

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014010895

DECISION

Student filed a Request for Due Process Hearing in Case No. 2014010895 with the Office of Administrative Hearings, State of California, on January 24, 2014, naming Garden Grove Unified School District (District).

June R. Lehrman, Administrative Law Judge (ALJ), heard this matter on March 20, 24, 25, 26 and 27, 2014, in Garden Grove, California.

Edwin Egelsee and Wesley Garlick, Attorneys at Law, represented Parents and Student (collectively, Student). Student's mother attended the hearing on all days.

Dan Harbottle, Attorney at Law, appeared on behalf of District. Lorraine Rae, Assistant Superintendent of Special Education and Student Services, attended the hearing on all days.

A continuance was granted for the parties to file written closing arguments and the record remained open until April 4, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE¹

Did District deny Student a free appropriate public education (FAPE) at individualized educational program (IEP) meetings dated March 21, 2012, November 2, 2012, and March 21, 2013, by failing to offer an appropriate placement and services to meet her mental health and behavioral needs?

SUMMARY OF DECISION

Student contends that District did not offer Student an appropriate placement to address her severe mental health and behavioral needs. She contends that District's offer of a special day class and behavior support plan was insufficient to meet her severe mental health needs, even when later supplemented with counseling and aide support. Student contends that District was aware of Student's longstanding record of extreme and escalating behaviors, resulting in an emergency psychiatric hospitalization in October 2012, yet failed to offer an IEP to address Student's needs. District contends Student's difficulties were home-based and not evidenced by formal suspensions from school, that the level of behaviors observed at school would not warrant a placement in a residential setting, and that she made academic progress while in District placements. District's contentions were not borne out by the evidence. Student has met her burden of proving that District's offers denied her a FAPE, by failing to appropriately address her severe mental health and emotional needs.

FACTUAL FINDINGS

Background

1. Student is a 14 year-old girl whose adoptive parents (Parents) reside within District's boundaries. Parents adopted Student in 2006 when she was seven years old. Prior to her adoption, Student had resided in therapeutic foster homes since approximately 2005 when at the age of five, Children's Protective Services removed her from her biological family, where she had been the victim of extreme physical, sexual and emotional abuse, including beating, burning, near drowning, and a severe traumatic brain injury when she was hit with a skillet. Student has been diagnosed with bipolar disorder, oppositional defiant disorder, reactive attachment disorder, post-traumatic stress disorder, and attention deficit hyperactivity disorder. Student's treating therapist, Licensed Clinical Social Worker Connie Hornyak, considered Student the most severely abused child she has seen in her extensive practice treating abused and foster children. Ms. Hornyak had treated Student since she was removed from her biological family and placed in foster care in 2005.

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.)

2. Student was the second of four children Parents adopted. After adopting Student, Parents adopted two of Student's eight biological siblings. Both of these biological siblings thereafter attended District schools; by the time of hearing one had graduated and the other was in high school. Parents were willing to provide a therapeutic home environment to the children. Mother was fully aware when adopting the children that they had special needs, although the extent of Student's emotional difficulties proved more extensive than her siblings. Mother's demeanor on the witness stand seemed warm, nurturing, aware of the difficulties of Student's situation, and overall concerned for Student's welfare. She had been an involved parent throughout her children's schooling, volunteering in the classroom. She did not requested residential treatment for her other children, because in her opinion their needs did not warrant that level of intervention, and she worked with District to educate them in District placements through their IEP's.

3. Student exhibited behavioral and emotional difficulties since entering school in first grade. She became defiant, verbally and physically aggressive when criticized or challenged, when asked to do non-preferred tasks, and when not given something she wanted. She became irritated and yelled at other students. Her behaviors were not consistent or predictable, thus she could have good days or weeks followed by escalations. She was suspended on May 25, 2007, for having a temper tantrum in class and throwing shoes at another student. She was suspended on February 18, 2009, for knocking items off her desk, throwing her chair, kicking her chair, and yelling at the class and teacher. She was suspended on February 26, 2009, for calling her teacher profane names and screaming and yelling at the teacher.

4. In the 2009-2010 school year, Student was in fourth grade at Garden Park Elementary School (Garden Park) in a general education program. Student was suspended twice in that year for verbally aggressive and physically violent behaviors. The first suspension was on December 11, 2009, for knocking over her chair; clearing the top of her desk; flinging her teacher's chair, and refusing to accompany the school principal to the office. The chair hit and injured another student. The second suspension was on February 25, 2010, when over the course of several days Student threw books and pencils at other students and the principal; refused to follow instructions; used profanity in class; hid in the girls' bathroom; and eloped from campus. There were also many other occasions when Student was removed from class and sent to the office to calm down due to explosive behaviors in class such as throwing papers, swearing and tipping over chairs and desks. Mother often received calls to come and pick her up. At times, Mother received such calls on a daily basis.

5. Student was first assessed and found eligible to receive special education and related services at the end of the 2009-2010 school year under the primary eligibility category of Emotional Disturbance, with secondary eligibility under Specific Learning Disability. District's assessor concluded that Student's emotional difficulties had been present for a long period of time and appeared to be adversely affecting her academic achievement. Student had inappropriate behaviors and feelings, an inability to build and

maintain satisfactory relationships with peers and teachers, and a general pervasive mood of unhappiness and depression.

6. Student's initial IEP, dated May 14, 2010, offered a general education placement with 15 minutes daily resource support, related services in the areas of language and speech and occupational therapy, and a behavior support plan (BSP). The BSP targeted defiance, verbal outbursts, throwing/knocking over objects, pushing, and hitting other students and adults. The antecedents to these behaviors were having demands placed upon her, or not getting her way. The BSP recommended interventions including: a structured school day; frequent praise and encouragement; tailored academics with resource support; ignoring negative behaviors if possible; folding rewards and incentives into the school day; time-outs; monitoring during unstructured times; verbal and physical redirection and prompting; removal from conflict situations to a safe place such as the school office; and other interventions. Parents consented to implementation of the IEP and BSP. No counseling or mental health services were offered.

7. On June 10, 2010, Student was suspended for kicking another student in the knee, leaving a dark bruise.

8. At the beginning of the 2010-2011 school year, Student attended a fifth grade general education class at Garden Park. On September 30, 2010, Student was suspended for not following teacher instructions, being defiant and verbally aggressive, and pushing the teacher.

9. On October 7, 2010, the parties convened an IEP team meeting to discuss Student's placement. District offered, and Parents consented to, a change of placement from general education at Garden Park to a "mild-to-moderate" special day class at Enders Elementary School (Enders). No other change was made to the May 14, 2010 IEP. No counseling or mental health services were offered.

10. Student's fifth grade special day class was taught by special education teacher Charlotte Gibson. Mother talked to Ms. Gibson daily, sometimes twice daily, to touch base about Student's status. Mother also volunteered in the class several times per week.

11. Student's behaviors and school performance improved in Ms. Gibson's fifth grade class. Ms. Gibson was able to help Student to remain calm, and worked hard to do so. Both Mother and Student's treating therapist, Ms. Hornyak, felt that Student improved tremendously in Ms. Gibson's class. Nevertheless, Mother observed Student's behaviors to continue in cycles with good periods followed by bad ones. Ms. Gibson observed a "honeymoon period" the first six weeks of school, where Student appeared eager to please, and engaged only in slight verbal aggression. However, after the first six weeks, Student's verbal aggression escalated, as did her leaving Ms. Gibson's classroom, throwing objects and using profanity.

12. Student's fifth grade report card, generated by Ms. Gibson, did not indicate that any problematic behaviors had occurred that year. At hearing, Ms. Gibson credibly explained that the absence of negative comments on her report cards for Student was meant to indicate that Student was trying, making progress, and doing her best, but did not negate the existence of the problematic behaviors.

2011-2012 School Year

13. For the 2011-2012, sixth grade school year, Student remained enrolled in a mild/moderate special day class at Enders with Ms. Gibson. As in fifth grade, Mother and Ms. Gibson interacted frequently and Mother volunteered in class. Despite Student's good relationship with Ms. Gibson, Student's behavior was, per both Mother's and Ms. Gibson's observations, violent and problematic. Student barricaded herself in the school bathroom, screamed, yelled, cleared items off desks by sweeping them with her arm, and turned over desks. Ms. Gibson on occasion had to clear the entire classroom of all the other students for their and Student's safety. Student threw pencils, pinched the other children, and hit and bit Ms. Gibson. Student exploded when she was told "No," was defiant to criticism, and unfriendly to other students. Student's episodes included kicking, biting, scratching, yelling, slamming items, kicking doors and using profanity, all of which frightened the other children.

14. Ms. Gibson utilized every behavior strategy she knew, including all those listed on Student's BSP, but Student nevertheless had, on average, two behavioral episodes per day in Ms. Gibson's class. In some weeks, Ms. Gibson called Mother to come into school twice daily. Twice weekly or more, Ms. Gibson physically restrained Student. The Enders campus had the support of a behavioral aide, whose help Ms. Gibson utilized when needed. Ms. Gibson also called on the assistant principal when needed. Ms. Gibson's special day class contained younger children for whose safety she feared. Ms. Gibson observed that once Student became enraged, there was no reasoning with her until the episode passed. Ms. Gibson was unable to identify any antecedents to Student's episodes of rage, which appeared without warning.

15. Despite these numerous incidents, Ms. Gibson never initiated any suspensions or discipline, but would instead call Mother or send Student to the school office. Ms. Gibson was of the opinion that formal suspensions were impermissible for special education students. Although District school psychologist, Alison Englar-Carlson, never witnessed any of Student's behavioral incidents on the Enders campus, the campus behavioral aide, assistant principal and school principal, were all aware of the incidents Student caused in class.

16. Ms. Gibson was clearly a devoted teacher. Her special day class contained children, ranging in age from third through sixth grades, with a variety of disabilities, including autism, speech issues, and orthopedic impairment. Ms. Gibson individualized the instruction for all her students, including Student. Student loved to read, and read above grade level. Ms. Gibson stayed in her classroom during lunch periods specifically

for Student because Student was unable to handle unstructured time. Ms. Gibson opined that although she did what she could for Student, her class did not meet Student's needs. Ms. Gibson had no background with emotionally disturbed children.

March 2012 Annual IEP

17. District convened an annual IEP team meeting for Student on March 21, 2012. Academically, Student was performing at grade level in reading and writing, but required additional support in math. Her present level of performance in the area of social-emotional development reflected her long history of abuse and emotional, social and behavioral difficulties. Within school settings, Student was bossy, had no tolerance for people who contradicted or corrected her, and misinterpreted social cues. When overwhelmed, she either shut down completely or went into a rage with throwing, screaming and cursing, which caused other students to be afraid of her. She tended to get into conflicts with classmates. She became irritated and frustrated easily, and would often become verbally aggressive when upset. Student when angry was aggressive verbally and physically with adults both at school and at home.

18. During discussion at the IEP team meeting, it was noted that Student's anger and rage issues "have decreased substantially. This indicated only that Student's behavior was cyclical and might periodically improve but then deteriorate. Overall, there was no significant improvement in Student's behaviors over the entire two-year period Ms. Gibson taught Student. Ms. Gibson, who attended the meeting, proposed mainstreaming Student during afternoons, to determine how well she might respond to a general education environment, with the option to immediately return her to the special day class as needed for temper and rage regulation. She proposed the mainstreaming before Student's move to middle school, and recommended the general education teacher, Ms. Glisson, whom she thought could best handle Student.

19. The IEP team proposed two annual goals relating to behavior. The first goal addressed the development of calming techniques to address Student's frustration. The responsible persons to implement this goal were teacher, parents and Student. The second goal addressed Student's refraining from entering arguments and conversations that did not pertain to her. No responsible persons were stated to implement this goal. Although she believed that these behavioral goals were insufficient to address Student's needs, Ms. Gibson did not propose additional goals because she was uncertain what supports would be in place in middle school to support any additional goals.

20. District proposed continued placement in the mild/moderate special day class for the duration of the 2011-2012 school year. For the upcoming 2012-2013 school year, which would be Student's seventh grade year, District recommended a special day class in a middle school. The particular middle school and particular daily schedule were undetermined. No transition to middle school was offered. No middle school staff attended the IEP meeting.

21. No counseling or mental health services were offered. The IEP stated no particulars with respect to Student's BSP; the preexisting BSP was continued with no modifications.

22. Parents consented to the annual IEP in its entirety. Thereafter the parties agreed that the IEP would be implemented at Bell middle school (Bell).

23. At the conclusion of sixth grade, Ms. Gibson issued a report card for Student. The sixth grade report card was somewhat less positive than the fifth grade report card, although Ms. Gibson again rated Student positively overall. According to the report card, Student approached or met grade level standards in reading, writing and math, and performed satisfactorily in history, science physical education and electives. At hearing, Ms. Gibson credibly explained that the absence of negative comments on her report cards for Student was meant to indicate that Student was trying, making progress, and doing her best. Had Ms. Gibson applied actual sixth grade standards, Student would have received many unsatisfactory marks on her behavior. Ms. Gibson retired after the 2011-2012 school year.

2012-2013 School Year

24. Prior to the beginning of the 2012-2013 school year, Mother took Student to Bell to accustom her to the new campus. She and Student walked the grounds, met special education teachers Patricia Sollitto and Hendrik Guevara, met staff, and showed Student where the office was located.

25. Student attended Bell from September 6, 2012, until October 11, 2012. During that time, she performed well in the majority of classes. Her BSP was followed, and she was able to take short reading breaks in the office before returning to class when she was particularly agitated. According to assistant principal, Chad Ouellette, Student would leave class when overwhelmed and come to his office, but this did not occur frequently. Her behaviors were moderate enough to redirect and keep her in the classroom.

26. Student's daily schedule was as follows: English and homeroom taught by general education teacher Liz Lindgren and resource support teacher Mr. Guevara; reading with general education teacher Danielle McLearie; math and physical education; history taught by Ms. Sollitto; and physical science taught by Mr. Guevara. Ms. McLearie and Ms. Lindgren recalled Student as cooperative, interested and participatory in homeroom and reading classes. However she did disrupt class approximately one time per week and was defiant when not allowed to answer, or during transition from one topic to another. When prompted by calming techniques such as speaking in a low voice, at eye level, Student could be calmed. Sometimes she would also need to take a break and would leave class and go to the school office. This occurred two-to-three times per week. Student received speech therapy once weekly for 30 minutes provided by District speech pathologist Suzanne Trader, and Student behaved well in those sessions. Mr. Guevara,

Student's resource support and physical science teacher, witnessed no incidents of misconduct by Student in either English/homeroom or physical science class; however she did require prompts, breaks and calming strategies. Student had difficulty in U.S. history taught by Ms. Sollitto, where she was more likely to engage in verbal aggression.

27. Student's medication regimen was changed in early October 2012. Parents saw escalating aggression following the change.

28. On Friday, October 5, 2012, Student received a one-day suspension for throwing papers in class at Ms. McLearnie, eloping out of the classroom, and refusing to take direction from Mr. Ouellette. While in Ms. McLearnie's second period reading class, Student refused to put a book away when asked. Ms. McLearnie asked several times and then Student crumpled a piece of paper and threw it at Ms. McLearnie. Ms. McLearnie told Student her behavior was inappropriate, and Student left the classroom. Ms. McLearnie called Mr. Ouellette, who determined that Student had gone into the girls' bathroom. He called in to her and she refused to come out. When she finally exited from the girls' room, they walked toward his office. Student proceeded farther to exit the building into the parking lot, where she sat on the curb. Student sat there, reading her book while Mr. Ouellette explained that she had to come back inside the building. Mother was called to come get Student. When Mother arrived, Student was sitting on a bench outside the school office. While Mother was in the office, Student ran outside to Mother's car. In the car going home, Student was very angry, screaming at Mother, throwing water bottles at Mother's head, and kicking at the windshield with her feet.

29. Mr. Ouellette suspended Student for one day for this incident. After the suspension, Student returned to school on Tuesday, October 9, 2012. The following day, Wednesday, October 10, 2012, Student cried and screamed at Mother before school, saying she did not want to go back to Bell.

October 2012 Incident, Hospitalization and Parental Placement at Oak Grove

30. On October 12, 2012, Student did not go to school. She had a violent tantrum at home after Mother encouraged her to go to school. She pushed and shoved Mother, started raging and throwing items, and locked herself in a room, banging her head against the wall. Mother called the police for assistance; this was the first time she had done so. When the police arrived, they handcuffed Student, put her on a gurney and took her to the hospital at University of California, Irvine, where she remained for 12 days.

31. After nine days in the hospital, the hospital case manager told Mother that Student could not remain in the hospital indefinitely. The case manager recommended that Mother investigate "level 14" residential treatment centers in Utah and New Mexico. The "level 14" designation indicated a lockdown facility. Mother asked if there were any closer options, and the case manager said there were no "level 14" facilities in California but there were "level 12" non-lockdown facilities, and recommended Oak Grove. Mother called Oak Grove, which agreed to admit Student.

32. Student was discharged from the hospital on October 24, 2012. Her discharge diagnoses were attention deficit hyperactivity disorder, bipolar disorder, oppositional defiant disorder and reactive attachment disorder. The discharge instructions for ongoing case management were that Student's emotional, medical, psychiatric, nutritional, educational and safety needs would be managed by Oak Grove. The hospital faxed Student's records to Oak Grove for continuity of care.

33. Student was medicated when discharged to Mother's custody from the hospital. Mother transported her to Oak Grove, which admitted her on October 24, 2012.

34. Oak Grove was a "level 12" residential facility that provided services to emotionally disturbed individuals aged six-to-18 who had been determined as unable to function in a non-residential educational environment. Its residential dormitories and some classes were segregated by sex. The dormitories, school, and therapist's offices were all located in close proximity. Classes were taught by special education teachers with the assistance of classroom and campus aides who rotated through the classes and dormitories. Students were monitored 24 hours a day, seven days a week. When not in class, they were monitored by dormitory staff and counsellors, who were available to help with any difficulties. Staff were always located in close proximity to the classrooms, or available by phone to come from the dormitories. Oak Grove also had a day program for non-residential students. Its services were paid for by various sources, including local educational agencies pursuant to IEP's.

35. At intake, Student was assessed for mental status and risk of self-harm by Oak Grove staff psychologist, Dr. Maria Flax. The purpose of this assessment was to put in place appropriate safety measures for the dormitory. Student presented as anxious, angry and labile. Student denied suicidal or homicidal ideation. She reported auditory hallucinations telling her to bang her head. She was reactive, had difficulty sitting still, and exhibited impaired concentration and limited problem solving skills. Increased safety measures and close monitoring by the clinical team were warranted. Student was also given a psychiatric evaluation by the Oak Grove staff psychiatrist, which generated a global assessment functioning score of 35. This score indicated low, impaired functioning, low ability to care for herself, interact with the environment or function socially.

36. Mother did not notify District of these events at the time because she was in a "state of crisis." It did not even occur to her to notify District at that time. Mother acted reasonably, pursuant to medical discharge instructions following Student's emergency hospitalization.

37. On October 28, 2012, Student's therapist, Ms. Hornyak, issued a report that recommended residential treatment. Ms. Hornyak's opinions were informed solely by her clinical treatment of Student and information she obtained from Student and Mother. Ms. Hornyak did not review Student's educational records. She had had no interaction with District personnel, and had not observed Student any time since Student moved from general to special education in the fifth-grade 2010-2011 school year.

November 2, 2012 Addendum IEP

38. Sometime after October 24, 2012, the date of Student's admission to Oak Grove, and October 31, 2012, Oak Grove told Mother that placement there could be obtained through an IEP. Mother promptly requested an addendum IEP meeting to discuss the Oak Grove placement.

39. District convened the IEP team by a notice dated October 31, 2012. The meeting took place on November 2, 2012. The participants were Mother, Ms. Sollitto, Mr. Guevara, school psychologist, LaTisha Vacairo, program supervisor, Ryan Loeberger, Ms. Lindgren, and Mr. Oullette. No one from Oak Grove attended. Ms. Vacairo did not know Student, although she had occasionally seen her on the Bell campus. Mr. Loeberger did not know Student and served as the note-taker and administrator at the meeting. The other District team members, Ms. Sollitto, Ms. Lindgren and Mr. Oullette had known Student only during her five-week tenure at Bell. No District members of the team had known Student at elementary school. By the time of the meeting, Ms. Gibson had retired. At the meeting, Mother indicated she was unable to manage Student at home, and she feared for future tantrum and rage episodes. Mother discussed Parents' private placement of Student at Oak Grove, and requested educational placement there through Student's IEP.

40. The District members of the IEP team reported on Student's behaviors during the four-to-five weeks while she had been at Bell. Aside from the paper-throwing incident that led to Student's October 5 suspension, her teachers did not note any physically aggressive behaviors, but verbal outbursts occurred two-to-three times per week in history class. Student reportedly had been able to follow her BSP. Student left class to go to the nurse often, two-to-three times per week, typically with permission, reporting that she was sick. If not allowed to leave, or when asked to do a non-preferred activity, she became defiant and argumentative, and walked out of the class without permission. Twice she had been tracked down for leaving a room. This behavior impeded her learning because she missed instructional time when out of class. Her outbursts disrupted the class and impeded the learning of others. The District members of the team did not believe that Student demonstrated the level of behaviors at school that would warrant a placement in a residential setting.

41. The IEP team revised Student's previous BSP that had been in place since Student's initial May 14, 2010 IEP. The behaviors targeted by the revised BSP were leaving class and verbal outbursts. The recommended strategies to address the problem behaviors were breaking down work into small chunks; modifying the workload; allowing frequent breaks; providing private work areas and a quiet area; preferred seating, checking in with Student frequently, modelling of desired behaviors, role plays, and other reinforcements.

42. The IEP also offered 30 minutes weekly individual counseling services. This was the first time any District counselling had been offered. Parents did not consent to the addendum IEP.

November 2012-March 2013

43. After Student was at Oak Grove for about 30 days, on November 24, 2012, Dr. Flax in collaboration with the family and staff at Oak Grove generated a comprehensive treatment plan. Its purpose was to set treatment goals, based on Student's behaviors and risk factors. The presenting problems were mood instability; severe emotional, physical and sexual abuse; and academic difficulties. Student's family was described as honest and supportive. Student was described as emotionally reactive, defiant to authority, and with a history of extreme aggression, processing and learning difficulties. The treatment plan set long- and short-term goals for lessening Student's social isolation, tantrums, frustration, aggression, elopement; self-injurious and destructive behaviors; and hallucinations. In terms of her academic difficulties, the treatment plan noted her history of elopement. It set long and short-terms goals of reducing these incidents.

44. Student's day at Oak Grove consisted of chores, meals, classes and after-school activities including group therapy or anger management therapy. There was very little unstructured time. She was monitored by a psychiatrist on staff at Oak Grove, who prescribed and monitored her medications. She was provided individual therapy and case management services by Dr. Flax, who consulted with the treating psychiatrist regarding Student's behavior and moods. The treatment team consisted of the psychiatrist, therapist, teachers, staff and Oak Gove's clinical director, who along with Student, attended monthly treatment team meetings to adjust goals and assess progress.

45. Oak Grove monitored Student's progress on her treatment goals with monthly and quarterly reports. These compiled data that were taken regularly by teachers and staff through use of a daily point sheet that followed Student across settings, 24 hours a day. The reports monitored Student's global assessment functioning, and tracked incidents of non-compliance, tantrums, not accepting or challenging answers, property destruction, self-destructive behaviors, physical aggression, hallucinations, self-isolation and elopement both from school and outside of school hours. The reports showed that Student's progress was not consistent. In some instances it worsened. For example, her global assessment functioning at intake was 35; by January 2013 it improved to 42; but then decreased by April 2013 to 40. Her incidents of noncompliance decreased from 118 in October-November 2012, to 78 in the mid-December 2012 time period. But it then spiked to 275 in January-February 2013 and 279 in February-March 2013.

46. Student's case manager and homeroom teacher, Amber Nicklas, recalled that when she first arrived, Student left class without permission and was found by staff, approximately three times per week. This improved over time, to an average of

one-to-two times per week. Student had average grades throughout her tenure at Oak Grove and worked at grade level academic standards.

March 2013 Triennial Assessment

47. District conducted a comprehensive triennial assessment dated March 21, 2013. District school psychologist, LaTisha Vacairo, conducted two observations of Student's placement at Oak Grove, during which she saw no significant behaviors. Student's Oak Grove teachers reported that Student became easily frustrated and agitated, struggled with following directions, had little patience, demanded immediate responses and attention, did not appropriately ask for help, yelled, screamed, cursed, expressed negative comments toward peers, and often used foul language and left class without permission when she was upset. Ms. Vacairo asked Oak Grove teachers and staff to complete the Behavior Assessment System of Children, second edition, an instrument used to evaluate the behavior and self-perceptions of children and young adults. Scores in the clinically significant range suggest a high level of maladjustment. Scores in the at-risk range identify a significant problem that may not be severe enough to require formal treatment, or may identify potential of a developing problem that needs careful monitoring.

48. According to the ratings from Student's Oak Grove teachers, she received scores in the clinically significant range on the following scales: hyperactivity, aggression, conduct problems, depression, attention problems, learning problems, atypicality, withdrawal, adaptability, social skills, and functional communication. She was reported to threaten to hurt others often, and was easily annoyed by others almost always. In class, she often or almost always lost her temper too easily, defied teachers, argued when denied her own way, called others names, was easily distracted from class work, had a short attention span, acted strangely, seemed out of touch with reality, seemed unaware of others, broke rules, got into trouble, disobeyed, used foul language, was negative about things, was easily upset, acted without thinking, had poor self-control, disrupted others' activities, interrupted others when they were speaking, had trouble keeping up in class, complained that lessons went too fast, and refused to join group activities.

49. Ms. Vacairo also administered standardized assessment instruments to Student to determine her cognitive abilities, and academic achievement. Consistent with past testing, Student demonstrated average or borderline cognitive ability, and average ability in reading and writing, but weaker math skills.

March 21, 2013, IEP

50. District convened an annual and triennial IEP team meeting for Student on March 21, 2013, to review her triennial assessment and to develop an offer of placement and services. The team members who participated in this meeting were: Parents, counsel for Parents and District, Ms. Nicklas, Dr. Flax, an Oak Grove administrator, Mr. Loeberger, Ms. Vacairo, Bell Principal Frank Mackay, a school nurse, Ms. Sollitto,

speech language pathologist, Suzanne Trader, and an occupational therapist. Aside from Ms. Sollitto, all of Student's teachers from Bell were excused from participating in the meeting. The District participants who knew Student were familiar with her only for the five weeks she attended Bell.

51. Oak Grove reported that Student was inconsistently able to monitor her frustration and demonstrate calming techniques. She continued to struggle using her coping skills. She used inappropriate language and had frequent outbursts. Student's behavior was inconsistent and she appeared to be more easily frustrated than when she first entered the program; she did not make as much progress as they had hoped.

52. Student's social-emotional development present levels of performance stated that she took pride in her work and was helpful, but demonstrated negative attention-seeking behaviors and became easily agitated and frustrated. She had difficulty listening to and following instructions. She had little patience and became upset if the teacher did not provide immediate assistance or feedback. She did not ask for help appropriately and yelled, screamed, cursed and demanded immediate attention. When frustrated or upset, which happened easily, she used foul language and walked out of class without permission. She struggled to complete class and homework consistently, struggled with working independently, and became easily distracted and off-task.

53. The IEP team proposed annual goals in writing, math, reading and articulation. The team proposed two goals in the area of social-emotional development. The first was that within a year, Student will be able to monitor her frustration level and use those same techniques to help herself from not yelling or throwing objects during class times. The second was that within a year, Student would refrain from entering arguments and or conversations which did not involve her.

54. The District's offer of placement was the same as it had been at the November IEP, the special day class at Bell. As in November, District offered 30 minutes individual counselling. The IEP team recommended continuing Student's BSP developed at the November 2012 IEP, without any modifications. District offered additional counseling, 60 minutes weekly to be provided by a nonpublic agency, with two, 30-minutes monthly sessions of parent counselling and 30 minutes monthly consultation to District staff to be provided by the same nonpublic agency. Following the meeting, by a letter dated March 27, 2013, District also offered an Intensive Behavior Instruction aide, trained in behavior strategies and under the supervision of a Board Certified Behavior Analyst to assist Student with behavior and social skills, both in class and during transition times at school. The Intensive Behavior Instruction aide would be provided for the full school day for the remainder of the 2012-2013 school year, and would carry over into the 2013-2014 school year for at least the first 30 days, at which time the service would be reviewed by the IEP team.

55. Ms. Vacairo and Mr. Loeberger felt this offer was appropriate because Student's behaviors had been manageable at Bell. In so determining, they relied on the

District team members who had known Student while at Bell, and who had attended the November IEP meeting.

Student's Expert Witness

56. Dr. Jack Schnel assessed Student privately and issued a report dated November 1, 2013. He concluded that Student's impulsive rages and explosions, non-compliant behaviors, and needs for immediate feedback and emotional support could not, in his opinion be provided for, based on the IEP's offered by District.

57. Dr. Schnel held a Ph.D. in Educational and Counseling Psychology and was a licensed Clinical Psychologist, as well as a former teacher who held a California teaching credential. He was a practicing school psychologist for 35 years, and had a private practice as a therapist. He was a Diplomate of the American Board of Professional Psychology, the analog for psychologists to physicians' board-certification. He consulted to both school districts and families, specializing in the evaluation, diagnosis and treatment of emotionally disturbed children and adolescents in hospital and school settings. Dr. Schnel's credentials were extensive. His demeanor as a witness was credible and thoughtful.

58. Dr. Schnel reviewed Student's file to assess whether he could, in good conscience, support her position. His practice was to distinguish between emotionally disturbed students who required residential treatment, and socially maladjusted or delinquent children who did not; he considered himself a conservative judge of the difference. He analyzed the depth of the individual's needs, to assess whether the youngster could or could not function in a public or nonpublic school, or whether their needs required the more structured residential environment.

59. Dr. Schnel met with Student three times. He interviewed the family and reviewed Student's health history. Like Ms. Hornyak, whom he knew and respected professionally, he had never before seen the degree of abuse and neglect as was experienced by Student. He interviewed Student's Oak Grove teachers, who reported that Student demonstrated impulsive, inattentive, aggressive and uncooperative behaviors in the classroom that were disruptive. She reportedly became aggressive when not getting her way; was verbally abusive towards staff and peers; destroyed property and bullied peers.

60. Dr. Schnel utilized a variety of formal testing instruments, focusing on Student's functioning in the school environment. Dr. Schnel concluded that Student's overall intellectual ability was in the average range, and her overall academic skills were average with a weakness in math, where her scores were low average. Utilizing the Bender Visual Motor Gestalt instrument, which measures visual motor integration skills, Dr. Schnel concluded that Student exhibited an impulsive and disorganized approach to environmental tasks and situations, consistent with the diagnosis of attention deficit hyperactivity disorder and organic brain injury. Utilizing the Achenbach Behavior Rating Scales, which he administered to Mother, Student, Oak Grove teachers and Ms. Gibson, he concluded that the results reflected clinically significant levels of attention problems, rule-breaking behavior

and aggressive behavior. Dr. Schnel did not administer any instruments to the District teachers who taught Student during her five weeks at Bell.

61. Dr. Schnel concluded that Student's internal state was fearful, illogical and chaotic. Her behaviors may be explained by persecutory feelings of being controlled by others. Thus, she exploded when not controlling her own environment, which made her behavior appear as illogical. He believes her case was very acute, and she was likely to have serious impairment of functioning well into her future.

62. In Dr. Schnel's opinion, the March 2012 IEP did not offer sufficient goals or services to address Student's needs. The IEP offered no mental health assistance or counselling. Dr. Schnel found the paucity of the offer "astounding" in light of the extensive information in the record about Student's pathology. He levelled similar criticism of the November 2012 IEP goals and services. Although in this IEP District did, for the first time, offer counseling, it was too little and too late, in Dr. Schnel's opinion. In Dr. Schnel's opinion, had Student remained at Bell, the good behavior exhibited during the first five weeks would not have lasted. In his opinion, the behavioral techniques noted in Student's BSP's, in a comprehensive middle school, would not be sufficient to meet her emotional and scholastic needs. The March 2013 IEP, although adding mental health and counseling services, and aide support, was in his opinion inadequate, since Student by then required a higher level of care.

63. Dr. Schnel recommended Student to remain in a residential setting. He also recommended individual family and group therapy and medical monitoring. He recommended a residential treatment center that provides a structured therapeutic environment, with coordination between the school and residential treatment, and with coordinated overall goals overseen by mental health professionals.

Student's Current Functioning at Oak Grove

64. Behaviorally, Student has had ups and down. At the time of hearing, Student was continuing to have frequent outbursts in class, approximately one-to-two per period, or six-to-12 throughout the school day. She made progress in her ability to self-correct and to wait for immediate feedback. She remained resistant to criticism and challenged staff. She was unable to accept correction. Ms. Nicklas saw Student make progress in her annoyance levels, temper, argumentativeness, distractibility, strange behaviors, awareness of others, following of rules, use of foul language, self-control, monitoring of frustration, and use of coping skills. Although still struggling, Student made progress in all areas and was much improved in some. She no longer threw objects in class. She was better at working with peers and taking correction. She was also progressing academically in writing and math and was working at grade level. Ms. Nicklas, whose demeanor on the stand was direct, straightforward, firm, distinct and no-nonsense, felt that her classroom was sufficiently structured, and met Student's academic and behavioral needs. Ms. Nicklas would rate Student as progressing on the

behavior goals in the March 21, 2013, IEP. Ms. Nicklas opined that the Oak Grove placement met Student's academic and behavioral needs.

65. Dr. Schnel observed Oak Grove twice, once in 2013 and once in 2014. He opined that it met Student's needs.

Costs

66. Student has attended Oak Grove since October 2012. Parents' out-of-pocket expenditures in the amount of \$21,852.44 to-date have been solely for the educational component of Oak Grove's program. Parents have also incurred, but not yet paid, the additional amount of \$1,866.24 owed to Oak Grove, for a total of \$ \$23,718.68.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq³; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: to ensure that (1) all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.

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

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

3. “Related services” are transportation and other developmental, corrective and supportive services, specifically including psychological and counselling services, that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd.(a).) In general, an 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.)

4. 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.)

5. 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).) 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: Did District deny Student a FAPE by failing to offer an appropriate placement and services to meet her mental health and behavioral needs?

6. Student contends the special day class at Bell was not an appropriate placement because it did not and could not address her severe behaviors and mental health needs, and that District therefore denied Student a FAPE in the March 21, 2012, IEP, the November 2, 2012 addendum IEP and the March 21, 2013 IEP. District contends the absence of formal suspensions demonstrated Student did not have severe difficulties, the level of behaviors at school did not warrant a placement in a residential setting, and Student's problems were home-based.

7. 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 *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

8. Whenever a child's behavior impedes his learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment (LRE). (*Ibid.*) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149; *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028.

9. An analysis of whether a residential placement is required must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1464, 1467.) If placement in a public or private residential program is necessary

to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104.)

10. School districts are required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) The term "supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate in accordance with the LRE mandate. (20 U.S.C. § 1401 (33).) School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

11. The Ninth Circuit follows a four-part test on the question of whether a placement is in the LRE. The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child will have on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (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 LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R. v. State Bd. of Educ.*, *supra*, 874 F.2d at p. 1048.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options (*Id.* at p. 1050).

12. 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 her 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 barricaded herself in the school bathroom, screamed, yelled, cleared items off desks by sweeping them with her arm, and turned over desks. On occasion Ms. Gibson cleared the entire classroom of all the other students for their and Student's safety. Student threw pencils, pinched the other children, and hit and bit Ms. Gibson. Student exploded when she was told no, was defiant to criticism, and unfriendly to other students. Because a full-time general education placement was not appropriate for Student, the focus must be on the continuum of placement options.

13. The March 21, 2012, IEP placed Student in a special day class setting for the duration of the 2011-2012 school year, with no counselling or mental health services, and left in place Student's 2010 BSP without any modifications, despite Student's extreme behavioral and psychological needs. On March 21, 2012, Student was in Ms. Gibson's sixth grade special day class at Enders. Ms. Gibson's and Mother's credible testimony established that for the entire sixth grade, despite Student's good relationship with Ms. Gibson, Student's behavior was violent and problematic. Despite Ms. Gibson's use of every behavior strategy she knew, including all those listed on Student BSP, Student nevertheless caused, on average, two behavioral episodes per day in Ms. Gibson's class and had to be physically restrained twice weekly or more. Ms. Gibson had no background with emotionally disturbed children. Although she did what she could for Student, she could not meet Student's needs. Based on what District knew at that time about Student's behavioral and emotions needs, the offer was not appropriate.

14. Student's performance in the special day class at Bell demonstrated that Student had no tolerance for people who contradicted or corrected her; misinterpreted social cues; went into rages with throwing, screaming and cursing, which caused other students to be afraid of her; became irritated and frustrated easily; and would often become verbally aggressive. Student was aggressive verbally and physically with adults both at school and at home. Thus, this class with no counselling or behavioral supports was not reasonably calculated to confer some educational benefit on her; her unique educational needs included not only her academics but also her, social, health, emotional, communicative, physical and vocational needs. (See *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106, [holding a district placement inappropriate, and residential treatment necessary, to provide FAPE to an abused adopted student with reactive attachment disorder, oppositional defiant disorder and other diagnoses, with a long history of conduct problems and verbal and physical aggression].) As credibly attested to by Ms. Hornyak and Dr. Schnel, Student required a more therapeutic educational environment to meet her mental health and behavioral needs.

15. District attempted to rebut the extensive evidence of Student's behavioral problems in sixth grade, arguing that no formal suspensions were issued between 2010 and October 5, 2012, and thus that there were no behavioral incidents. However, the cessation of formal suspensions did not indicate that Student's behaviors were adequately managed. Rather, Ms. Gibson simply did not issue formal suspensions, no matter how unmanageable Student's behaviors were. Likewise, Ms. Gibson's report cards, while emphasizing the

positive, did not rebut her credible testimony about what was actually occurring in the classroom. District, through Ms. Gibson, the campus aide at Enders, and the assistant principal and school principal, was aware at the time of the March 2012 IEP of the numerous incidents Student caused in class.

16. For the same reasons, the March 2012 offer was also not appropriate as it related to the upcoming seventh grade, for which District offered the special day class at Bell with no counselling or mental health services, no modification of Student's 2010 BSP, and no plan for making the transition from the elementary to the middle school environments. At hearing, Ms. Gibson opined that the offer was insufficient to address Student's needs, but she did not propose additional goals and services because she was uncertain what supports would be in place in middle school.

17. The November 2, 2012, addendum IEP likewise denied Student a FAPE. It offered the special day class at Bell, 30 minutes weekly individual counseling services, and modified Student's BSP to target behaviors she had exhibited while at Bell, specifically leaving class and verbal outbursts. District's contention at the November 2, 2012, IEP that it could provide for Student's needs was based solely on information regarding her functioning for the five weeks she was at Bell, and failed to take into account either her previous record of severe behaviors, or her then-current status. By the time of the IEP meeting, Student had been released from a psychiatric hospitalization under medical directives to be placed into residential treatment, with which directives Mother complied. The discharge instructions for ongoing case management, stated that Student's emotional, medical, psychiatric, nutritional, educational and safety needs would be managed by Oak Grove, and that Student's records had been faxed to Oak Grove for continuity of care. At intake into Oak Grove, Student was assessed for mental status and risk of self-harm. Oak Grove found that increased safety measures and close monitoring by the clinical team were warranted, and that Student's global assessment functioning score of 35 indicated low, impaired functioning, low ability to care for herself, interact with the environment or function socially. Even while she had been at Bell, aside from the paper-throwing incident that led to Student's October 5 suspension, verbal outbursts occurred two-to-three times per week, Student left class two-to-three times per week, and Student became defiant if not allowed to leave, or when asked to do a non-preferred activity. Nevertheless District members of the team did not believe that Student demonstrated the level of behaviors at school that would warrant a placement in a residential setting. In relying on an impression of Student based solely on the five-week stay at Bell, District inappropriately disregarded information in its possession regarding Student's extensive previous behavioral problems and her then-current status, contrary to Ms. Hornyak's treatment plan. At hearing, Dr. Schnel credibly opined that the November 2012 IEP offer did not address Student's then-current behavioral or mental health needs.

18. The March 21, 2013 IEP, as amended by District's March 27, 2013 letter, denied Student a FAPE. The offer, made while Student was at Oak Grove, did not sufficiently take into account Student's then-current levels of functioning as reported by Oak

Grove teachers and staff on the triennial assessment conducted by Ms. Vacairo. According to the ratings from Student's Oak Grove teachers, reflected in Ms. Vacairo's assessment report, Student received scores in the clinically significant range in hyperactivity, aggression, conduct problems, depression, attention, learning problems, atypicality, withdrawal, adaptability, social skills, and functional communication. Her behaviors at Oak Grove included threatening to hurt others often, defying and arguing when denied her own way, seeming out of touch with reality, seeming unaware of others, breaking rules, and other disruptions. Her in-class behaviors countered District's contention that Student's problems were home-based.

19. Student's present levels of performance on the IEP accurately reflected that Student was only able to monitor her frustration and demonstrate calming techniques 50 percent of the time, used inappropriate language, had frequent outbursts, demonstrated negative attention-seeking behaviors, was easily agitated and frustrated, had difficulty listening to and following instructions, had little patience, did not ask for help appropriately, yelled, screamed, cursed, demanded immediate attention, used foul language and walked out of class without permission. Despite the present levels, the March 2013 IEP did not revise Student's BSP offered in November which had only targeted Student's leaving class and verbal outbursts. In sum, despite the addition of 60 minutes weekly counseling, with parent counseling and consultation, and an aide for the remainder of the 2012-2013 school year, Student's severe emotional and behavioral needs could not be appropriately managed by District's March 2013 offer of a special day class placement. Although adding mental health and counseling services, the March 2013 offer was inadequate, since Student by then required a higher level of care.

20. The evidence established that Student had especially unique needs. Student had a long history of aggressive behaviors, failure to comply with teacher instructions, eloping, destruction of property, and threatening physical harm to others. The nature of Student's social skills and communications deficits were so severe that placement in the special day class was not appropriate and could not meet Student's unique needs, even with substantial accommodations and related services that were not originally offered. The District placement was inappropriate because of the severity of Student's behaviors, and the lack of consistent behavior supports during the school day. Student's needs required intensive therapeutic support on a regular and consistent basis, which could not be provided in District's placement in order to achieve some educational benefit. In sum, based upon what the IEP team knew at the time of the March 2012, November 2012 and March 2013 IEP team meetings about Student's behavior, emotional dysregulation, and struggles, it was not objectively reasonable to offer placement in the special day class. Accordingly, Student has met the burden of proof by a preponderance of the evidence that District's offers of placement did not provide Student a FAPE.

REMEDIES

21. Student prevailed on the single issue presented. As a remedy, Student requests reimbursement for out-of-pocket costs, and prospective placement at Oak Grove, or another appropriate residential treatment center. District disagrees, and contends that no remedy is warranted, and that reimbursement should be denied because it offered Student a FAPE, and because Mother did not give District advance notice of the placement at Oak Grove.

22. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (*Burlington*)(reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (*Carter*) (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

23. Reimbursement may be reduced or denied if, at the most recent IEP team meeting the parents attended prior to removing the child, the parents did not inform the IEP team they were rejecting the proposed placement, and state their concerns and intent to enroll their child in a private school at public expense; or at least ten business days prior to the removal of the child, the parents did not give written notice to the public agency of this information. (20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(e).) Reimbursement may also be reduced or denied if, prior to the parents' removal of the child, the public agency provided the required notice to the parents of its intent to evaluate the child, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parents did not make the child available for the evaluation. (20 U.S.C. § 1412(a)(10)(C)(iii)(II); 34 C.F.R. § 300.148(e).)

24. Reimbursement must not be denied for parents' failure to provide the required notice if the school prevented them from providing notice, the district did not comply with its notice requirements, or compliance with the notice requirement "would likely result in physical harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb), (cc); 34 C.F.R. § 300.148(e)(1)(ii), (iii).) The cost of reimbursement may, in the discretion of the ALJ, not be reduced for failure to provide the required notice if compliance with the notice requirement "would likely result in serious emotional harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 C.F.R. § 300.148(e)(1).)

25. Reimbursement may also be reduced or denied if the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, (*Patricia P.*) the Court of Appeals held that a parent who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.” In *Patricia P.* reimbursement was denied where the parent had enrolled the child in a private school in another state and at most offered to allow an evaluation by district personnel if the district personnel traveled to the out-of-state placement. (*Ibid.*)

26. To provide a pupil a FAPE, the pupil is entitled to relief that is “appropriate” in light of the purposes of the IDEA (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, at p. 370.) ALJ’s have broad latitude to fashion equitable remedies appropriate for denial of FAPE. (*Burlington, supra*, at p. 370; *Parents v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.)

27. The analysis of Student’s reimbursement and placement requests requires determining whether Parent’s unilateral placement was appropriate within the meaning of *Carter, supra*, and whether equitable factors require reduction of the requested reimbursement. Here, the evidence showed that the educational program at Oak Grove was designed to provide a highly structured learning environment for students with social/emotional deficits that impeded their ability to access their education. Oak Grove included an intensive therapeutic component that provided Student with group and individual counseling, monitoring and intensive support. Student’s flat global assessment functioning scores and her inconsistent progress on her treatment goals at Oak Grove, does not establish the impropriety of that placement, but rather evidences the severity of Student’s needs. Although behaviorally, Student has had ups and downs and continued to have frequent outbursts in class, she made progress in annoyance levels, temper, argumentativeness, distractibility, strange behaviors, awareness of others, following of rules, use of foul language, self-control, monitoring of frustration, and use of coping skills, and was much improved in some. She was also progressing academically in writing and math, and was working at grade level. Thus, Student met her burden of proof that Oak Grove was an “appropriate” placement for purposes of reimbursement. Parents are entitled to reimbursement of tuition expenses incurred to-date.

28. Equitable factors do not support a reduction in the amount of requested reimbursement. Although Parents did not timely provide a 10-day letter to District notifying District of their intention to unilaterally place Student at Oak Grove, Parents acted reasonably pursuant to medical discharge instructions following Student’s emergency hospitalization. Parents were in a “crisis” situation, having been instructed that Student had to leave the hospital and be placed in residential treatment. Delay would likely have resulted in serious risk of harm to Student, who was transported in a medicated state from the hospital to Oak Grove. Student was admitted to Oak Grove on October 24, 2012, and Parents notified District of the placement no later than October 31, 2012, immediately upon learning that payment for residential treatment could be available through an IEP.

29. Mother presented a bill for tuition in the amount of \$21,852.44. Mother testified that Parents paid these amounts stated on the itemized statement produced at hearing, and have incurred but not yet paid an additional \$1,866.24. Parents are entitled to an award of \$23,718.68 for tuition expenses incurred at Oak Grove.

30. Student's request for prospective placement at Oak Grove or another residential treatment center is granted. Such a prospective placement is necessary to provide Student a FAPE, and is appropriate relief in light of the purposes of the IDEA. Student's placement shall be in a residential treatment center that provides a structured therapeutic environment, with coordination between the school and residential treatment, with coordinated overall goals overseen by mental health professionals. The evidence at hearing established that Student requires this level of intervention to access her education and obtain some educational benefit.

ORDER

1. Within 45 days of the date of this Order, District shall reimburse Parents \$23,718.68 for tuition expenses incurred at Oak Grove.
2. Student's placement shall be in a residential treatment center that provides a structured therapeutic environment, with coordination between the school and residential treatment, overseen by mental health professionals. District will pay the costs of the program, including non-medical care and room and board.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on all issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

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

Dated: April 21, 2014

_____/s/
JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings