

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

REDLANDS UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2013020510

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PARENT ON BEHALF OF STUDENT,

v.

REDLANDS UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012110422

**CORRECTED<sup>1</sup> DECISION**

Administrative Law Judge (ALJ) Marian H. Tully, Office of Administrative Hearings (OAH), State of California, heard this matter in Redlands, California, on April 15 and 16, 2013.

Attorney Margaret J. McNair represented Student. Student's mother (Parent) was present throughout the hearing.

Attorney Tracy L. Tibbals represented Redlands Unified School District (District). District's Director of Student Services, Dr. Patrick Smith,

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<sup>1</sup> The Decision issued May 10, 2013, is corrected on page 2 solely to reflect OAH's timely receipt of District's closing argument on April 30, 2013. In all other respects the Decision is as issued.

attended the first day of the hearing and East Valley SELPA Program Manager, Laura Chisholm, attended both days of the hearing.

Student filed his Request for Due Process Hearing in OAH case number 2012110422 on November 14, 2012. District filed its Request for Due Process hearing in OAH case number 2013020510 on February 13, 2013. The two cases were consolidated on February 14, 2013, and all timelines applicable to OAH case number 2013020510 were ordered applied to both matters. At the conclusion of the hearing the parties were granted a continuance to file written closing arguments by April 30, 2013. District and Student timely filed written closing arguments, the record was closed, and the matter was submitted on April 30, 2013.

## ISSUES<sup>2</sup>

### *Student's Issues*

1) Did District deny Student a free appropriate public education (FAPE) from November 14, 2010 through November 14, 2012 (the date the due process hearing request was filed), by failing to assess Student in all suspected areas of disability, specifically by failing to conduct a comprehensive neuropsychological assessment, an FBA and/or an FAA?

2) Did District deny Student a FAPE from November 14, 2010 through November 14, 2012, because Student's operative individualized education programs (IEP's) were not appropriate, particularly in the areas of resource specialist program (RSP) services and behavior support plans (BSP's)?

### *District's Issue*

3) Did District offer Student a FAPE in the June 4, 2012 IEP?

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<sup>2</sup> The issues alleged in the parties' complaints have been rephrased for clarity.

## FACTUAL FINDINGS

1. Student attended seventh grade at Beattie Middle School (Beattie), his school of residence within District, for the 2010-2011 (sixth grade) and 2011-2012 (seventh grade) school years. Student was eligible for special education as a child with a specific learning disability (SLD). At all relevant times, District was aware that in addition to his SLD, Student had been diagnosed with, and took medication for, attention deficit hyper activity disorder (ADHD).

### *2010-2011 School Year*

2. Student had an IEP with a BSP in place during the 2010-2011 school year. The 2010-2011 IEP was not in evidence and there was no testimony about the placement and services the IEP provided. The BSP was not in evidence and there was no testimony about the BSP. Student ended the 2010-2011 school year with an adjusted grade point average of 2.15, based on a “D+” in science and otherwise passing grades.

### *May 17, 2011 IEP*

3. District held an annual IEP team meeting on May 17, 2011. Dr. Peter Lock was in his third year as Assistant Principal at Beattie at the time of the hearing. He had been employed at Beattie for nine years. He taught English at another District school for 6 years before going to Beattie. As Assistant Principal, Dr. Lock was responsible for discipline, the school disaster plan, school site counseling, and supervision between classes, at lunch and during after school activities. He was acquainted with Student and he attended the meeting. Student’s disciplinary history was considered during the IEP team meeting. In the five months between November 19, 2010 and April 21, 2011, Student had approximately 11 discipline infractions. These infractions included yelling in the locker room, purchasing a condom from another student on campus, possession of a replica gun on campus,<sup>3</sup> “messing around” in the locker room, mutual fighting, a defiance warning, a cell phone violation, roughhousing, witnessing another student spread rumors of a fight,

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<sup>3</sup> The incident involving Student’s possession of a replica gun was the subject of a pre-expulsion manifestation determination review which was not at issue in this hearing.

an incident involving a bag of marijuana that did not belong to him,<sup>4</sup> and an incident on the school bus.

4. Aurora Guevara was Student's special education teacher, his case carrier and she attended the IEP team meeting. Ms. Guevara held a master's degree in special education and taught special education at Beattie for 10 years. Ms. Guevara observed, and other members of the team reported, Student had difficulty staying on task; he interrupted instruction and work time with unnecessary comments, laughing, making noises, talking and arguing with peers and adults. These behaviors interfered with his own and his peers' academic success and teacher instruction. Student's behaviors were caused by his need for self-stimulation to reduce anxiety and his need for attention.

5. Ms. Guevara, along with School Psychologist Kimberly Clark, developed a BSP to address Student's behaviors. The purpose of the BSP was to increase Student's use of appropriate replacement behavior, reduce the frequency of problem behavior and develop new general skills that would remove Student's need to use the problem behaviors. The BSP provided teacher strategies to address Student's behaviors. The strategies included providing clear instructions and what Student needed to complete tasks; giving positive reinforcements and feedback; explaining expectations; prompting and reminders; conferencing with Student privately; visual charting; and weekly, or more often and as needed, communication with Parent through phone calls, email, notes, letters, and progress reports. Parent and Student signed the BSP.

6. Student's May 2011 IEP for the 2011-2012 school year contained measurable academic goals in reading, writing and math, and a behavior goal. The behavior goal addressed Student's ability to stay on task without interrupting instruction or work time with unnecessary comments, laughing or talking. The IEP included specialized academic instruction (SAI) for 200 minutes per week beginning July 1, 2011 through May 17, 2012. Student would spend 67 percent of his time outside of general education and 33 percent of his time in general education classes and non-academic

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<sup>4</sup> Student was referred to counseling for the incident involving a bag of marijuana. Student showed a bag of marijuana to a student on campus. The student told him what was in the bag and Student immediately returned it to the student that gave it to him. Backpacks were searched and parents of the students involved were called.

activities. Parent consented to the IEP and it was implemented for the 2011-2012 school year.

*2011-2012 School Year*

7. During the 2011-2012 school year, between August 30, 2011 and June 4, 2012, Student had approximately 17 discipline infractions including theft of a peanut butter and jelly sandwich and 15 defiance warnings for behaviors such as gum chewing, dress code violations, yelling in the locker room, missing detention, horseplay, profanity, and “cutting the mile” in physical education class. Student ended the school year with passing grades in all subjects. Student’s adjusted grade point average upon completion of the 2011-2012 school year was 2.45.

*April 2012 Triennial Assessment*

8. Kimberly M. Clark conducted a psychoeducational assessment on April 5 and 12, 2012. Ms. Clark had been a school psychologist for 10 years. She was employed by District at Beattie since 2004. She held a bachelor’s degree and a master’s degree in school counseling with a specialist degree in educational psychology, and a pupil personnel credential. As school psychologist Ms. Clark counseled students, tested students for annual and triennial review, and assisted with IEPs and BSPs.

9. Ms. Clark interviewed Student, met with him several times and observed him in the classroom. She collected information from his teachers and the school counselor. She attempted to obtain information from Parent by mailing a Connors Rating Scale questionnaire to her. She did not receive a response to the questionnaire. She telephoned Parent to find out if Parent had any concerns. The call was disconnected. Parent did not answer Ms. Clark’s call back, nor return Ms. Clark’s voice mail request for a call back.

10. Ms. Clark collected Educational Evaluations from Student’s teachers. Evaluations were submitted by math teacher Kevin Hu, English teacher Ms. Guevara, social studies and science teacher Cozette Holmes, and Student’s physical education and music appreciation teachers. Mr. Hu reported Student was capable of understanding abstract concepts but performed below his abilities most of the time. It was hard for Student to remain quiet, he was constantly out of his seat and he needed constant prompting to stay on task. He scored well on assessments and turned in his

homework. Mr. Hu observed other students in his class had a “love hate relationship” with Student. Ms. Guevara reported Student had excellent decoding, better retention and comprehension than in the previous year, good penmanship, grade level reading skills, and that he could compose well-structured sentences when he was focused. She reported Student continued to struggle with distractibility and inappropriate behavior. Ms. Holmes reported Student was doing well academically, but his classroom behaviors continued to interfere with his success and that of his peers and interfered with teacher instruction. Other teachers noted Student had trouble staying in his seat, staying on task, and following directions.

11. School counselor, Cindy Kaiser, reported Student appeared to need constant attention from peers and adults, sought attention by yelling, leaving his seat, making inappropriate comments, and disobeying rules.

12. Ms. Clark administered the following assessment instruments: Wechsler Individual Achievement Test- Second Edition (WIAT-II), Connors’ Rating Scale – Three: Short Version (Teacher), Behavior Assessment System for Children – Second Edition (BASC) for teachers and Student, Test of Auditory Processing Skills - Third Edition (TAPS-3), Test of Visual Perceptual Skills – Revised (TVPS-R), and Bender-Gestalt Test of Visual Motor Integration II. Ms. Clark selected these instruments based upon her review of Student’s health and educational records, her knowledge of Student, and the information collected from his teachers. The assessment instruments were administered so as not to be discriminatory on a racial or cultural basis, in Student’s primary language, were valid and reliable, and were given according to the instructions.

13. Student tested in the low average range in the WIAT-II Reading and Math Composites and within the mild deficit range in Written Language Composite. Student tested in the average range in expressive and receptive language.

14. The Connors’ Rating Scale (Teacher) showed very elevated responses for hyperactivity/impulsivity, aggression/defiance, and peer relationships. The BASC for teachers showed Student was in the “at risk” range for hyperactivity, attention problems, atypicality, withdrawal, adaptability, social skills, leadership, study skills, and functional communication. The “at-risk” range identified a potential or developing problem that needed to be monitored but may not have needed formal

treatment. The BASC for teachers showed Student was in the “clinically significant” range for aggression and conduct problems. The “clinically significant” range indicated problems that needed to be addressed. Student’s self-report on the BASC for students indicated Student was within the “at risk” range for attitude to school, attitude to teachers, sensation seeking, locus of control, depression, attention problems, and self-esteem. Student’s responses indicated he was in the “clinically significant” range for relations with parents. The results from the Bender-Gestalt Test of Visual Motor Integration II were within average range. The TAPS-3 results indicated Student was in the low-average range. The TVPS-R indicated difficulty in visual perception. Student passed vision and hearing screenings.

15. Ms. Clark concluded Student had learning disabilities in auditory and visual processing and difficulty maintaining attention. She recommended Student continue with SAI because there was a severe discrepancy between Student’s academic scores and his intellectual ability. Ms. Clark suggested Student be provided outlets to help Student regroup when his attention was fleeting and that the focus at home and at school should be on what Student was doing correctly instead of what he was not doing correctly to help Student feel successful and minimize potential future mood disorders. Ms. Clark also concluded Student should be monitored for depression based on his self-report in the BASC.

16. Ms. Clark prepared a report on May 31, 2012. The report included a comprehensive review of Student’s history and background information, a description of the assessments administered with detailed scores on tests and subtests, the raw data obtained from teachers and Student, and her interpretation of the assessments and information collected. She set forth her findings, conclusions and recommendations in detail. Copies of the teachers’ Evaluation Forms and Ms. Kaiser’s written observations were included in the report.

*June 4, 2012 IEP*

17. District held Student’s triennial IEP team meeting on June 4, 2012. The meeting was attended by Parent, District Coordinator of Special Services Dr. Keith Driberg, Ms. Clark, Beattie Principal Angela Neuhaus, Mr. Hu, and Special Education Teacher Kellee Baker. All but Mr. Hu and Ms. Baker testified at the hearing. Ms. Holmes prepared the paperwork before the meeting but did not attend the meeting because she was out of town. Parent

was given a written copy of her rights as a parent with a child in special education.

18. Dr. Driberg facilitated the meeting. Parent invited Dr. Driberg to attend the meeting because he was familiar with Student and his family. Dr. Driberg held a bachelor's degree in theology, master's degrees in educational counseling and school psychology, a doctorate in psychology and credentials in educational administration. Dr. Driberg was licensed in psychology and educational psychology in California, nationally certified as a school psychologist, and held multiple teaching credentials. He began his career in education as a secondary teacher in 1978; first became a school psychologist in 1988 and has taught at the college level in education and psychology since 1991. He worked from 2001 to 2011 as special education coordinator-psychological services in another school district and began his employment as District Coordinator of Special Services in 2011. His responsibilities included attending IEP meetings at the request of a parent or psychologist. He attended five to ten IEP meetings a week.

19. Ms. Clark distributed copies of her report at the meeting. She explained her findings and the team discussed the results of her assessments. Parent provided an outside psychological assessment done by Dr. Michelle Molina, at the request of Post-Adoption Services, to the IEP team during the meeting. Ms. Clark reviewed Dr. Molina's report with the team. Parent asked questions concerning Ms. Clark's assessment. She did not agree with Ms. Clark's report.

20. Ms. Clark did not recall anyone asking about an FBA or an FAA. Typically an FBA or an FAA was used for maladaptive behaviors such as injury to self or others or property damage. In her opinion, neither an FBA nor an FAA would have been appropriate for Student because Student did not have that kind of serious behavior.

21. Ms. Clark's testimony was credible and persuasive. Ms. Clark testified consistently in detail about the specifics of her assessment and the IEP meeting. She was an experienced highly qualified school psychologist. She administered a variety of appropriate assessment tools and she was qualified to interpret the results. She collected data from teachers and a school counselor. She interviewed Student and made a reasonable attempt to collect data from Parent. Her conclusions were logical and based upon the information

available to her at the time of the IEP team meeting. In Ms. Clark's opinion, Student was assessed in all areas of suspected disability.

22. Ms. Neuhaus attended the IEP team meeting and prepared the notes of the meeting. The team discussed Student's present levels of performance (PLOPS). Student's reading and math ability was in the low average range. His written expression showed a mild deficit. He was currently receiving a "C+" in Science and a "B+" in Social Studies without modified curriculum. Student continued to have behavior difficulties. Student had "trouble" keeping his mind on his work. He "actively" refused to do what adults asked of him. He was restless and overactive in the classroom, and he displayed aggressive, argumentative, defiant and threatening behavior. The team also discussed Student's discipline history. The team considered Student's participation in standardized testing and reviewed his test results. Student was tested in English Language Arts, Writing, Math and Science using the California Modified Assessment (CMA). Student tested below basic or far below basic in English Language Arts and Writing. Both the CMA and the California Standards Test (CST) are based on grade level content but the CMA is less rigorous than the CST.

23. The team was aware of Student's ADHD diagnosis, and that he took prescription medication for ADHD. There was some concern Student was not taking his medication consistently.

24. Ms. Baker presented a draft BSP to the team, page by page, after which the team discussed it. Behaviors addressed in the 2012 BSP included oppositional defiance toward staff, disregard for classroom and/or school wide rules, and excessive talking, noises, and blurting out/interjecting during instruction. These behaviors impeded Student's learning and that of his peers and caused lost instruction time. The behaviors occurred during structured and unstructured time as a result of overstimulation and Student's need for attention and approval from peers and adults. The BSP provided for teacher proximity, removal to a less stimulating environment (another classroom, area or office to limit distractions), frequent prompts to refocus and oral and visual reminders of expectations. Teacher strategies included: provide clear directions and what Student would need to complete a task, provide positive reinforcements, explain expectations, and use reciprocal progress reports to exchange information between Parent and school. The BSP set out progressive consequences for inappropriate behavior beginning with removal for short periods of time for redirection, prompts to refocus followed by a firm

command, offer Student a choice between “A” and “B,” call home, and, if Student refused to comply during redirection, referral to the office. If the behavior reoccurred, staff was to talk to Student one to one, describe what would happen if the behavior posed significant risk to Student or others and implement disciplinary process to ensure safety and rapid de-escalation. The BSP also instructed staff and teachers to have a one to one positive discussion with Student after the behavior ended to explore why problem occurred, the effect of Student’s behavior on the situation and how to problem solve in a positive way. The 2012 BSP revised the 2011 BSP because, based on discipline records and teacher observations, Student’s defiance behavior had increased since the prior year.

25. Parent signed the BSP indicating she participated in the plan development, but she did not agree with the BSP. She felt that previous BSPs were ineffective and she felt additional interventions were necessary. She requested a one-to-one aide for Student.

26. Dr. Drieberg opined that Student’s behaviors were adequately identified in the BSP, and the strategies would appropriately address impediments to Student’s learning. The 2012 BSP included additional strategies in order to address Student’s then current needs. The 2011 BSP and the 2012 BSP both addressed classroom behavior but the 2012 BSP also included a response to defiance behaviors that were not present in 2011. In his opinion an FBA or an FAA would not have been necessary because those assessments addressed intense serious behaviors and Student was not a danger to himself or others, or to property. He further opined that Student was assessed in all areas of suspected disability. Dr. Drieberg was a highly qualified, credible and persuasive witness because his opinions were based on his knowledge of Student and his family, his independent recall of the IEP team meeting, his teaching experience and extensive experience in special education providing psychological services.

27. The IEP team found Student continued to be eligible as a student with an SLD. The team agreed upon measurable academic goals in reading, writing, and algebra. Accommodations including modified and shortened tests and assignments when necessary, copies of notes to help Student focus on lessons, and teacher proximity were provided. Student’s classroom and defiance behaviors were addressed in the BSP. The team, including Parent, agreed to refer Student for school-based counseling. Weekly counseling was offered to help Student learn self-monitoring skills and to seek

assistance. The team agreed Student would take the CMA in English Language Arts, Writing and Science and the CST in Algebra and Social Studies. District offered Student placement at Beattie with SAI for 150 minutes per day, five days a week. Student would spend 53 percent of his time outside of general education and 47 percent of his time in general education classes and non-academic activities.

28. Parent agreed with the placement, accommodations and services offered in the IEP but disagreed with the BSP. At the conclusion of the team meeting she told District she wanted time to think about it. Later, she returned to District several times to sign the IEP to indicate her consent to the IEP and her disagreement with the BSP, but District did not provide the original to Parent and she would not sign a copy. As of the date of the hearing, Parent had not given written consent to the IEP.

*Parent's Testimony*

29. At the hearing, Parent expressed her continuing concern that Student's BSPs were ineffective. According to Parent, Student's behavior at home correlated to his behavior at school and she did not see improvement at home. She felt Student's behaviors were escalating during the 2012-2013 school year. She described a recent explosive incident at home, and her daughter reported several incidents that occurred at school. Some of these incidents were corroborated by Student's disciplinary records for the 2012-2013 school year. One incident resulted in a pre-expulsion manifestation determination review.<sup>5</sup>

30. During sixth and seventh grade someone from Beattie would call her when Student had behavior or disciplinary issues at school. She had not been called during the 2012-2013 school year. Parent received some progress reports from school through the mail.

31. Parent investigated other placements for Student but these placements were not appropriate because the students in the programs had more severe behaviors and disabilities than Student.

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<sup>5</sup> The manifestation determination review was not at issue in this hearing.

*Additional Witnesses and Expert Testimony*

32. District Education Specialist Gina Maddox, School Counselor Marc Thomas Porritt, and Special Services Coordinator Conor D. Kelly testified at the hearing. These witnesses testified to events that occurred after the June 4, 2012 IEP team meeting.<sup>6</sup>

33. Ms. Holmes was a special education teacher for 39 years, nine years at Beattie. She held a Level II Special Education Credential. Ms. Holmes taught Student when he was in sixth and seventh grades and had been his case carrier for two years at the time of the 2012 IEP. Although she did not attend the June 4, 2012 IEP team meeting, she had been a member of the team and she knew Student well. Ms. Holmes described Student as a likeable kid, who had good attendance, appeared to like coming to school, was academically capable and was making progress on his goals. Ms. Holmes was aware of Student's ADHD. In her opinion, Student did not have any disabilities that were not assessed.

34. Gina Maddox was employed at Beattie as an education specialist for nine years. Her responsibilities included student assessment and teaching. She held a bachelor's degree in liberal studies, a master's degree in special education, an education specialist clear credential and a Cross-cultural Language and Development (CLAD) Certificate. Before she worked for District at Beattie, she was employed as a residential child care worker for school age boys with volatile behavior and serious aggression. Ms. Maddox taught Student in seventh grade Algebra and English. She described him as a good student who tried hard, stayed on task, and responded to constructive criticism, directives and re-directives. She did not encounter "much" behavior difficulties with Student in her classes. She was familiar with Student's IEP

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<sup>6</sup> The ALJ considered the testimony of these witnesses to the extent their observations and opinions were relevant to Student's academic needs and behavior issues that were or should have been known to the IEP team at the time the IEP, including the BSP, was developed and whether District assessed Student in all areas of suspected disability. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

and the BSP. She did not see any need for an FBA or FAA. She did not observe or suspect any disabilities which would have required assessment.

35. Marc Thomas Porritt was employed by District as a DIS counselor since August 2012. Mr. Porritt held a bachelor's degree in psychology, a master's degree in general psychology, and anticipated completing a Ph.D. in clinical psychology in June 2013. He saw Student in 30 minute counseling sessions about three times per month beginning in October 2012. He was familiar with Student's 2012 IEP and BSP. He described Student as respectful and "a good kid." Mr. Porritt worked with Student to clarify school rules, identify safe adults for Student to contact, develop coping skills, and learn how to self-regulate emotions. Based on Student's IEP and BSP, and his observation of Student in the counseling sessions, Mr. Porritt opined the BSP allowed Student to regulate his behavior in class and there was no indication that there were any other areas of suspected disabilities that should have been assessed in preparation for the triennial IEP team meeting.

36. Conor D. Kelly was employed by District as a special services coordinator – behavior analyst since July 2012, and as an education consultant from April 2011 through June 2012. He held a bachelor's degree in psychology/pre-medicine, a master's degree in applied behavior analysis and special education and anticipated obtaining his doctorate in educational leadership in May 2014. At District's request, in January 2013, Mr. Kelly took Parent and Student to observe behavior intervention programs. He reviewed Student's IEP and BSP. None of the programs were appropriate for Student because Student's behaviors were not as intense or frequent as the behaviors that warranted the level of intervention provided in the alternative placements.

37. Gregory B. Johnson, was a licensed marriage and family therapist for 13 years. His practice included individual and family counseling. He previously worked with teenagers in a mental health group home. He worked with youth and families for over 25 years. He worked with school districts, advocated for educational rights, participated in IEPs and assisted classroom teachers, principals and administrators to help students with negative behaviors and to improve academic performance.

38. Parent consulted Mr. Johnson for help with Student's behavior at home and at school. Mr. Johnson conducted a mental status examination of

Student on January 17, 2013.<sup>7</sup> Mr. Johnson interviewed Student and reviewed school records including the 2012 IEP and psychoeducational assessment. He did not observe Student in the school setting or speak to anyone from District. He administered a Connors Rating Scale and tested for ADHD. Mr. Johnson concluded Student presented with attention deficit disorder with hyperactivity, oppositional defiant disorder, learning disability and depressive disorder. He ruled out bipolar disorder and anxiety disorder.

39. Mr. Johnson prepared a report of his examination on January 31, 2013. He made several recommendations for Student including special education services, educational tutoring, updated assessments and reevaluation for processing issues based upon previous information in the IEP and Student's current classroom struggles, assessment for assistive learning, individual counseling/psychiatric services, and social skills specialty group.

40. Other than the assistive learning assessment which was recommended but not described or defined in his January 2013 report, he did not recommend any other assessments. He did not testify as to any other suspected disabilities that Student might have had at the time of District's triennial assessment in 2012 and he did not offer any opinion that District failed to properly assess Student at that time.

41. In Mr. Johnson's opinion, Student needed more assistance than the average student. Student needed a specialized academic setting to help him organize, focus, become motivated and address academics. Mr. Johnson characterized the 2012 BSP as "superficial." For example, he felt more could be done to capture Student's attention and motivate him, to create an environment where Student would not feel threatened, and to show Student that teachers and staff cared about him. Mr. Johnson described how he worked with Student and Parent by introducing a technique to Student, going over it with Student and Parent together, modeling the technique, conducting a rehearsal with them, and assigning work on the technique for practice at home.

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<sup>7</sup> The ALJ considered Mr. Johnson's observations and opinions to the extent relevant to Student's academic needs that were or should have been known to the IEP team at the time of the IEP meeting, and as to whether Student had suspected disabilities that required District to conduct a neuropsychological assessment, an FBA or an FAA. (See *Adams v. State of Oregon*, *supra*, 195 F.3d at p. 1149.)

He hoped Parent and school could work together when there was a technique that was working for Student.

## LEGAL CONCLUSIONS

### *Burden of Proof and Statute of Limitations*

1. The petitioning party has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Student has the burden of proof for Issue One and Issue Two, which were raised in OAH case number 2012110422. Thus, as to the first issue, Student must prove that during the limitations period, he was denied a FAPE because District failed to assess Student in all suspected areas of disability, in particular a comprehensive neuropsychological assessment, an FBA and/or an FAA. As to Issue Two, Student must prove that District denied Student a FAPE in all operative IEP's during the limitations period, including the June 4, 2012 IEP, by failing to offer appropriate levels of RSP support and an appropriate BSP. District has the burden of proof for Issue Three, which was raised in OAH case number 2013020510. As discussed below, as to Issue Three, District must prove that District followed the required procedures to develop the IEP and the IEP offered Student a FAPE in the LRE.

2. A request for a due process hearing "shall 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." (Ed. Code, § 56505, sub. (1).) This time limitation does not apply to a parent if the parent was prevented from requesting a due process hearing because the district withheld information that the district was required to provide to the parent. (*Ibid.*, see 20 U.S.C. § 1415(f)(3)(D).) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Education*. (2d Cir. 2003) 334 F.3d 217, 221.)

### *Applicable Law*

#### *FAPE*

3. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. §

1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (p).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. 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, 207; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031.)

5. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, 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 [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.)

6. School districts are required to provide each special education student with a program in the LRE. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services

cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a)<sup>8</sup>; Ed. Code, § 56031.)

7. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

8. 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. v. State Bd. of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].)

9. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the

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<sup>8</sup> All further references to the Code of Federal Regulations are to the 2006 edition.

least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

10. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.)

#### *Assessment*

11. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

12. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.)

13. Individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the

school district, county office, or special education local plan area” must assess students’ suspected disabilities for the district. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student’s academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

14. A school district’s failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 at pp. 1031-1033.) A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

### *IEP*

15. At the beginning of each school year, each local educational agency (LEA) must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) An IEP team meeting must be held at least annually to review the pupil’s progress, whether the annual goals are being achieved, and the appropriateness of placement. (Ed. Code, § 56343, subd. (d).)

16. Each school district is required to initiate and conduct IEP team meetings for the purpose of developing, reviewing, and revising the IEP of

each individual with exceptional needs. (Ed. Code, § 56340.) An 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 regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

17. 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*, *supra*, 993 F.2d 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].)

18. In developing the IEP, the 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 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).)

19. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement

and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

20. An IEP must contain a statement of measurable annual goals related to “meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum” and “meeting 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); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between PLOP’s, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

21. When a special education student’s behavior impedes the child's learning or that of others, a district 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)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Although the IDEA requires a school district to consider the need for a BSP when a student exhibits problem behavior, it does not provide any guidance as to the BSP’s format or contents, and may be developed on a case-by-case basis, taking into account the particular student’s behavioral needs. (See 34 C.F.R. § 300.530(a).) The regulations implementing the IDEA do not require that any particular methodology, strategy or technique be used to develop a student’s BSP. (71 Fed. Reg. 46683 (Aug. 14, 2006).)

22. 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; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP 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, subs. (h) & (i).)

23. If a parent refuses services in an IEP that had been consented to in the past, or the school district determines that the refused services are required to provide a FAPE, the school district shall file a request for a due process hearing. (Ed. Code, § 56346, subs. (d) & (f).)

*Issue One*

24. In the first issue, Student contends District denied him a FAPE during the statute of limitations period because District failed to assess Student in all suspected areas of disability, specifically, a comprehensive neuropsychological assessment, an FBA and/or an FAA. Student seeks an order requiring District to fund an independent neuropsychological assessment and a FAA and compensatory education including behavior and educational therapy. District contends it properly assessed Student in all areas of suspected disabilities. For the reasons set forth below, Student failed to meet his burden of proof.

25. The IDEA provides for periodic reassessments to be conducted not more frequently than once a year unless a parent and the District agree otherwise, but at least once every three years unless the parent and the District agree reassessment is not necessary. (U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(1).) The only assessments in evidence were the assessments done by Ms. Clark in May 2012 for Student's triennial review. There was no evidence as to what, if any, assessments were done, or should have been done, in the three years preceding Ms. Clark's assessments. There was no evidence Parent requested assessment in the three years before the triennial assessment were done in May 2012. A reassessment may also be performed if warranted by the child's educational or related services needs. (U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).) There was no evidence that Student's educational or related services needs warranted a reassessment at any time before May 2012.

26. As to the assessments conducted in spring of 2012, school psychologist, Ms. Clark, used a wide variety of technically sound assessment tools to gather relevant functional, developmental and academic information from and about Student. Ms. Clark was trained and knowledgeable; her assessment tools were selected and administered properly; were not racially or culturally biased; provided in Student's language; and not based on an intelligence quotient. (Factual Findings 8 through 15 and 21; Legal Conclusions 11 and 14.)

27. Ms. Clark was knowledgeable about Student's disability, competent to perform the assessment and qualified to interpret the results. She prepared a written report including her recommendations for special education, the basis for her determinations, the relationship between Student's behavior and his academic performance, and other educationally relevant medical and developmental findings. She provided copies of her report and supporting data to Parent at the IEP team meeting. (Factual Findings 15, 16, 19 and 21; Legal Conclusion 13.)

28. Student did not present any evidence of a suspected disability that was not assessed. All of the well qualified professionals who knew Student (Ms. Clark, Dr. Driberg, Mr. Porritt, Ms. Holmes, and Ms. Maddox), testified that Student did not have any suspected disabilities that were not assessed in 2012. None of them suspected that Student had any disability other than his SLD and behaviors associated with his ADHD diagnosis. Student's expert, Mr. Johnson, reviewed Ms. Clark's assessment. He did not criticize Ms. Clark's assessment in any way. He did not identify any disabilities that should have been suspected and further assessed at any time. He said nothing about whether a neuropsychological assessment, a FBA or FAA should have been conducted in 2012. Accordingly, Student did not prove that District failed to assess Student in all areas of suspected disability during the limitations period. Thus, Student was not denied a FAPE on this ground. (Factual Findings 18, 21, 26, 33-35, and 38-40; Legal Conclusions 11-14.)

#### *Issues Two and Three*

29. Student's Issue Two contends that Student was denied a FAPE by all operative IEP's during the limitations period, and District's issue, Issue Three, overlaps with Student's contentions, to the extent it seeks a declaration of whether District offered a FAPE in the June 4, 2012 IEP. Accordingly, Issues Two and Three will be analyzed together based on the overlap of applicable law and the June 4, 2012 IEP in both issues. In Issue Two, Student contends he was denied a FAPE during the limitations period because his operative IEP's were inappropriate. In particular, Student contends that the educational services such as RSP and the BSP's to address Students' behavior were inadequate. Student seeks compensatory education, a one to one aide, and placement in a non-public school. District contends that at all times, Student's IEP's offered him a FAPE in the LRE and that the BSP's were appropriate. District seeks an order that the District offered Student a FAPE in

the LRE in the June 4, 2012 IEP, and it has the burden of proof on that issue. For the reasons set forth below, Student failed to meet his burden of proof on Issue Two and District met its burden of proof on Issue Three.

*IEP(s) from November 14, 2010 through May 17, 2011*

30. There was evidence that Student had an IEP for the 2010-2011 school year, but the IEP itself was not offered as evidence by either party, and there was no testimony about the placement and services the IEP provided. There was no evidence of any placement or services that were not provided that should have been provided. There was no evidence the IEP provided placement or services that were inadequate or inappropriate. Therefore, Student failed to prove a denial of FAPE during the limitations period for any IEP before the 2011-2012 school year. (Factual Finding 2; Legal Conclusions 2-10 and 15-22.)

*May 17, 2011 IEP - 2011-2012 school year*

31. The May 17, 2011 IEP offered placement and services for the 2011-2012 school year. There was no evidence the May 2011 IEP was not appropriate, particularly, no evidence the RSP services and/or the BSP failed to address Student's needs. The team considered Student's academic needs and the IEP contained measurable academic goals in reading, writing and math, supported by SAI for 200 minutes per week. The IEP team considered Student's classroom behaviors and his discipline record and addressed his behavior difficulties with an appropriate behavior goal and a BSP. Both Parent and Student signed the BSP and Parent consented to the IEP. Student failed to prove that the placement and services in the May 17, 2011 IEP denied him a FAPE. (Factual Findings 2-7; Legal Conclusions 1-23.)

*June 4, 2012 IEP - 2012-2013 school year*

32. The June 4, 2012 IEP is at issue in both Student's Issue Two and District's Issue (Issue Three). For the reasons set forth below, Student failed to meet his burden of proof on Student's Issue Two. On Issue Three, District's burden is to prove it provided a FAPE to Student in the LRE is twofold. First, District must demonstrate it has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, District must demonstrate that the IEP developed through those procedures was designed to meet Student's unique needs, and was reasonably calculated

to enable Student to receive educational benefit. (*Ibid.*) For the reasons set forth below, District met its burden of proof on Issue Three.

33. The preponderance of the evidence established that the psychoeducational assessment conducted prior to the June 4, 2012 IEP team meeting addressed all areas of Student's suspected disability and provided the IEP team with sufficient information from which Student could be offered a FAPE. In other words, the District met its procedural obligation to assess Student. All other procedural and substantive requirements were also met. (Factual Findings 2-18; Legal Conclusions 3-22.)

34. The IEP team met approximately a year after the previous IEP team meeting and produced an IEP before the start of the next school year. All required members were present. The psychologist who conducted the psychoeducational assessment attended, and she was qualified to explain her results and recommendations. Parent fully participated in the process. Parent's input was included, she had an opportunity to ask questions and her concerns were discussed by the team and addressed in the IEP. The team considered Student's strengths, Parent's concerns, and the functional, academic and developmental needs of Student. (Factual Findings 17-25; Legal Conclusions 15-18.)

35. The IEP met all written requirements. The IEP detailed Student's current levels of academic and functional performance including the results of all tests and assessments and the data collected. The IEP contained measurable annual goals that addressed academics and behavior and all of the areas of need identified by the assessment and the IEP team. The evidence showed that all of the goals were drafted based on an extensive review of Student's PLOP's, past goals, discipline history and new information obtained through the psychoeducational assessment. The IEP contained a full description of the offered placement, and all services, modifications, and accommodations. The IEP described the extent to which Student would not participate with nondisabled children in a regular class or activities. The IEP included a statement of the special education and related services offered; the start date, frequency and the location of services. (Factual Findings 24-28; Legal Conclusions 18-22.)

36. District's evidence proved the 2012 BSP addressed Student's behavioral issues. Parent agreed to the 2011 BSP. Student showed some gains in academics and improvement in classroom behavior during the 2011-

2012 school year. However, Student's classroom behavior continued to interfere with his success and that of his peers and with teacher instruction. The 2012 BSP addressed Student's continuing classroom behavior with additional strategies and consequences, and addressed more generalized disciplinary and increasingly defiant behaviors. The 2012 BSP took into account Student's then current behavior, including: defiance toward staff, disregard for classroom and/or school wide rules, excessive talking, noises, and blurting out/interjecting during instruction. The BSP included positive behavioral supports and strategies to address Student's behavior and help Student develop general skills to eliminate Student's need to use problem behaviors inside and outside the classroom. (Factual Findings 5-10, 24-26; Legal Conclusion 21.)

37. Student's expert had been providing therapy for Student for three months at the time of hearing. He did not testify that the BSP failed to properly identify and address Student's behaviors. He felt that more could be done. Mr. Johnson's opinion based on his evaluation of Student in January 2013 did not establish that the BSP was inappropriate when it was developed. Mr. Johnson concluded Student needed help to organize, focus, become motivated and address academics, including special education services, educational tutoring, updated assessments and reevaluation for processing issues based upon previous information in the IEP and Student's current classroom struggles, and individual counseling. All of these needs were addressed in the IEP and BSP. District was permitted to provide the methodology, strategy and techniques appropriate to Student taking into account Student's needs at the time. Accordingly, Student failed to show that he was denied a FAPE on this ground based upon Mr. Johnson's testimony and District met its burden to prove the BSP appropriately addressed Student's needs. (Factual Findings 37 through 41; Legal Conclusion 21.)

38. Student presented evidence that Student's behaviors were becoming more frequent and more serious during the 2012-2013 school year. Student went to Mr. Johnson for therapy due to increased difficulties at home and at school. Behavior issues occurring after the June 4, 2012 IEP would be properly addressed by an IEP team, not in this decision. Parent may request an IEP team meeting at any time and District must hold an IEP team meeting annually. Whether the June 4, 2012 IEP denied Student a FAPE must be determined by looking at what was reasonable at that time. (Factual Findings 29, 37 through 41; Legal Conclusions 9 and 15.)

39. The IEP was designed to meet Student's unique needs and was reasonably calculated to provide Student with some educational benefit in the LRE. (See *Rowley, supra*, 458 U.S. at pp. 200-204.) Student's continued placement at Beattie with SAI was appropriate because Student was able to function at age/grade level with modifications, accommodations and support. There was no evidence that additional services or RSP were needed. The IDEA expresses a policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114 & 300.116; Ed. Code, § 56031.) Applying the *Rachel H.* factors in this case, District's offered program met the IDEA's aspiration of inclusion to the maximum extent appropriate. District demonstrated Student was capable of doing grade level work with no modification in math and with modification in other subjects. Accordingly, the 2012 IEP provided more time in the regular environment than the 2011 IEP, and adjusted the SAI to include only those subjects where Student was below basic or struggling. The BSP considered and addressed the effect of Student's behaviors on his classmates and teachers. Parent disagreed with the BSP but agreed to the placement and related services. However, *Rowley* leaves program methodology to District's discretion and, while District is required to consider Parental input, Parent's preference is not controlling. District met its burden to prove by a preponderance of the evidence that the June 4, 2012 IEP offered Student a FAPE in the LRE. Student failed to meet his burden of demonstrating that the IEP did not provide a FAPE, in particular, the RSP services and BSP. (Factual Findings 17-41; Legal Conclusions 1-23.)

#### ORDER

1. All of Student's requests for relief are denied.
2. The June 4, 2012 IEP offered Student a FAPE in the LRE.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the 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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 10, 2013

/s/

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MARIAN H. TULLY  
Administrative Law Judge  
Office of Administrative Hearings