

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2011110163

v.

FOUNTAIN VALLEY SCHOOL DISTRICT,

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FOUNTAIN VALLEY SCHOOL DISTRICT,

OAH CASE NO. 2011120391

v.

PARENTS ON BEHALF OF STUDENT.

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**DECISION**

The due process hearing in this case convened on March 12, 13, 14, 15, 16, 27, 28, and May 4, 2012, before Administrative Law Judge (ALJ) Paul H. Kamoroff, from the Office of Administrative Hearings (OAH), State of California, in Fountain Valley, California.

Vanessa Jarvis, Attorney at Law, represented Student at the due process hearing. Kenneth Campbell, student advocate, also represented Student and was present throughout the hearing. Student's Mother (Mother) and Father (Father) attended each day of the hearing. Vietnamese translation was provided by Minh-Hanh Nguyen on March 12, 13 and 14, 2012; Timothy Nguyen on March 15, 2012; Vi Nguyen on March 16 and May 4, 2012; Lee Mary Ginter on March 27, 2012; and Hue Kindybal on March 28, 2012. Student was not present during the hearing.

Jennifer Brown, Attorney at Law, represented the Fountain Valley School District (District). Abby Bickford, Director of Special Education for the District, and Robyn Moses, Program Director of the West Orange County Consortium for Special Education (WOCCSE), were also present on behalf of the District during each day of the hearing.

On November 1, 2011, Mother on behalf of Student (Student) filed a Request for Due Process Hearing naming the District as the respondent. On December 9, 2011, the District filed its own Request for Due Process. On December 14, 2011, the cases were consolidated

and a continuance was granted. On December 19, 2011, Student filed a First Amended Request for Due Process.

At hearing, the ALJ received oral and documentary evidence. The following witnesses testified: Robyn Moses, Celeste Pepitone, Mother, Lara Epling, Laurie Ferri, Abby Bickford and Joan Hersh.

At the request of the parties, the record remained open for the submission of written closing arguments. The parties filed their closing briefs on May 18, 2012. The matter was submitted on May 18, 2012.

## ISSUES

The issues for hearing and decision in this matter are as follows:

### *District's Issues:*

1) Did the District's offer of placement and services in Student's June 15, 2011, individualized education program (IEP), as amended on September 6, 2011, constitute an offer of a free appropriate public education (FAPE), such that District may implement it in its entirety without parental consent, should Student re-enroll in the District?<sup>1</sup>

2) Was the District's Behavior Intervention Plan (BIP) dated June 15, 2011, based on a Functional Analysis Assessment (FAA), appropriate such that District may implement the BIP without parental consent, should Student re-enroll in the District?

### *Student's Issues:*

1) Did the District deny Student a FAPE in Student's June 15, 2011, IEP, by failing to offer a one-to-one aide to support Student in his behaviors and social thinking in Student's general education class?

2) Did the District deny Student a FAPE by failing to implement those components of the June 15, 2011, IEP to which Student's parent provided consent?

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<sup>1</sup> The parties stipulated that the offer of goals and objectives, speech and language services, psychological services and counseling services set forth in the June 15, 2011, IEP does not constitute a denial of FAPE to Student, and does not otherwise violate the Individuals with Disabilities in Education Act.

3) If the District denied Student a FAPE in his June 15, 2011, IEP, are Student's parents entitled to reimbursement for costs and expenses incurred for Student's placement in private school for the 2011-2012 school year?<sup>2</sup>

## OVERVIEW

Student is six years old and has resided within the District during his entire educational career. During the latter part of the 2010-2011 school year, Student began manifesting serious behaviors while at school, which threatened his safety and the safety of those around him. Student attended school in the District until the beginning of the 2011-2012 school year, when his Parents unilaterally placed him at a private school. Student's private school placement followed two IEP meetings, held in June and September 2011. The District asserted that the IEP's provided Student a FAPE. The District also asserted that a BIP provided in June 2011, was appropriate and necessary to meet Student's serious behavioral needs. The District presented substantial evidence to support its contentions that the IEP's and BIP were appropriate to meet Student's individual needs at the time they were offered. Student's primary complaint was that Student's unique needs had changed since the educational plans were offered. Student's argument is misguided, as the appropriateness of an IEP must be examined at the time the educational plan was offered.

Student also disagreed with the IEP's because he believed the District neglected to offer an aide to support him in the regular education class. However, the IEP's clearly and coherently provided an aide to support Student during the regular education component of the school day. Student further asserted he was denied a FAPE because the District failed to implement the portions of the IEP which were agreed upon by his Parents. The evidence also established that the District was willing to provide the portions of the IEP which were agreed to, but was unable to do so because the Student did not attend the District's school. For the following reasons, this Decision determines that the June 2011 IEP and BIP, and the September 2011 IEP, were procedurally and substantively appropriate.

## FACTUAL FINDINGS

### *Jurisdictional and Background Information*

1. Student is a bright, six-year-old male who at all relevant times resided with his Parents within the boundaries of the District. Student is eligible for special education and related services under the primary eligibility category of autism. Student has a secondary area of eligibility under emotional disturbance (sometimes ED). Student has unique needs in the areas of pragmatic language, social/emotional skills and serious behaviors.

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<sup>2</sup> The parties stipulated that this issue would be limited to whether a FAPE was denied by the conduct alleged in Student's issues 1 and 2 only.

2. Student initially qualified for special education services under the designation of autism in 2008, when he was 3 years-old. Student exhibited developmental delays in the areas of socialization, communication, emotional/behavioral, sensory processing, adaptive and some pre-academic areas. Upon beginning his educational career and throughout the 2008-2009 school year (SY), the District provided Student related services and specialized academic instruction (SAI) in a structured, preschool, special day class (SDC) at Newland Elementary School (Newland), for the entirety of his school day. By all accounts, Student progressed academically in this placement.

3. For the 2009-2010 SY, through February 2010, the District continued to provide Student SAI in a SDC at Newland for the entirety of his school day. Student received related services in the areas of Applied Behavioral Analysis (ABA), speech and language (S/L), and occupational therapy (OT). Student, who has average cognitive abilities, continued to show academic progress in this educational program.

4. Due to Student's academic progress, the District held an addendum IEP meeting in February 2010, to modify Student's placement to include a blended preschool program for a portion of the school day. The blended program resembled a structured, high functioning SDC and focused on communication and socialization development. However, the blended program incorporated typically developing peers into the same class. The blended classroom included one credentialed Special Education teacher and two adult aides, and was limited to 15 students; 10 which were typically developing students and five which were special needs pupils with IEP's. The blended program provided a unique opportunity where Student was provided specialized instruction in a small, structured SDC, while concurrently receiving grade level curriculum with typically developing peers. Given Student's overall educational progress and transition into a lesser restrictive environment, the IEP team recommended decreasing Student's ABA services. Along with every prior IEP, Student's parents participated in this meeting and consented to this IEP addendum.

#### *Student's Behavior at Home*

5. In April 2010, the IEP team convened an annual IEP meeting for Student. The team reviewed an updated Multidisciplinary assessment which found that, although Student possessed average to above average cognitive abilities, he had deficits in listening comprehension, social language and was 'at risk' for aggression. Although Student exhibited delays in socialization and social communication skills, he had shown strong educational progress in his school program. As such, the team recommended increasing the blended preschool program for the entire school day, along with pull-out S/L services and in-home ABA services. During this meeting, Mother shared with the team that Student was increasingly exhibiting behaviors at home, such as hitting and eloping, which Mother felt constituted safety concerns. The team discussed that Student was not exhibiting similar behaviors at school, but nonetheless agreed to provide Student a Functional Behavior Assessment (FBA), and a related Behavior Support Plan (BSP), to address the at-home behaviors. Mother consented to this IEP and agreed the District could begin developing a FBA and BSP for Student.

6. The IEP team met again on May 25, 2010, to discuss the FBA and create the BSP. Pursuant to Mother's input, the BSP was developed to primarily target an increase in aggressive behaviors which had arisen at home. The targeted behaviors included hitting, kicking, whining, yelling, and/or throwing items and refusing to comply. In conjunction with this BSP and in addition to at-home ABA, the District's autism specialist also agreed to collaborate with Parents regarding the use of behavioral strategies in the home. The team and Parents discussed that, at that point, Student had not exhibited these behaviors while at school. Consequently, the team and Parents agreed that Student should remain in the blended program at Newland for the entire school day. Parents consented to the BSP and IEP. Despite the increase of at-home behaviors, Student continued to progress in the blended school program.

7. For the 2010-2011 SY, the District placed Student in the blended program at Newland for the entire school day. While Student began the school year without any notable behavior issues arising at school, a significant increase in serious behaviors manifested at school during the second half of the school year.

#### *Student's Behavior at School*

8. On March 31, 2011, the District convened an IEP meeting to discuss an increase in Student's problem behaviors at school. During class, Student was engaging in hitting, kicking, spitting, eloping and throwing items. In response to these behaviors, the District proposed to conduct an updated FBA and develop a new BSP; this time to address aggressive behaviors arising at school. Mother consented to the District developing a new FBA and BSP to address the Student's at-school behaviors.

#### *Behavioral Emergencies*

9. On April 12, 2011, prior to the completion of the new FBA and BSP, the District convened an emergency IEP meeting due to a serious behavior incident which occurred at school. The incident involved Student being defiant, destroying classroom property, urinating on the floor, spitting, tipping over furniture and throwing items at the staff. The District provided Parents a Behavior Emergency Report (BER) regarding the incident. The IEP recommended amending Student's placement to include 90 minutes, daily, in a more restrictive SDC, and the remainder of the day in the blended preschool program. The IEP team also recommended conducting a Functional Analysis Assessment (FAA) to develop a Behavior Intervention Plan (BIP), instead of developing a new FBA and BSP, as agreed to at the last meeting. The IEP team believed a BSP, even if revised, would not provide sufficient support to address the behaviors Student was now exhibiting. Mother agreed to the FAA, but not to the change in the school placement.

10. On May 4, 2011, prior to the completion of the FAA, the District held another emergency IEP to address a second serious behavioral incident which occurred at school. This behavioral incident involved Student throwing items, knocking down classroom structures and furniture, hitting staff, pulling hair, kicking staff, and spitting at school staff.

This conduct resulted in Student being physically restrained by District staff, who had been trained in a trauma-free restraint methodology called Professional Assault Respondent Training (Pro-ACT). The District provided Parents written notice of this incident in a BER. To address Student's deteriorating behaviors; the IEP team again recommended amending Student's placement to include 90 minutes in a more restrictive SDC, with the remainder of the day in the blended program. Mother again disagreed with the change in school placement.

11. On June 7, 2011, the District convened a third emergency IEP meeting to review another serious behavioral incident which occurred at school. This incident involved Student scratching and biting school staff, urinating on the floor, tearing things off the wall, kicking, screaming, stripping naked, self-harm, and throwing items. Again, District staff utilized restraint methods to physically restrain Student until his behaviors deescalated. The District provided written notice of this incident to Parents in another BER. The District did not offer modifications to Student's educational plan at this meeting because it was still in the process of conducting its FAA and because Student's annual IEP meeting was scheduled for the following week.

*The June 15, 2011, IEP*

12. On June 15, 2011, the District convened an IEP meeting for Student to develop a new annual offer of a FAPE, including planning Student's transition from Preschool to Kindergarten; to review a triennial evaluation; and to review the FAA. The IEP team reviewed Student's present levels of performance, developed new annual goals and objectives, and proposed an offer of placement and services through the end of the 2011-2012 SY and extended school year (ESY).

13. Twelve people participated in the June 15, 2011, IEP meeting. District staff members included Abby Bickford, the District's director of special programs, who attended as the administrative designee; school psychologist, Laurie Ferri; blended program SDC teacher, Joan Hersh; SDC teacher, Lara Epling; autism behaviorist, Maria Springer; speech and language pathologist, Celeste Pepitone, and; general education teacher, Pamela Blanket. The Student's Mother, Father and attorney were present, along with several of Mother's friends.

14. During this meeting, the IEP team reviewed Student's present levels of performance in pre-academic, academic, cognitive and functional abilities. The team also reviewed the Student's present levels of performance in speech and language, fine motor skills, attention, and social and emotional development. The team reviewed Student's progress from his last years' goals, including reviewing Student's progress in receptive language, expressive language, reading, writing, math, social/emotional, vocational, adaptive/daily living, and fine motor goals. Parents and their attorney participated in this discussion, including asking various question regarding the Student's progress and present levels of performance. The IEP team answered Parents' questions, and their attorney's questions, regarding Student's present levels of performance, and did not limit their

discussion regarding these concerns. The team also reviewed Student's triennial Multidisciplinary team evaluation.

15. Student's triennial evaluation was discussed and reviewed by various members of the IEP team. This evaluation was conducted by Laurie Ferri, Joan Hersh, Celeste Pepitone and Debra Farnum, the school nurse. The evaluation included a review of school records, Parent interview, Student interview, clinical observations, review of health and developmental history, the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the Behavior Assessment System for Children, Second Edition (BASC-2), the Conners' Rating Scale – Revised (Conners-3), the Woodcock-Johnson Test of Achievement, Third Edition (WJ-III), and the Wechsler Individual Achievement Test, Second Edition (WIAT-II). The school psychologist, Ms. Ferri, conducted the academic, psychological and cognitive portions of the assessment.

16. Ms. Ferri has over 30 years' experience in psychology and counseling, with over 19 years as a school psychologist. Ms. Ferri has comprehensive knowledge, training and experience in autism, attention deficit, emotional disturbance, oppositional behaviors, social skills programming and behavioral interventions. She holds specialized training in Behavior Intervention Case Management (BICM), restraint interventions and research based instruction. Ms. Ferri obtained a bachelor of science in recreation therapy in 1980 and a master's of science in counseling in 1983. She has been a school psychologist for the District since 1993, and has worked as the school psychologist at Newland for the past three years. She is very familiar with Student. Ms. Ferri previously assessed Student, and has observed Student on many occasions at school and at home. Ms. Ferri presented as a highly qualified and credible witness, who evinced a genuine and sympathetic understanding of Student's challenges. Ms. Ferri participated in the June 15, 2011, IEP meeting, where she shared the results of the triennial evaluation with Parents and their attorney, and participated in the team's FAPE offer. Ms. Ferri answered Parents' questions and their attorney's questions, and did not limit the IEP discussion in any manner.

17. Ms. Ferri shared that the cognitive test in the triennial evaluation, including the WISC-IV and WJ-III, revealed that Student's cognitive functioning was in the average to low average range. Ms. Ferri also stated that this testing indicated disparities in Student's verbal and nonverbal indexes. Ms. Ferri stated the triennial also revealed that Student has pragmatic and social speech impairments. Ms. Ferri's observations, along with inventories from the BASC-2, indicated significant concerns in areas of Student's social/emotional development, with clinically significant concerns found in the areas of aggression, hyperactivity, externalizing problems, adaptability, atypicality, interpersonal difficulties, and inappropriate behaviors in both the home and school settings. Ms. Ferri concluded that, in addition to autism, Student met the eligibility requirements for a student with an emotional disturbance. As to ED, the assessment determined that Student exhibited "inappropriate types of behavior or feelings under normal circumstances exhibited in several situations." The assessment established that when Student feels angry or frustrated from a triggering event he will sometimes act out in a physically aggressive manner. The assessment found that Student's emotional outbursts directly impact Student's learning, disrupted his time in

the classroom, and disrupted the learning of his peers. This assessment informed the team as to the Student's present, unique needs and assisted the team in composing the IEP offer.

18. Ms. Pepitone, the District's speech and language pathologist (SLP), conducted the S/L portions of the triennial assessment and participated in the June 15, 2011, IEP meeting. Ms. Pepitone received a master's of science in speech pathology in 1983 and a bachelor of arts in communication disorders in 1980. Ms. Pepitone has worked as a private practitioner and as a school SLP for various school districts for just under 30 years. While she has provided SLP services to students of varying disabilities, she has primarily served autistic students. Ms. Pepitone is very familiar with Student and has assessed him on several occasions, including conducting his first S/L assessment when Student was two years old. In addition to assessing Student, Ms. Pepitone has provided him S/L services for over three years. She also observes him in class weekly. In addition to providing services to students at Newland, Ms. Pepitone has provided S/L services at Courageous Elementary school, which is also located in the District. Ms. Pepitone's testimony was knowledgeable and provided dependable insight to Student's needs.

19. Ms. Pepitone presented the results of Student's triennial S/L assessment to Parents and their attorney at the June 15, 2011, IEP meeting. The S/L assessment revealed deficits in perspective taking, flexibility and semantics, which impact Student's academic and social functioning in the school setting. After discussing the assessment and Student's progress towards last years' goals, the District proposed new S/L goals in the areas of social language, perspective taking, thought flexibility, expressive language, semantics and syntax. The team, including Ms. Pepitone, discussed Student's needs with his Parents at this IEP meeting, including how the team believed Student's social deficits were contributing to his negative behaviors.

20. Ms. Pepitone routinely observed Student in class and has witnessed an increase in Student's negative behaviors, including hitting other students. To address Student's social skill deficits and resulting negative behaviors, the June IEP team discussed providing Student a small, structured SDC at the beginning of each school day, with a transition to a later general education classroom. The daily, structured SDC would provide Student specialized instruction each morning, along with priming before his transition into the general education classroom. Priming is the process of teaching skills in a small, structured environment prior to generalizing those skills in a larger, less controlled environment. Ms. Pepitone testified that Parents and their counsel were active participants in the IEP discussion.

21. Ms. Hersh also assisted with the triennial evaluation, including collecting data for the academic and behavioral portions of the report. Ms. Hersh is a highly qualified special education teacher who has taught the blended preschool program in the District since 2004. Ms. Hersh obtained a bachelor of science, with honors, in elementary and special education in 1974. Ms. Hersh obtained a master's of arts in special education in 1975. She has received various teaching awards, including an Excellence in Special Education Award in 2011, the Naset Outstanding Special Education Teacher Award in 2009 and the Golden

Bell Award in 2008. Ms. Hersh has been a teacher for varying degrees of handicapped students since 1975, and has been a special education teacher for preschoolers in the District since 1999. Ms. Hersh is also very familiar with Student. Ms. Hersh has been Student's teacher in the blended program, which Student has attended, first for a portion of the school day and then for the entirety of the school day, since the 2009-2010 SY. Ms. Hersh presented as a caring and thoughtful teacher who was genuinely concerned regarding both Student's academic and behavioral needs.

22. Based upon the triennial evaluation, Parent input, teacher input and a comprehensive review of Student's present unique needs, the IEP team formulated 12 new goals in the following areas: (i) social language, (ii) expressive language, (iii) behavior: eloping, (iv) behavior: physical aggression, (v) behavior: self-regulation, (vi) behavior: compliance, (vii) behavior: conflict resolution, (viii) behavior: solutions to conflict/problems, (ix) behavior: describing feelings/thoughts, (xi) behavior: modifying own behavior, and (xii) thought flexibility.

23. In addition to the 12 goals, the IEP provided the following accommodations:

- a) Specially trained adult to provide support for Student during his time in general education (except for the adult's duty free lunch);
- b) Flexibility in seating at snack and lunch;
- c) Visual supports and visual schedules;
- d) Opportunities for breaks; and
- e) Frontloading for changes in the class or schedule.

24. Following the goals and accommodations, the team provided an offer of placement and services for the 2011- 2012 SY. The offer included SAI for 105 minutes per day, from 8:00 a.m. to 9:45 a.m. daily, in the Explorer program (sometimes Explorer). Explorer is a specialized program taught by a credentialed special education teacher. Explorer provides specialized instruction in a structured educational setting with individualized curriculum. It has an adult-to-student ratio of one adult to three students. The teachers in the Explorer program receive specialized training in social thinking, social communication and ABA. There are generally less than 15 students in the Explorer program, all of whom are at grade level or higher. Similar to Student, pupils in Explorer have average to above average cognitive abilities, but have delays in social skills, pragmatic language, and behavioral delays. Explorer permits "frontloading" of social, language and behavioral skills at the beginning of the school day. Following the Explorer program, the team recommended that Student transition, daily with an aide, to a general education Kindergarten class.

25. The District's general education Kindergarten is divided into two classes, the "Early Bird" and the "Late Bird" classrooms. Each provides general education instruction at

grade level curriculum. The Early Bird class runs from 8:00 a.m. to 11:20 a.m. daily. The Late Bird class runs for a longer period of time, 9:45 a.m. to 1:50 p.m. daily and, unlike the Early Bird, includes an unstructured component, a lunch break.

26. The team discussed that to meet his unique needs and recommended goals, Student required specialized instruction from a credentialed special education teacher. District witnesses Ms. Epling, Ms. Ferri, Ms. Hersh, Ms. Pepitone and Ms. Bickford, each testified in an informed and sincere manner, and provided credible testimony that Student's unique needs required that he receive instruction in the Explorer program; which provided, in addition to daily, specialized instruction taught by a credentialed special education teacher, a weekly social skills component. To address Student's serious behavior and social communication deficits, the IEP team determined that he also required priming prior to attending the regular education classroom.

27. After discussion amongst all team members, Parents and their attorney, the team recommended that Student's educational placement consist of both the Explorer program and the Late Bird class, whereby Student would first attend the Explorer program and then transition, with an adult aide, to the Late Bird class. The team analyzed that Student, with the assistance of an aide, could generalize the social and behavior skills taught in the structured Explorer program into the Late Bird class, which includes both structured and unstructured components. Therefore, Student would first receive the specialized instruction and related services, along with priming, in Explorer, prior to attending a specific regular education class, the Late Bird class.

28. The District has one Explorer Kindergarten school program, which is located at Courageous Elementary School (Courageous). The Explorer classroom at Courageous is comparable to Student's 2010-2011 SY placement in the blended preschool program at Newland; both classes provide a high-functioning SDC with instruction from a credentialed special education teacher, while providing grade level curriculum. The Late Bird class is also located at Courageous.

29. In addition to specialized instruction in the Explorer class, the IEP provided the following related services and placement:

- a) Speech and language services at two sessions per week, 30 minutes per session;
- b) Psycho-educational services at two sessions per month, 20 minutes per session, including consultation to oversee the implementation of the BIP;
- c) Individual counseling services at two sessions per week, 30 minutes per session;

d) Placement in the general education Late Bird Kindergarten classroom from 9:45 a.m. to 1:50 p.m. daily, with an aide to support Student's needs in the areas of behavior and social thinking; and

e) ESY, which included social thinking and specialized academic instruction.

30. While Parents and their attorney participated in the development of the IEP offer, Parents did not agree with significant portions of the IEP.

31. Parents did not agree with the team's recommendation to place Student in Explorer and the Late Bird class. Regarding the placement offer, Parents wrote the following in the IEP handwritten notes:

- Replacement for late bird.
- Request early bird general education with well training [*sic*]aide support full time.

32. Parents also disagreed with Student receiving specialized academic instruction and the ESY offer. Finally, Parents disagreed with the BIP, which the District offered in conjunction with the June 15, 2011, IEP.

#### *The June 2011 FAA and BIP*

33. During the June 15, 2011, IEP meeting, the team reviewed the FAA and related BIP. The purpose of the BIP was to address Student's behaviors in the educational setting. Ms. Hersh and Ms. Ferri collected data from February through June 2011 for the FAA, including tracking the frequency of specific target behaviors. The FAA targeted behaviors included (1) eloping, (2) hitting/kicking and, (3) throwing/moving. The FAA also identified functions of Student's behavior, including seeking to avoid social demands, to get what he wants, to maintain control, and attention seeking. The FAA identified and tracked antecedents for Student's behavior, which included frequent distractions in the classroom which interfere with his functioning and task completion; pragmatic and social language deficits; and, difficulties with perspective taking. The FAA included data pertaining to instructional approaches which had been previously used with Student, and delineated preferred reinforcers for behavior management.

34. The District developed the BIP based upon the FAA, along with a thorough review of school records, a review of Student's health and medical history, an interview with Mother, daily data taken over the course of several months, and multiple observations. The BIP included objective and measurable descriptions of the targeted behaviors identified in the FAA. The three target behaviors set forth in the BIP were "eloping, hitting/kicking, and throwing /moving [objects]". A description of these behaviors was also set forth in the BIP. The BIP also included objective and measurable descriptions of appropriate replacement behaviors to be taught to Student. These included self-calming strategies, such as counting and breathing exercises, asking for help, going to a quiet area or requesting a break. The BIP

included three goals which are specific to the behaviors and interventions and replacement behaviors identified in the FAA, and the BIP correlated to the eight behavior goals established in the June 15, 2011, IEP. The BIP included a description of the interventions to be used, including 15 interventions of varying approaches, none which utilize physical restraining the Student. The BIP described in detail the circumstances for the use of the interventions. The BIP detailed the modification of antecedent and consequent events which will be implemented as necessary to prevent the onset of the targeted behaviors (eloping, hitting/kicking, and throwing). The BIP detailed contingent behavioral interventions and special behavioral interventions that would be implemented before and during any incidences of targeted behaviors. The BIP included a description of how data will be collected to record the frequency of the use of interventions, the frequency of the targeted and replacement behaviors, and included criteria for discontinuing the use of interventions for lack of effectiveness. The BIP provided that such data will be collected on a daily basis and reviewed at least every three months, along with yearly review at the annual IEP meetings. The District reviewed the BIP and all of its components at the June 15, 2011, IEP team meeting.

35. Parents and their attorney had the opportunity to discuss the BIP with the team during the June 2011 IEP meeting. The BIP review took approximately 45 minutes and was not limited in time or scope.

36. Parents disagreed with the BIP because they believed it proposed utilizing a restraint system to address Student's behaviors. Handwritten notes on the June IEP, wherein the BIP was offered, state that Mother disagreed with "Restrain [*sic*] systems through the school time." Based upon this belief, Parents refused to permit the District to implement the BIP. In an attempt to address Parents' areas of disagreement to the IEP, the District reconvened an IEP team meeting in early September, immediately following the summer break and prior to the beginning of the school year.

#### *The September 6, 2011, IEP*

37. The IEP team reconvened on September 6, 2011, to further discuss Parents' concerns pertaining to the District's annual offer of a FAPE.

38. Twelve people participated in the September 2011 IEP meeting. District staff members included Abby Bickford, Lara Epling, Laurie Ferri, Courageous school Principal Chris Christenson, general education teacher Bridget Gersi, Robyn Moses, who is the District's Special Education Local Planning Area (SELPA) director, along with the District's attorney and a Vietnamese translator. Parents attended, along with their new advocates, Jim and Wiley Campbell (advocates).

39. Mother testified that she knew translation services were available for IEP meetings and school documents, but had chosen not to request these services prior to the September meeting. Her request for translation services coincided with the inclusion of the advocates and her retention of new legal counsel, who work together for the Special

Education Law Firm (SELF). SELF also represented Student at the hearing. Mother had not previously indicated a need for translation, despite having had several special education attorneys represent her son over the past three years. During the September meeting, although a Vietnamese translator was present, at the onset of the meeting Mother stated she spoke English and did not require a translator. Following this comment, Parents did not utilize the translator and each parent spoke English intelligibly throughout the meeting.

40. The September 2011 IEP team provided five areas of clarification to Student's educational program.<sup>3</sup> First, the team reiterated that Student's stay put placement would be the Explorer class, which is the most comparable placement the District has to Student's last placement, the blended class.

41. Next, the September 2011 IEP team re-confirmed the support aide would be individual to the Student, would be with him during the entire general education portion of the school day, and the aide would be trained in ABA methodologies. Regarding the aide, the IEP document stated that Student will be provided the following:

"District's offer of a program to provide FAPE includes placement in a general education classroom with a specially trained (ABA methodology) aide..."

42. Third, per Mother's request, the September 2011 IEP team agreed to provide all of Student's related services, including speech and language, counseling, and social skills, prior to the general education portion of his day. The team agreed that it was important to minimize transitions and disruptions to Student's routine.

43. Fourth, Parents raised a new concern that they felt the length of the school day was causing Student to fatigue, which was contributing to his behaviors. While the team disagreed that Student appeared fatigued while at school, or that such had been observed as an antecedent to Student's behaviors, the team agreed to collect data of any indication of fatigue. The team agreed to reconvene an IEP meeting in October to review the data pertaining to symptoms of fatigue, and whether this impacted Student's academics or behavior.

44. Lastly, the September 6, 2011, IEP team again discussed the BIP. Ms. Moses and Ms. Bickford clearly explained the plan, specific interventions contained in the plan, and the training of staff that are responsible for implementing the interventions. Ms. Moses clearly described that consent to the BIP did not require Parents to consent to the "Emergency Behavior Interventions," which include the prone restraint methods that Parents had expressed concern about. Ms. Moses explained the restraints were not part of the BIP and would be utilized only if the BIP is ineffective.

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<sup>3</sup> The parties jointly submitted an audio recording of the September 6, 2011, IEP meeting. In addition to testimony and documentary evidence, the audio recording informed this tribunal as to what was discussed during this meeting.

45. The September 2011 meeting also provided Parents, along with their advocates, an opportunity to further discuss the team's placement offer. During this discussion, the advocates emphatically requested that the District provide the Early Bird class and eliminate the Explorer program, as desired by Parents. Advocates also suggested reducing Student's related services, including eliminating counseling and social skills. While the team considered these suggestions and various placement alternatives, during this deliberation it became apparent that the June 2011 FAPE offer, including goals, services and placement, was adeptly based upon Student's unique needs. Various team members, including Ms. Moses, Ms. Bickford and Ms. Ferri, reasoned that changing Students' placement and eliminating services, as requested by advocates, would diminish the FAPE offer, which the District was obligated to provide Student. While the advocates failed to specify any quantifiable support for their requests, they did threaten "years" of litigation if the District failed to capitulate to the Parents' desired placement.

46. Notwithstanding the threat of legal action, the team reiterated its offer to place Student in the Explorer program at the beginning of each school day, where he would receive specialized instruction, related services and priming, prior to transitioning to general education. The team discussed that, following the Explorer class, the District would place Student, accompanied with a support aide, in the Late Bird, general education class; where he would receive curriculum level instruction with typically developing peers. Any change to the June offer would diminish the FAPE offer in some manner, which was unacceptable to the IEP team. The team also reiterated its recommendation to implement the June 15, 2011, BIP.

47. The team and Parents and their advocates discussed the placement offer and BIP in prodigious detail at both the June 2011 and September 2011 IEP meetings. Similar to the June meeting, Parents and their advocates' participation at the September IEP meeting were not limited in breath or duration. Parents and their advocates were able to discuss with various, highly qualified special educators as to Student's needs, and details pertaining to the District's IEP offer. Parents refused to consent to the September 6, 2011, amendment IEP

#### *District's Witness Testimony*

48. Robyn Moses attended the September team meeting and discussed the IEP offer, including placement and the BIP, with the Parents and their advocates. Ms. Moses is the SELPA Program Director and Behavior Intervention Case Manager, has been a California school psychologist since 1989, a Pro-ACT instructor, and a presenter on autism, manifestation determinations, and behavior and emotional disorders in the school environment. She received her bachelor's of science in child development with a minor in psychology in 1987 from California State University, Northridge, and her master's of science in educational psychology and counseling in 1989 from the same institution. She holds a clear pupil personnel services credential; an administrative services credential and a professional clear administrative services credential. Similar to the June 2011 IEP team, Ms. Moses explained to Parents and their advocates the various reasons why Student required placement in the Explorer program.

49. Ms. Moses testified that Student required placement in the Explorer program for the following reasons: (1) to provide Student with direct instruction in the areas of social thinking and behavior, which is not available in a general education classroom, (2) to implement Student's goals, which require specialized instruction and a credentialed, special education teacher, which are not available in a general education classroom, (3) to have an opportunity for a trained special education teacher to frontload and prime Student for his placement in general education on a daily basis, including preparing for any changes which may occur on any given day, and (4) to allow Student to participate in the social thinking group which was only offered in the Explorer program. Ms. Moses stressed the importance of Student receiving the Explorer program and BIP to address his autistic and emotional disturbance related needs, particularly those challenges associated with Student's social, emotional and behavioral development. Ms. Moses presented as a highly qualified individual who was thoughtful and deliberative concerning Student's particular needs. Similar to Ms. Moses, Ms. Pepitone and Ms. Epling each testified credibly as to the importance of Student receiving the Explorer program on a daily basis, prior to attending the general education class.

50. Ms. Bickford similarly testified in support of the Explorer program. Ms. Bickford is the District's Director of Support Services, where she oversees all Special Education for the District. She previously served as the District's Autism, Program and Inclusion Specialists. Ms. Bickford has a master's of arts in special education, moderate/severe and multiple/CLAD teaching credentials from National University, and autism certification from the University of California, Davis. Ms. Bickford is very knowledgeable of Student and his family. She has observed Student on various occasions over several years, and has attended IEP meetings for Student and his two older brothers, who are also autistic. Ms. Bickford presented as a well-informed and credible witness.

51. In addition to the concerns delineated by Ms. Moses, Ms. Bickford credibly testified that any compromise to the Explorer program, such as providing Student the "Early Bird" general education class without the Explorer program, specialized instruction, BIP, or related services, as posited by Student's advocates, would deny Student a FAPE. Ms. Bickford stated that the desired changes would "set [student] up to fail."

52. Ms. Ferri testified that Student requires the specialized instruction and social skills development offered in the Explorer program, while being permitted to maximize his opportunity to be with non-disabled peers by allowing him a full day of general education Kindergarten. Ms. Ferri has witnessed Student attacking school staff, running naked in the classroom, urinating in the class and tantrum uncontrollably. Ms. Ferri stated that a failure to provide much needed specialized instruction to Student in the areas of social, emotional and behavioral development, including placement in the Explorer program and a BIP, would be a denial of FAPE and would be "extremely inappropriate" for Student. Ms. Ferri is a qualified special educator who presented as a believable and highly concerned witness.

53. Ms. Hersh also testified in support of the FAPE offer. Ms. Hersh stated that Student's behaviors have risen to being unmanageable absent additional support services.

Ms. Hersh has witnessed Student hitting and kicking other students, throwing objects, tearing off his clothes and running naked, tantrum and attacking school staff. Ms. Hersh has been forced to “evacuate” her classroom over 30 times between January and June 2011, as a direct result of Student’s escalating behaviors. A classroom evacuation occurs when Student’s behaviors rise to the level of being unmanageable by the teacher and classroom aides, and presents a serious risk of harm to Student, staff or his classmates. Ms. Hersh stated that an evacuation requires a termination of classroom activities, Student’s classmates being led outside the classroom to a separate campus location safely away from Student, and the calling of District staff who are trained in behavioral emergency interventions. Each evacuation lasts approximately one hour from the time Student begins the behavioral outburst until he can be calmed down; which is disruptive not only to Student’s education, but creates a significant disruption to the education of his fellow classmates. Notwithstanding Student’s serious behaviors, Ms. Hersh continues to believe that, given Student’s average cognitive abilities, he should have an opportunity to be educated in a general education classroom for a portion of the school day; so long as the general education placement is supplemented with specialized instruction such as the Explorer program and a BIP. Ms. Hersh presented as a diligent and credible advocate for Student, whose patience and ongoing diligence during a trying school year is commendable.

54. Overall, the District provided six highly qualified special educators, all of whom were directly familiar with Student and his unique needs. The District witnesses testified in a uniform and credible manner that the team considered Student’s unique needs in a deliberative, informed, and caring manner. The District’s recommendations were based upon data collected from direct observations and timely, appropriate assessments. A cohesive argument was provided that the subject IEP’s and BIP were appropriate to meet Student’s unique needs and would, if implemented, provide Student an educational benefit. The importance of providing the Explorer program prior to Student’s transition into the general education classroom, on a daily basis, along with the importance of implementing the BIP, was underscored with each witnesses’ testimony.

55. In sum, other than Mother’s testimony, Student presented no witnesses or evidence which disputed the appropriateness of the June and September 2011 IEP offers or the June 2011 BIP. Student called only two witnesses to support his case in chief, Mother and Robyn Moses. Ms. Moses acted as a representative for the District during the hearing and her testimony consistently supported the District’s contentions. Student recalled Mother as a rebuttal witness. Student presented no expert testimony to countervail the testimony provided by the District. Student failed to provide any documentary evidence, including an assessment of any sort, in support of his case.

#### *Mother’s Testimony*

##### *The Aide*

56. Mother testified that she did not consent to the subject IEP’s because they failed to include an aide to support Student during his time in the general educational

classroom. She also complained that the IEP's failed to describe that the aide would receive ABA training. However, during hearing, after it was pointed out that the IEP's explicitly offered an aide, and included ABA training for the aide, Mother testified she was content with the aide offer. No evidence was provided which impeached the quality of the District's aide offer.

### *The BIP*

57. Mother testified that her primary disagreement with the BIP stemmed from a belief it included a provision that the District staff may physically restrain Student. Mother stated she was concerned Student would be harmed if the District was permitted to implement the restraint methodologies she believed were contained in the BIP. In regard to this area of concern, Mother referred to the last page of the BIP, which provided a detailed description of restraint methods listed under the title "Emergency Behavior Interventions." Below this title, the following interventions were listed: (1) a chair restraint system, and (2) a four person prone restraint method.

58. However, prior to the section entitled "Emergency Behavior Interventions," along with the two physical restraint methods listed below this title, the BIP stated the following:

"Should the above Behavioral Interventions Plan be ineffective in stopping behavior which poses an imminent threat to the student, other pupils, and/or staff, the following emergency intervention will be utilized."

Consequently, the restraint methods were not part of the BIP. Rather, the restraint methods were emergency behavior interventions the District utilizes when there is no BIP, or when the BIP has been ineffective.

59. In contravention to Mother's testimony, Ms. Ferri, who is a highly trained BICM and school psychologist, and Ms. Moses, who is also a highly qualified BICM and school psychologist, each testified that the BIP was developed in a manner which was appropriate to meet Student's needs, and necessary to provide him a FAPE. Ms. Moses testified that the testing procedures used, the methodologies included, and even the forms used to create the BIP, were established by the SELPA and have been approved by the Orange County Department of Education. Ms. Ferri and Ms. Moses testified that the District designed the BIP to meet Student's individual needs, with the goal to decrease the need to utilize the physical restraint methods. This included developing a BIP whereby positive replacement behaviors, not physical restraints, would be utilized to diminish Student's escalating behavior. Ms. Moses, Ms. Bickford and Ms. Ferri each testified that District staff responsible for utilizing the restraints are highly trained and experienced individuals. These individuals utilize a methodology process labeled "Pro-ACT," which requires initial and on-going training. The Pro-ACT methodology is designed to restrain the student in a manner that does not harm the student or those around him. Nonetheless, the District witnesses testified the primary purpose of the BIP was to prevent the escalation of Student's behaviors

so that the need for behavioral emergencies, such as the restraint interventions which Mother disagreed with, are reduced or eliminated. In fact, the District had previously used the restraint methods indicated because Student had not had a BIP, as stated in the BER's previously provided to Parents.

60. Student also argued that the BIP was not based upon accurate data. Mother testified that a behavior inventory that she completed included incorrect responses regarding Student's behaviors. However, it was not established that this inventory was used as a basis for the FAA or BIP. Moreover, the disputed inventory responses indicated similar behaviors to Student's present conduct, per Mother's own testimony. As such, this argument was incoherent and little weight was given to this particular complaint.

61. No credible or coherent argument was provided by Student which impeached the appropriateness of the BIP, nor did Student offer an expert to counter the substantial evidence presented by the District. Student failed to provide credible evidence to establish that the BIP, or even the emergency restraints, would be unlawful or harmful. Notably, Mother testified at various times that she agreed that the remainder of the BIP, outside of the emergency restraints, was appropriate to meet Student's unique needs.

#### *The Private School*

62. Student began attending the private school, Sts. Simon & Jude Catholic School (private school) approximately two days following the September 2011 IEP team meeting. While Mother could not remember when she first enrolled Student at the private school, she remembered the enrollment process predated his first day of attendance. Based upon this timeline, it is highly likely that Student was enrolled at the private school prior to the September 6, 2011, IEP meeting. District witnesses and Mother all testified that Student had not attended, or attempted to attend, the District during the 2011-2012 SY. Mother testified that Student's attendance at the private school was based upon a unilateral, parental choice. Mother further testified that Student was not receiving any specialized instruction or services at the private school. Mother also testified that Student was not receiving aide support at the private school.

63. Student argued that the District had refused to observe Student at the private school. In this vein, Mother testified that she was worried the June and September 2011 IEP's were no longer appropriate to meet Student's needs; as it was now several months later and the District had failed to obtain updated information regarding Student. However, Mother admitted that she had prohibited the District from observing Student at the private school. She had also obstructed attempts by the District to obtain updated information pertaining to Student, including refusing to sign release of information forms. The District provided an email from Mother to the private school, which provided the following:

“[District] should not be allowed to observe [student] at SSJ [private school]’. Any contact /correspondence from and to the school district should be cleared with us first hand, for obvious reasons.”

64. Other than invoices and Mother's testimony, the Student failed to provide any information pertaining to the private school, its appropriateness to meet Student's unique needs, or Student's progress while at the private school.

65. Mother testified that Student has had behavior incidents while at the private school, including hitting, kicking and tantrums. To explain Student's difficulties at the private school, Mother reasoned it would take Student approximately one year to fully acclimate to the new school.

66. Mother also testified that she had not been told by anyone working for the District that the agreed upon goals and services contained in the June 15, 2011, IEP would not be implemented upon Student's return from the private school to a District school.

#### *Summation of Parents' Concerns*

67. Based upon Parents' notes written into the June 15, 2011, IEP, the discussion recorded from the September 6, 2011, IEP, various letters, and Mother's testimony, it is clear that Parents did not agree with placing Student in the Explorer and Late Bird classes, and instead desired that Student be placed solely in the Early Bird class.

68. However, Student failed to provide any evidence showing how the IEP's and BIP were not appropriate to meet his unique needs. To the contrary, Mother testified that Student did have serious behaviors and social impairments which manifested at school. Mother testified she was routinely informed of these challenges by District staff; Mother was kept abreast of Student's significant behavioral problems through timely BER's and frequent communication with Student's teacher and District staff. Mother had even sought help from the District when Student's behaviors had become unmanageable at home. Mother was aware that Student's behavior had disrupted his education and that of his peers. Mother also testified that she had agreed that the 12 IEP goals, which required specialized instruction and support services not attributable to the general education class, and which required the Explorer program and the BIP, were appropriate for Student.

#### *Correspondence Following the IEP's*

69. Following the IEP's, several letters were sent between the parties pertaining to the District's offer of FAPE. On June 17, 2011, Parents provided the District a letter wherein they reiterated their areas of disagreement to the June IEP. This letter reaffirmed their disagreement with the Explorer and Late Bird classes. Parents also indicated a concern that Student being pulled out of class would impact his academic development. Parents also restated their disagreement to the restraint systems they believed were included in the FAA and BIP. Finally, Parents stated they would be providing at-home ABA services and would be requesting reimbursement for these services from the District.<sup>4</sup> Also on June 17, 2011,

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<sup>4</sup> Mother implied during her testimony that Student could benefit from more ABA services; however, Student did not raise the appropriateness of ABA as an issue in the

Parents sent a separate letter to the District wherein they reiterated their dissent to the BIP, and requested that a different behavior support system be developed.

70. On July 11, 2011, the District provided a detailed, prior written notice letter to Parents, responding to each request set forth in the June correspondence. The District denied the request for Student to attend the Early Bird class. The District also clearly described that Student would be receiving aide support in the general education classroom. The letter stated as follows:

“The District will provide Student with participation in the general education setting, with aide support. The aide will have sufficient training and experience to implement all aspects of his program.”

In regard to this letter, Ms. Moses testified that she personally consulted with Ms. Bickford regarding the nature of the aide services being offered to Student, including that the aide would be specific to Student and trained in ABA and Pro-ACT methodologies.

71. On August 18, 2011, Student’s counsel provided a letter reiterating dissent to the Explorer program, BIP and ESY. Due to the areas of disagreement, Student’s counsel requested that “stay put” be provided as to Student’s placement.<sup>5</sup> This letter explained that stay put should be a classroom similar to the “blended preschool program” Student had received during the 2010-2011 SY.

72. On September 2, 2011, Ms. Moses responded to the August 18 letter. Ms. Moses acknowledged Parents’ dissent to the placement offer contained in the June 15, 2011 IEP. Regarding Student’s request for stay put placement, Ms. Moses explained that the blended preschool program did not exist for Kindergarten. Therefore, Student would need to receive his specialized academic instruction, as called for in his last agreed upon placement, in a comparable, alternative setting. Ms. Moses explained that the Explorer program was the least restrictive setting available in which to receive a comparable placement to the blended program. Similar to the blended program, the students in the Explorer program are high functioning, with average to above average academic and cognitive abilities, with similar profiles to the special education students in the blended preschool class. The teacher and curriculum are also similar to what is found in the blended class. Ms. Moses explained that the Explorer class was the most comparable to what Student received in the blended preschool program, and therefore would be considered his stay put placement.

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present hearing. There was no evidence provided by either party as to the appropriateness of direct ABA services, and such was not an issue for this due process hearing. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

<sup>5</sup> Under federal and California law, a special education student is entitled to remain in his or her current educational placement, referred to as “stay put,” pending the completion of due process hearing procedures, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a)(2006); Ed. Code, §§ 48915.5, 56505, subd. (d).)

73. Ms. Moses' letter also acknowledged that Parents consented in part to the June 15, 2011, IEP. As to the components which were agreed to, the letter stated the following:

“We are in agreement that [Student] will be provided the speech and language, psychological services and individual counseling services outlined in the June 15, 2011 IEP, which have been consented to by Parents.”

74. In regard to Ms. Moses' letter of September 2, 2011, Mother testified that her attorney had received this letter and that she understood the District had offered to provide Student the related services which had been agreed to from the June 15, 2011, IEP. Mother was unable to identify any document or District staff which conveyed an unwillingness to provide Student with the agreed upon services.

75. Following the September 2, 2011, letter, the District presented the September 6, 2011, amendment IEP, which Parents refused to sign.

76. On October 5, 2011, approximately one month after Student began attending the private school, Student's counsel sent correspondence to the District. This letter states: “On [Mother's] behalf, we hereby memorialize the rejection by [Student's] parents of placement offered by the District...” This letter further states that Mother did not believe the District offered Student a FAPE. Also contained in this letter was the first notice that Mother would be seeking reimbursement for expenses incurred by placing Student in the private school.

77. On October 24, 2011, Ms. Moses sent another letter to Student, again emphasizing the District's willingness and ability to provide the portions of the June 15, 2011, IEP which the Parents had provided consent. Ms. Moses provided substantial testimony clarifying and supporting the various letters which she had sent to Student's counsel.

78. The various letters which went back and forth between Student and District highlighted three significant matters, including (1) Student's dissent to the IEP placement offer, (2) a disagreement amongst the parties as to what a stay put placement would resemble, and (3) the District's willingness to provide the agreed upon portions of the IEP.

79. A totality of the evidence shows that the June and September 2011 IEP's and June 2011 BIP were designed to meet Student's unique needs and provide him a FAPE. The District established that the educational plans were based upon timely assessment and data, and recommended by informed, caring and credible witnesses. Parents and their representatives were able to review the educational plans with qualified District staff. The evidence also clearly demonstrated that the District offered in a coherent and understandable manner a support aide to address Student's behavior and social impairments during the general education portion of the school day. As to the District's failure to provide the agreed upon portions of the June 15, 2011, IEP, Student fell far short of substantiating that the District would have failed to provide these services had Student attended Courageous.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The present matter involved two consolidated cases. Student and the District, by seeking relief in their respective cases, assumed the burden of proving the essential elements of their claims.

### *Framework for Decision*

2. Under the Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, which meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 - 207.)

4. In *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, supra*, 458 U.S. at p. 201.) *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 “sufficient to confer some educational benefit” upon the child. (*Ibid.*)

5. 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. (*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, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

6. There are two principal considerations in claims brought pursuant to the IDEA; substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation is subject to a harmless error analysis and constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; *M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 653.)

*District's Issue No. 1: Did District's offer of placement and services in Student's June 15, 2011 IEP, as amended on September 6, 2011, constitute an offer of FAPE, such that District may implement it in its entirety without parental consent, should Student re-enroll in the District?*

7. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (Ed. Code, § 56340.)

8. An annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications; and, if 16 years or older, measurable post-secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345(a).) After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (Ed. Code, § 56380.1.)

### *The IEP Provided Student an Educational Benefit*

9. The June 15, 2011, IEP was reasonably calculated to provide Student with an educational benefit. The reasonable calculation appears in the connection between the information concerning Student and the program proposed in the IEP. The District team members used this information to establish Student's present levels of performance and to develop 12 goals, various accommodations, related services, and a BIP which addressed his needs. The discussion of a continuum of placements was limited, yet, the District discussed possibilities of general education without the Explorer program, as well as a traditional SDC without general education. Based upon all factors considered, including the least restrictive environment (LRE), the District offered Student placement in a specific regular education classroom, the Late Bird class, with a support aide, which was preempted by placement in a particular SDC, the Explorer program, with support from related services in the areas of social skills, S/L and individual counseling. (Factual Findings 12-30.)

10. The determination that the June 15, 2011, IEP offered Student educational benefit is also supported by the testimony of Student's preschool teacher, Ms. Hersh. Based upon Ms. Hersh's credible observations, Student's significant behaviors and his social deficits were disruptive in the classroom. (Factual Finding 53.) On the other hand, throughout the hearing, Mother's testimony was less than compelling and lacked the support of an expert witness or assessments. In addition to Ms. Hersh's credible testimony, the District provided expert testimony from Ms. Moses, Ms. Bickford, Ms. Epling, Ms. Pepitone and Ms. Ferri that the IEP and BIP were designed to support Student's unique academic, social and behavioral needs, and were based upon timely and appropriate data and assessment. There is no question that Student required a more structured environment, such as the Explorer program, and a comprehensive behavior plan, such as the BIP. (Factual Findings 9-11, 14-29, 33, 34 and 48-55.) There is also no question that the Parents desired a general education placement without the SDC placement component. (Factual Findings 32, 56, 57, 60, 67 and 69-78.) However, Mother does not have the authority to unilaterally determine the IEP team's offer of placement. This desire for a different placement does not define the validity of an IEP or the District's offer of placement in the LRE. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley*, supra, 458 U.S. at p. 207].) In this regard, the District witnesses were more persuasive than the Student's witness, Mother, who could not articulate or support a cohesive criticism of the placement. Mother emphatically stressed that the IEP's were inappropriate because they did not consider Student's needs as of the time of the hearing, yet provided nothing to support this theory. Further, the District had no opportunity to consider updated information pertaining to Student due to Parents' conduct which prevented the District from obtaining updated information. (Factual Findings 63.) Moreover, the IEP must only be judged by the information available to the team at the time of its development. (Legal Conclusion 5.)

11. As credibly testified by Ms. Bickford, Ms. Hersh, Ms. Pepitone, Ms. Epling, Ms. Moses and Ms. Ferri, the educational program developed in the June 15, 2011, IEP and as amended in September 6, 2011, IEP, was collaborative between all parties, including

Parents. The IEP resulted in a creative, yet balanced program for Student. Student's academics could be advanced, rigorous and at grade level, yet he would still be provided with appropriate specialized instruction in a social and behavior intensive program. He would also receive aide support during general education, and related services and support during the Explorer program so as not to disrupt his time in general education. Student would be taught at State standards, while allowing him to practice his social skills in a controlled forum. (Factual Findings 12–29 and 48-55.) The District's offer of placement and services as contained in the IEP's provided a thoughtful and deliberative program which constitutes a FAPE for the 2011-2012 school year.

12. In sum, based on Factual Findings 12 through 30 and 48 through 55, and Legal Conclusions seven through 11, the District's June 15, 2011, IEP offer, including its placements for the 2010-2011 SY, complied with the substantive requirements of the IDEA. It addressed all of Student's unique needs and was reasonably calculated to allow him to obtain meaningful educational benefit.

*Formal, Written Offer of FAPE*

13. An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).) The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526 (*Union*).) Based on Factual Findings 12 through 29 and 37 through 47, the June 15, 2011, IEP offer was as clear as it could reasonably be in its statement of the proposed beginning of services and the anticipated frequency, location, and duration of those services. In the alternative, any violation was de minimus and did no harm either to Student's education or Parents' right to participate in the decision-making process.

14. The June 15, 2011, IEP provided a clear and coherent written offer which Parents understood in making their decision whether to accept the offer. The District IEP members clearly informed Parents at the June 15, 2011, IEP meeting that they believed, based on Student's performance levels, progress and his unique needs, the appropriate placement was the Explorer program followed by the Late Bird class, which for Kindergarten would be located at Courageous. When Parents objected, the team held an amendment IEP on September 6, 2011, to discuss Parents' concerns and more elaborately clarify the program offer. After a full discussion, the District IEP team members stood by the same placement offer. This was reiterated in clear terms in the District's letter of July 11, 2011. (Factual Findings 70.)

### *The Least Restrictive Environment*

15. Both Federal and State law require a school district to provide special education in the least restrictive environment (LRE) appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general 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) (2006); Ed. Code, § 56040.1.)

16. In light of this preference for the LRE, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit Court of Appeals, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four 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 would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student.

17. Here, Student has average cognitive abilities and therefore can benefit educationally from placement in a regular class. However, Student has serious behaviors which manifest at school. These behaviors, including kicking and hitting classmates and staff, stripping naked and urinating on the floor, and damaging property, pose an immediate and serious threat to his safety and the safety of those around him. Student's unique impairments impact the non-academic benefits he is able to receive in a regular class full time. Student's unique impairments also impact his teacher and classmates. Student's class is often evacuated due to Student's behaviors, which is overly disruptive to his teacher and classmates. Accordingly, the evidence established that Student will benefit from a more restrictive special day class with specialized instruction for a portion of the school day. The District's offer for placement in the Explorer program, where Student can receive specialized instruction, followed by placement for a portion of the day in the Late Bird regular education class, was a deliberative and thoughtful reconciliation of Student's unique impairments and abilities. (Factual Findings 8–11, 12 – 30, 37-55 and 59.)

18. In sum, based on Factual Findings 12 through 30 and 47 through 55 and 59, and Legal Conclusions nine through 17, the District's June 15, 2011 IEP offer would place Student in the LRE. It would place Student with typically developing peers in all the situations in which Student's education can be satisfactorily pursued there, and in the more restrictive setting of an SDC for the individualized instruction and services that can be appropriately delivered only in such a setting.

### *Student's Complaints to the IEP*

19. In the present matter, the parties stipulated that the offer of goals and objectives, speech and language services, psychological services and counseling services set forth in the June 15, 2011, IEP does not constitute a denial of FAPE to Student, and does not otherwise violate applicable state or federal laws. In addition to this stipulation, the Student failed to raise any procedural complaints to the June 15, 2011, or September 6, 2011, IEP's.

20. Student asserted two complaints to the June 15, 2011, IEP.

21. First, Student argues that the educational plan is defective because "it failed to provide for an aide the IEP team agreed was needed." As determined herein in Legal Conclusions 44 through 62, the IEP sufficiently offered Student aide support.

22. Second, Student complains that the IEP should not be implemented for the following reason:

"District offered no evidence that the June 2011 IEP is appropriate for Student in Fall 2012, 2013, 2014 or any other time in the future."

23. Student attempts to constrict the District with an artificial Catch-22. First, Parents restricted the District's ability to obtain updated information regarding Student; Parents refused to sign release of information forms, prohibited District staff from observing Student at the private school, and prohibited the private school staff from discussing Student with the District. Following this conduct, Mother complained that the District failed to obtain information pertaining to Student's abilities while at the private school. (Factual Finding 63.) Student's argument fails as being inequitable. More importantly, the argument that the June 15, 2011, IEP is defective because it does not reflect Student's needs for school years following the subject school year, 2011-2012, highlights a serious misunderstanding of applicable law.

### *The Snapshot Rule*

24. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*) Consequently, Student's argument fails, as the District was not required to design the June 15, 2011, IEP to meet Student's needs in "Fall 2012, 2013, 2014" and so on. Rather, the District's obligation was limited to ensuring the IEP was designed to meet Student's unique needs at the time the IEP was presented. A preponderance of evidence shows that the educational plan offered Student a FAPE at the time it was presented. (Factual Findings 8-30 and 37-55; Legal Conclusions 7-18.)

25. Finally, Student's reliance on 20 U.S.C. § 1414(d)(A)(i) is also misplaced. This section provides that an IEP is updated at least annually. Here, there is no allegation that the District failed to provide Student an annual IEP. Moreover, there is no allegation that the District would refuse Parents' request for an updated IEP, should Student re-enroll in the District.

26. The testimony of each District witness regarding the appropriateness of the June 15, 2011, IEP was credible and compelling. In particular, each witness with a professional degree has extensive experience and qualifications, and has dedicated her career to the education and improvement of disabled children. The District based the June 2011 IEP on a balanced consideration of the information concerning Student available at the time of the meeting. The District IEP team members carefully reviewed such information, established Student's needs, formulated goals to address the needs, and offered a program designed to help Student make progress on the goals.

27. For the foregoing reasons, the District established by a preponderance of evidence that the June 15, 2011, IEP, and the September 6, 2011, amendment IEP, provided Student a FAPE.

*District's Issue No. 2: Was the District's Behavior Intervention Plan (BIP) dated June 15, 2011, based on a Functional Analysis Assessment (FAA), appropriate such that the District may implement the BIP without parental consent, should Student re-enroll in District?*

#### *School Based Behavior Intervention*

28. Behavior intervention is the implementation of procedures to produce lasting positive changes in the student's behavior, and 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. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).)

29. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that a local educational agency, here, the District, conduct an FAA, resulting in a BIP, when a student

develops a “serious behavior problem,” and the IEP team finds that the instructional/behavioral approaches specified in the student’s IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).) A serious behavior problem means the individual’s behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil’s IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Here, Student’s behaviors are serious, self-injurious, assaultive, cause property damage and threaten the well-being of student and those around him. (Factual Findings 8–11 and 52-53.) Therefore, a BIP is legally required. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).)

30. A BIP is “a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual’s IEP.” (Cal. Code Regs., tit. 5, §§ 3052, subd. (a)(3), 3001, subd. (h).) A BIP shall be based upon an FAA. (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) Before the BIP can be written, an FAA must be conducted. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).) An FAA must include a systematic observation of the occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).) It must also include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(B).) An FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).)

31. An FAA must include an ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(D).) An FAA must include a review of records for health and medical factors that may influence behaviors. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(E).) An FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(F).)

32. Following an FAA, the school district must prepare a written report of the assessment, which must include the following: (1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(A).); (2) a description of the targeted behavior(s) that include baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(B).); (3) a description of the rate of alternative

behaviors, their antecedents and consequences. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(C)); and, (4) recommendations for consideration by the IEP team which may include a proposed behavioral intervention plan. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(D).)

33. Under California regulations, the following criteria apply to BIP's: 1) they must be developed by the IEP team, which must include the Behavior Intervention Case Manager; 2) they must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) they must be based on an FAA, be in the IEP and used in a systematic manner; 4) emergency interventions shall not be a substitute for a BIP; 5) behavioral interventions cannot cause pain or trauma; and 6) to the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

34. The BIP must contain a statement of the frequency of consultation between the Behavior Intervention Case Manager and the parents and staff responsible for implementing the plan. In addition, the BIP must contain: 1) a summary of relevant and determinative information gathered from an FAA; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness, or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other non-educational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. (Cal. Code Regs., tit. 5, § 3052.) The California Legislature intended that if behavior interventions were used for a special education student, that such interventions "ensure a pupil's right to placement in the least restrictive environment." (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).)

35. A "behavioral emergency" is the demonstration of a serious behavior problem, that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (c).) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the school district shall notify the pupil's parent(s) within one school day whenever an emergency intervention is used or serious property damage occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(5).) After a "behavioral emergency," a "Behavioral Emergency Report" must be completed that includes: 1) the name of the student; 2) the setting and location of the incident; 3) the name of the staff or other persons involved; 4) a description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and 5) details of any injuries sustained by anyone as a result of the incident. (*Ibid.*)

*The June 2011 FAA and BIP*

36. An analysis of each of the applicable legal requirements pertaining to the development of a FAA and BIP established that the June 2011 behavior assessment and plan were appropriate. Included in the BIP were (1) a summary of information from the FAA; (2) an objective and measurable description of the targeted behaviors and the replacement behaviors; (3) Goals and objectives specific to the behavior plan; (4) a detailed description of the interventions to be used and the circumstances for their use; (5) specific schedules for recording the frequency of the interventions, and the targeted behaviors, including criteria for discontinuing use of intervention for a lack of effectiveness; (6) criteria by which the procedures will be phased-out, or less restrictive behavioral intervention techniques will be used; (7) specific dates for periodic review by the IEP team of the efficacy of the program; and (8) intervention set forth in sufficient detail so as to direct the implementation of the plan. (Factual Findings 33–35, 48–55 and 59; Legal Conclusions 28–34.)

37. The June 15, 2011, BIP was drafted on WOCCSE forms and was developed by the Orange County Department of Education. Ms. Moses testified credibly that the forms were utilized in conformance with all applicable legal requirements. The BIP form used by the WOCCSE is an integrated form, which includes both the FAA section and the BIP. Ms. Moses and Ms. Ferri credibly testified that the analysis of Student’s targeted behaviors and proposed interventions were appropriate. The District developed the BIP based upon a thorough review of records, including health and medical records, an interview with Mother, daily data, and numerous observations. The District reviewed the BIP at the June 15, 2011, IEP meeting, where Parents and their attorney were provided a full opportunity to participate in that discussion. (Factual Findings 33–36 and 44.)

38. Student’s behaviors are serious and frequent, and threaten injury to himself and others. The evidence substantiates a clear and immediate need for intensive behavior intervention. (Factual Findings 8–11, 20 and 52–53; Legal Conclusion 10.)

39. The Emergency Behavior Interventions used by the District and identified by the BIP were not part of the BIP. The restraints included in the Emergency Behavior interventions were not used in lieu of the BIP, and the primary purpose of the BIP was to decrease or eliminate the need to use the Emergency Behavior Interventions. The District provided lawful emergency behavior reports following each incident which required the utilization of an Emergency Behavior Intervention. The primary goal of the restraints was to prevent injury or self- injury caused by Student’s behaviors. The restraints included in the Emergency Behavior Interventions were lawful and evidence established that the restraints were utilized by trained staff in a manner that did not cause harm or trauma to Student. (Factual Findings 9–11, 33-35, 44 and 59.)

40. Student’s closing brief primarily argues that the BIP was defective on two grounds. First, Student argues that the BIP was based upon faulty information because Mother misunderstood the prescribed responses on an inventory pertaining to Student’s behaviors. However, the inventory cited, if material at all, was employed only as a small

component of the assessments, procedures and observations used to develop the BIP. Moreover, Mother's testimony regarding the inventory was not coherent or credible, and established that similar behaviors to what was indicated in the inventory still existed. (Factual Finding 60.)

41. Second, Student asserts "the District offered no evidence the June 2011 BIP is appropriate for Student now (May 2012) or in the future." Notably, Student failed to present any evidence showing a change in Student's behaviors since the BIP was developed. Conversely, Mother's testimony established that Student still exhibits the target behaviors that were identified in the June 2011 BIP, including hitting, kicking, and throwing, as of the time of hearing. (Factual Finding 65.) Student's argument also presupposes a legal obligation on the District which simply does not exist, that the BIP must be based upon data which did not exist at the time it was presented. Rather, the BIP, which was offered as part of Student's June 15, 2011, IEP, was necessarily based upon data which existed at the time it was offered. (Legal Conclusions 36-38.)

42. Ms. Ferri, Ms. Moses, Ms. Bickford and Ms. Hersh each testified credibly that the BIP developed was appropriate to meet Student's unique behaviors, and was necessary to provide him a FAPE. (Factual Findings 49, 51-53 and 59.) This tribunal agrees that the BIP was based upon appropriate assessment and observation of Student, met all lawful requirements, and was necessary to provide Student a FAPE.

43. In summation, the BIP did not deny the Student a FAPE. Evidence overwhelming established a clear and present need for significant behavior intervention, and the District appropriately delivered on this need. The District discussed the BIP with Parents and offered the BIP in a clear and coherent manner which Parents understood in making their decision whether to accept the BIP. It was based upon a legally sufficient FAA, parent interview, review of records, and systematic observation. It identified target behaviors and positive replacement behaviors, included a manner to track the target behaviors and scheduled reviews of the efficacy of the behavior plan. (Factual Findings 33-35.) The District carefully designed the BIP to address Student's unique behaviors and met all legal requirements.

*Student's Issue One: Did the District deny Student a FAPE in Student's June 15, 2011, IEP by failing to offer a one-to-one aide to support Student in his behaviors and social thinking in Student's general education class?*

44. A disabled child's special education program may require "related services" that are required to assist a pupil to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a)(2006).)

45. In California, "related services" are called "designated instruction and services" and can include:

"such developmental, corrective, and other supportive services (including . . .

orientation, and mobility services . . .) as may be required to assist an individual with exceptional needs to benefit from special education . . . .”

(Ed. Code, § 56363, subd. (a).)

46. One-to-one aide assistance can be included in IEP designated instruction and services if required to assist an individual with exceptional needs to benefit from special education.

47. Student asserts that the June 15, 2011, IEP failed to provide him a FAPE because it did not include an offer for aide support during his general education class. Student failed to provide expert testimony or documentary evidence to show that he required an aide to benefit from his classroom placement. Nonetheless, the District did not dispute that Student required an aide whenever he attended general education and, given Student’s serious behaviors, an aide to support Student was an area of consensus amongst the parties. (Factual Findings 8-11, 24 and 27.)

48. However, the June 15, 2011, IEP document provided, in writing and in several parts, that Student will receive an aide to support Student in his general education class. Specifically, under the accommodation section, the IEP provided that Student will receive the following:

“Specially trained adult to provide support for [Student] during his time in general education (except for adult’s duty free lunch).”

Under the Notes section, the IEP provided the following:

“District team is proposing for 2011/2012 school year: General education with an aide to support his behaviors and social thinking...(9:45-1:50).”

(Factual Findings 24, 27 and 29(d).)

49. The BIP, which is attached to the June 15, 2011, IEP, also provided that Student will be provided an “Instructional Assistant.” Letters following the IEP also clarified the aide offer. (Factual Finding 70.) Finally, the amendment IEP of September 6, 2011, stated:

“District’s offer of program to provide FAPE includes placement in a general education classroom with a specially trained (ABA methodology) aide and the specialized instruction and related services indicated below, to occur prior to the start of the general education kindergarten classroom day.”

(Factual Finding 41.)

50. As such, the IEP written documents clearly and coherently provided Student

an aide, including specifying that the aide will support Student while in general education, the nature of the support and the duration and frequency of the support.

51. Parents meaningfully participated in the IEP process, whereby they discussed with the team that Student would receive an aide and the nature and qualifications of the aide. (Factual Finding 13–16, 20, 27, 36, 38, and 41.) Student does not dispute that the IEP team discussed the aide and Parents understood that the District planned to provide an aide. Student’s closing brief stated:

“Each witness agreed that, at the June 15, 2011 IEP meeting, the team discussed Student’s need for an aide and that the District planed [*sic*] to provide one.”

52. Mother testified that she understood that Student would receive an aide to support him in the general education class, and understood that the IEP’s offered such aide support. (Factual Finding 56.)

53. The District provided six witnesses to the IEP’s and IEP process. All of the District’s witnesses testified in a credible manner that Student was offered an aide, the aide would be provided uniquely for Student, to support his social and behavioral needs whenever he was in the general education classroom, and the aide would be appropriately trained to meet Student’s unique needs. Moreover, Ms. Bickford provided credible testimony which established that the District had taken steps to implement the aide when Student returned to school. The District contended that the IEP document as a whole clearly laid out the District’s FAPE offer, and the offer was reiterated by Ms. Moses’s July 11, 2011, correspondence which reviewed the discussions at the IEP meetings, information considered by the team, the offer itself and the reasons for the team making the specific offer. The District also argued the June 15, 2011, IEP, including the aide support, was clear and understandable to the Parent, and was again clearly delineated in the September 6, 2011, amendment IEP, which was also understood by the Parents. (Factual Findings 23(a), 29(d) and 41.) Pursuant to the evidence provided, the District’s contentions are correct.

54. Student’s actual complaint regarding the aide, which was clarified in his closing brief, was that the educational plan failed to offer Student an aide *in a precise location of the IEP*. In his closing brief, Student argued the following:

“the aide was not even mentioned in section 12b of the June 15, 2011 IEP, where the District’s offer of FAPE was summarized.”

55. Student’s complaint is a highly technical objection to the IEP, which has not been accepted by the courts. There is no requirement that the entirety of the FAPE offer be in a specific portion of the IEP as long as the offer is sufficiently clear so that the parents can understand it and make intelligent decisions regarding the offer. (*Union, supra*, 15 F.3d at p. 1519.)

56. Similarly, in *Parent v. Downey Unified School Dist.* (2011) Cal. Offc. Admin. Hrg. Case Number 2011050579, a valid FAPE offer was contained in several areas of the IEP document. (See also, *Parents v. Cabrillo Unified School District* (2009) Offc. Admin. Hrg. Case Number 2009010191.)

57. Student also errs because a failure to make a formal written FAPE offer has been held to be harmless error where parents were aware of the District's offer as they fully participated in the IEP process. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 460-461.) Here, the evidence demonstrates that Parents fully participated in two IEP meetings, during which the District's provision of an aide was discussed in detail and Parents understood that an aide would be provided to Student. (Factual Findings 13-16, 20, 27, 38, 41 and 56.)

58. The aide was offered in a clear and coherent manner, and was understandable to Parents. Student's technical objection to the location of the written offer is not supported by law.

59. In his closing brief, Student also asserts that the aide offer was defective because the subject IEP's failed to set forth the qualifications of the aide, and methodologies that the District was going to use to train the aide. Again, Student's argument is misguided.

60. Student's contention is factually erroneous because the subject IEP's provided for "a specially trained (ABA methodology) aide", and the details of the aide service were discussed at the IEP meetings. (Factual Finding 41.)

61. Student's argument is also legally specious as an IEP is not required to specify the qualifications and training of service providers, and does not need to specify methodologies, including teaching methods such as group and one-to-one instruction, that are used in an offered educational placement. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 952; *S.M. v. State of Hawaii, Dept. of Educ.* (D.Hawaii 2011) 808 F.Supp.2d 1269, 1279.)

62. In conclusion, the June 15, 2011, IEP provided a clear and coherent offer, which included a support aide, which Parents understood in making their decision whether to accept the offer. The September 6, 2011, amendment IEP supplemented this offer in a clear and concise manner, which the Parents also understood. No further description of the aide services was required. The aide support as offered by the District did not deny Student an educational benefit nor did it impede Parents' ability to participate in the IEP process.

*Student's Issue No. 2: Did District deny Student a FAPE by failing to implement those components of the June 15, 2011, IEP to which Student's parent provided consent?*

63. Student complains that the District denied him a FAPE by refusing to allow him to attend general education Kindergarten without the Explorer program. Student asserts

two legal theories which would require the District to provide Student a general education placement. First, Student argues that the District was obligated to provide general education because it was an agreed-upon portion of the IEP. Student simultaneously asserts that, while placement was not an agreed-upon portion of the IEP, the District was obligated to provide Student general education as Student's stay put. Student errs on both theories.

*Student Did Not Consent to the District's Offer of Placement*

64. California Code of Regulations, title 5, section 3042, defines "educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP.

65. Here, the June 15, 2011, IEP provided educational placement using a specific and unique combination of two classes, the Explorer program and, following the Explorer program, the Late Bird general education classroom. The amendment IEP of September 6, 2011, repeated this precise placement offer. (Factual Findings 27–30, 45, 46 and 47.)

66. Student asserts that Parents' unilateral demand for the Early Bird general education class, without the Explorer program, required the District to provide such, instead of the IEP's stated placement offer. Student mistakenly cites Title 34, Code of Federal Regulations section 300.300(d)(3), as controlling legal authority. This section provides that a school district must not use a parent's dissent to a particular service as a basis for denying an agreed upon service. (34 C.F.R. § 300(d)(3) (2006).) Here, Parents failed to give unambiguous consent to the IEP team's clear and coherent offer of placement, which was the Explorer and Late Bird classes. (Factual Findings 30, 31, 45, 47, 56 and 69-78.) As such, the authority relied upon by Student is inapplicable.

67. Student further asserts that his request for the Early Bird class negated or altered the IEP's explicit placement offer, thereby requiring the District to implement Parents' unilateral choice regarding placement. Student fails to provide any legal authority to support this theory.

68. Contrary to Student's argument, a school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist.* No. 2580 (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Therefore, the District was under no obligation to provide Student a placement which was not offered in the IEP.

### *Stay Put and Limitation of Issues*

69. In the alternative, Student argues he was entitled to a general education placement of his choice pursuant to stay put.

70. A party who requests a due process hearing may not raise issues at the hearing that were not raised in his request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

71. Here, during the hearing and in his closing brief, Student argued that the District was required to provide him a general education placement of his choosing as his stay put placement. The Student further asserted the District is required to provide him compensatory education due to its failure to provide him the stay put placement of his choosing. However, Student failed to allege a stay put violation as an issue for the present case. Moreover, the District has not agreed to the addition of a stay put related allegation for this case. Consequently, this Decision will not consider the Student's stay put claim.

72. In sum, the District was willing to provide the portions of the June 15, 2011, IEP which the Parents had provided unambiguous consent to implement. The reason that Student did not receive the portions of the June 15, 2011, IEP which were agreed to, was solely Parents' unilateral action to not have Student attend Courageous. (Legal Conclusions 64 - 68 and Factual Findings 56 and 62 - 66.)

*Student's Issue No. 3: If the District denied Student a FAPE in his June 15, 2011, IEP, are Student's parents entitled to reimbursement for costs and expenses incurred for Student's placement in private school for the 2011-2012 school year ?*

73. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].)

74. Student asserts that the District should be required to reimburse Mother costs attributable to the private school he attended during the 2011-2012 SY. As clarified by Student's counsel, this request for reimbursement correlates solely to Student's claims.

75. Regarding Student's first issue, as determined in Legal Conclusions 44 through 62, the aide support as offered by the District was appropriate to meet Student's unique needs and was offered in a clear and coherent manner which was understandable to Parents.

76. Regarding Student's second issue, as determined in Legal Conclusions 64 through 72, Parents' dissent to the placement offered by the District, as facially contained on the IEP itself and reiterated in various letters from Student's counsel, along with the testimony provided at hearing, substantially showed that Parents disagreed to the placement offered by the IEP team. Moreover, Parents' request for general education was ambiguous as it did not reflect the specific placement offered by the District. The evidence further established that the District was willing to provide the agreed-upon portions of the June 15, 2011, IEP, but was unable to provide such solely due to Parents' unilateral action of placing Student at the private school.

77. Accordingly, all of Student's claims for reimbursement are denied.<sup>6</sup>

#### ORDER

1. The District's June 15, 2011, IEP, as amended by the September 6, 2011, IEP, offered Student a free appropriate public education in the least restrictive environment.
2. The District's June 15, 2011, Behavior Intervention Plan was appropriate.
3. Student's request for relief is denied.

#### PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, the District prevailed on each issue presented.

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<sup>6</sup> In its Closing Brief, absent a motion and contained solely in the "Conclusion" paragraph, the District requested that an Order to Show Cause for sanctions be issued against the Student and his counsel, pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(II). District's request for sanctions requires an accompanying motion and will therefore not be considered in this Decision.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: June 25, 2012

/s/

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PAUL H. KAMOROFF  
Administrative Law Judge  
Office of Administrative Hearings