and follow rules, even when upset. As of November 2013, Student was showing improved ability to limit behaviors of yelling, hitting and throwing, even when frustrated or upset, and to stay engaged with peers in game-playing according to the rules. Student was also making progress in altering his own behavior in response to a peer or adults expression of discomfort or distress.

40. Mother has observed Student at school many times and has never seen him engaging in inappropriate behaviors, although many students in the Beacon program have. She disputed that Student's behaviors were different from those she had seen other children at Beacon engage in. She disputed that he engaged in sexually inappropriate behaviors or expressions of cruelty to animals. When with her, he was a very well-behaved child, a loving boy who had compassion for other children and wanted to help them. The problems District described at school shocked her, because these behaviors did not present elsewhere. Mother's view is therefore that proper supports have been missing in school, but not that a change of placement is required. Mother asserted that Student was making more progress with his tutor, Mr. Lusk, at Sunday school, and in a program she took him to at the public library two hours per week after school, than he had been able to accomplish at school.

41. Mother has visited Five Acres and objected to the placement. Her research on that school through the Internet and at parent workshops has revealed that the students there can be aggressive, that some have been abused, that some have been removed from their homes, and that some are placed through the courts. Mother did not believe that this population was the appropriate environment for Student. She has not consented to the Five Acres placement, preferring that Student remain at Village Glen, where she has requested the additional support of a one-to-one assistant.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA²

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

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

³ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (“*Rowley*”), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C.

§ 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Issue: District's Offer of FAPE

5. District requested the due process hearing and had the burden of proof. District contends that the offer of placement at Five Acres contained in the November 19, 2013 IEP offered Student a FAPE. Student contends the offer is not in the least restrictive environment.

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

7. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) School districts are legally required to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322 (e).)

8. The IEP team is required to include one or both of the student's parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

9. An IEP should include: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

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

11. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when 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).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education, supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated

instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

12. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Board of Education, supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

13. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

14. Here, in developing the November 2013 IEP, the District complied with the procedural requirements of IDEA and California law. Mother was provided with the opportunity to participate in the development of Student's IEP. She participated in and assisted with the development of Student's present levels of performance, goals, educational program, related services and discussion of the continuum of placement options. Her participation was with the assistance of an interpreter, and was meaningful. She expressed her opinions and disagreements. She requested revisions to the goals, which were edited until she agreed with them. The IEP team, comprised of the necessary participants, developed an IEP which comported with the procedural requirements of IDEA and California law including a statement of present levels, measurable goals, education program and services. In developing the IEP, the IEP team considered Student's strengths Mother's concerns, the result of the most recent assessments, and Student's academic, developmental, and functional needs.

15. District also met its burden of showing that the November 2013 IEP substantively offered Student a FAPE in the least restrictive environment. Here, as an initial matter, full-time placement in general education for Student would not have been appropriate. Student had social and behavioral challenges that required behavioral supports, such that placement full-time in general education would not have permitted him to attain either academic or non-academic benefits. The effect of such a placement in that type of classroom setting would be highly disruptive to other students and teachers. Student's behavior problems in the school setting were clinically significant, and he exhibited clinically significant levels of hyperactivity, aggression, conduct problems, and learning problems. He broke rules, disobeyed, defied, lied, teased, argued, called other children

names, annoyed others on purpose, lost his temper, threatened and disrupted others. Although Student had made progress on exhibiting physical aggression, some sort of aggressive behavior occurred at school on four out of five days and included poking peers, stepping on other students' feet, touching items on others' desks, making inappropriate and sexualized comments to other students and staff, drawing sexually explicit pictures, making sexualized physical contact with peers and staff, and describing violent "play" with animals. Because a full-time general education placement was not appropriate for Student, the focus must be on what placement was appropriate on the continuum of placement options.

16. All the opinions of the professional educators who worked with or assessed Student in the school setting, were that he had emotional overlays involving anger and control, that impacted his behavior more than his autism. This was the opinion of his school counselor, who had worked with him in individual school counseling sessions since October 2011, Ms. Schiern who assessed him, Ms. Loscos, his Village Glen teacher, and Ms. Lazer. Student was not academically or otherwise successful in his Village Glen placement, even with a high adult-to-student ratio and additional individual supports. Village Glen's applied behavior analysis strategy of modifying environments so as not to trigger behaviors, successful for most of their students, was not working for Student. Student presented differently from their normal student profile, and he stood out from the rest. Thus, he had difficulty receiving any social benefit from participating in the class. He had also been unable to keep pace with the class curriculum, made insufficient progress toward achieving grade level standards, met no standards independently in any core subject areas or sub-areas, and was not making any independent progress toward achieving the standards. Student did not understand the curriculum, and did not want to do even the work he understood. Since Student was unable to access the curriculum, it was not appropriate for Student's academic needs. Thus, Student required a different placement than Village Glen in order to be provided a FAPE.

17. On the basis of all the school-based information including behavior logs, report cards, assessments and observation, Student required a program that, like Five Acres, could serve students with emotional and behavioral problems.

18. Five Acres' low student-to-teacher ratio, with extra support from a behavior support team, was reasonably calculated to help Student get his behavior under control. Student would be able to take breaks or time-outs and then problem-solve with the teacher to help pinpoint triggers, in a program specifically geared toward helping students identify their emotions. Five Acres could provide counseling and behavioral supports, utilized a therapeutic approach, and could be individualized to Student's social, behavioral and academic needs. The Five Acres placement could provide Student with a small class size, the modified individualized curriculum he needed, and an environment in which he could interact with similarly situated peers. Student's academic, social, and behavioral needs made this therapeutic placement appropriate. The assessment data supported the District's decision to make the offer of Five Acres. In evaluating placement options, District offered Five Acres after considering the restrictiveness of the placement and its suitability to implement Student's IEP, and the academic and non-academic benefits of the placement.

19. Student's remarkably different presentation in his home and community environments, as opposed to at school, cannot alter the analysis of whether District's offer constituted a FAPE in the least restrictive environment. Special education is, by definition, instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction. (34 C.F.R. § 300.39 (a)&(b)(3).) *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. Thus, it was Student's needs in the educational setting that District was legally obligated to address. Here, District's offer was designed to meet Student's unique needs, comport with his IEP, and was reasonably calculated to provide him with some educational benefit.

20. Thus District met its burden of demonstrating that its offer of placement as contained in the November 19, 2013, IEP was appropriate. Accordingly, the IEP offered Student a FAPE, and District may implement it without Parental consent to the placement.

ORDER

1. District's offer of placement contained in the November 19, 2013, IEP, offered Student a FAPE.

2. Should Parent enroll Student within District for the 2014-15 school year, District may implement the November 19, 2013, IEP, without parental consent.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

Dated: June 2, 2014

/s/

JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings