

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014030104

DECISION

On March 4, 2014, Capistrano Unified School District filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings, State of California, naming Student.

The hearing took place before Administrative Law Judge Judith L. Pasewark of the Office of Administrative Hearings on June 2, 3, 4, and 5, 2014.

Ernest Bell, Attorney at Law, represented District. Linda Griffith, District special education legal specialist, attended the hearing on behalf of District. Shaheer Faltas attended the hearing on behalf of Journey Charter School, Student's school of attendance.¹

Mother represented Student and attended each day of the hearing. Student attended the hearing on one day to testify on his own behalf. District served Father with a copy of its complaint, and OAH timely notified Father of the hearing dates for this matter. Father did not attend the hearing, nor did he make any appearance in this matter.

¹ Neither party extensively developed the record regarding the legal relationship between Journey and District. The evidence established that District has been a primary developer of Student's IEP's even though they are implemented at Journey by Journey staff. Journey was not a party to this action, and the matter was presented as District being Student's local educational agency. Accordingly, this Decision treats District as Student's local educational agency, responsible for providing Student a free appropriate public education.

ISSUE

The sole issue in this matter is whether District's offer of placement, program and services finalized in its October 16, 2013 individualized education program constitutes a free appropriate public education in the least restrictive environment for Student.

SUMMARY OF DECISION

Student's last agreed upon IEP provides specialized academic instruction, individualized counseling services and additional program support in a general education placement at Journey Charter School. District contends this academic placement and related services can no longer meet Student's unique needs. Rather, due to Student's social-emotional and behavioral needs, Student requires a therapeutically embedded program in a smaller classroom. District has offered placement in such a classroom in a behavior intervention classroom at Wood Canyon Middle School. Student (sometimes Mother) consented to Student's goals and behavior plan modifications contained in the October 16, 2013 IEP, however, Mother does not agree with the proposed change of placement, and Student wishes to remain at Journey. Mother contends that, with appropriate modification of Student's behavior intervention plan, and with appropriate and consistent implementation of that plan, Student can be successful in his current placement at Journey. In this matter, District has shown that Journey can no longer provide Student with the educational environment he requires in order to appropriately access his education at this time. Further, District's offer of placement at Wood Canyon is appropriate, and offers Student a FAPE in the least restrictive environment.

FACTUAL FINDINGS

District's October 16, 2013 IEP

1. Creation of the IEP at issue in this matter commenced at an IEP team meeting on June 6, 2013, and was completed as District's offer of FAPE on October 16, 2013. The June 6, 2013 IEP created, in essence, an interim IEP for the beginning of the 2013-2014 school year. Student's behavior initially escalated in RSP class². Student stated it was hard for him to be in the regular classroom and then go to the RSP room. He felt he missed so much because he was in the RSP room, and he didn't like what they do; it was boring. Ms. Mayfield, Student's RSP teacher reported, Student rarely fully participated in his main lesson and almost all other classes. Although Student exhibited significant behavior issues, the IEP team agreed to try a transition plan into the fifth grade to include more time in general education and create more rewards and incentives to assist Student in becoming more successful. At the beginning of the new school year, Part Two of the IEP meeting would be

² Journey refers to its specialized academic instruction as resource service program or RSP.

held to complete the IEP and make a final decision regarding the amount of time Student would spend in RSP and general education. Additionally, it was anticipated that Student's behavior intervention plan (BIP) could be revised accordingly, to meet his needs.

2. Part Two of the IEP meeting took place on October 14, and 16, 2013. The IEP contains six behavior goals, four reading goals, four math goals, and four goals in written expression. Additionally, the IEP offered Student support services of individualized counseling twice per month, as well as counseling for Mother. The goals were appropriate and comported to Student's areas of unique need. Mother consented to the goals and services in the IEP. Student's BIP was not modified, as District members of the IEP team had reached the conclusion that regardless of how thorough a BIP was created, an appropriate BIP for Student could not be consistently implemented in a general education classroom or in the Journey environment itself. Given Student's continuing and escalating behavior issues, the IEP team offered Student placement of specialized academic instruction in a self-contained behavior intervention classroom at Wood Canyon, rather than continuing placement in the general education classroom at Journey. Mother strenuously disagreed with this offer, wanting Student to remain at Journey with an appropriate and fully implemented BIP.

Background

3. Student is an 11-year-old boy who will enter the sixth grade for the 2014-2015 school year. He has attended Journey since kindergarten. Student qualifies for special education and related services under the categories of other health impairment due to attention deficit hyperactive disorder (ADHD), autistic-like behaviors, and specific learning disability. Journey is located outside District and accepts students throughout Orange County by means of a lottery system.

4. Journey is an alternate curriculum general education school based upon the Waldorf method of education. It is the only public school in Orange County utilizing this methodology. In determining the appropriate educational placement for Student, it is important to understand the educational environment at Journey. Waldorf emphasizes the Arts, embracing music, dance, theater, writing, literature, and hand work. The goal is to educate the whole child, the heart and the hands, as well as the mind.³ Journey strives to provide a Renaissance-type education. Teachers remain with students through several grades, and Journey creates a class community with parents, teachers and students. The curriculum at Journey is linked to state standards, but in a different order and with a different approach. Journey stresses the use of imagination and hands-on learning. In order to keep a sense of wonder, questions are not always answered. Students create their own main lesson books. Students participate in many festivals and special school traditions, such as the Rose Ceremony, Harvest Festival, Fairy Market, and May Faire. Students also participate in an

³ Waldorf Education: An Introduction, www.whywaldorfworks.org, Official site for Waldorf Education in North America.

annual off-site camping trip. Distinctly, Journey presents a more unstructured educational environment than traditional general education settings.

5. Student's program at Journey includes rotations of Spanish, singing in class, music (violin), handiwork, daily circle time, nature walks, and garden time (eco-literacy), in addition to his main lesson blocks. Student's schedule and class rotations change on a daily basis.

6. Student has always exhibited behavioral issues in school. In 2007, Student was diagnosed with autism. Additionally, Student experienced a series of traumatic events in his home life which, in part, exacerbated his behaviors at school. Further, District noted that although Student had average academic abilities, he was not making appropriate progress on grade-level curriculum. As a result, Student qualified for special education and related services in 2007. Student's behavioral incidents increased in intensity over time, and Student continued to experience personal losses. While Mother reported that nothing was done to remedy Student's situation, educational documents reflect that Student's IEP's and BIP's were frequently updated between 2010 and 2012. By April 2012, District decided to hold early triennial assessments, due to Student's increasingly poor behavior and low work compliance. Mother consented to the assessment plan.

7. District reviewed Student's triennial multidisciplinary psychoeducational assessments at Student's June 14, 2012 IEP meeting in order to complete Student's annual IEP for the 2012-2013 school year. The administrative validity of the assessments was not disputed. The psychoeducational assessment contained parent and teacher input, a review of records, classroom and playground observations, Student interview, and a series of well recognized standardized assessments and rating scales. Student continued to qualify for special education and related services under Other Health Impairment due to ADHD, Autistic-like Behaviors, and Specific Learning Disability. Given Student's behaviors, the triennial also explored eligibility under Emotional Disturbance and Speech and Language. The IEP team determined Student did not qualify under Emotional Disturbance as his behaviors were more attributable to ADHD, executive functioning deficits, and autistic-like behaviors. Additionally, Student no longer qualified for Speech and Language services; Student's use of language exhibited clear and strong language skills. Rather, Student at times, showed poor impulse control in group sessions, and was easily distracted by making noises, commenting inappropriately, going off topic, and creating his own rules or interpretations of the task. This was in spite of Student knowing what was expected of him, what the rules were, and how the rules should be followed.

8. At the June 14, 2012 IEP meeting, it was noted that Student's behavior was significantly better in small group settings versus the general education classroom. He demonstrated more participation, work completion and positive behavior in the RSP room, whereas he demonstrated non-compliance, inappropriate language and unwillingness to participate in the general education setting. The IEP team discussed Student's progress on goals and determined Student had not made adequate progress on his behavior goals. An additional support aide was added, as well as individual counseling for Student.

9. Additional IEP meetings were held on September 11, and November 1, 2012, to discuss continuing concern with Student's social interactions and behaviors, resulting from Student's maladaptive behaviors. Student believed his peers perceived his IEP and accommodations as unfair. They made unkind remarks, and Student continued to segregate himself from the class. A transition plan was crafted to allow Student more time with his peers in general education, with less specialized academic instruction time. The transition plan was not successful, and Student continued to resist working in the general education classroom.

Behavioral Problems Abound

10. Student's refusal to follow directions, to obey classroom rules, and to exert effort in class, required almost constant prompting from his teachers and aides. Many of these behaviors required direct interventions from school administrators and the RSP teacher, including his removal from class. Many times, Student refused to engage people directly, instead placing his head on his desk, and covering his face with his hoodie. Other times, especially during group activities, Student would make distracting noises or bring distracting items or toys into class. These behaviors became increasingly alarming to Journey staff. When Student was asked to comply with directives, he might roll over on his back on the floor and kick chairs. He curled up in a ball many times, placed pillows on top of himself, and hid as well.

11. Beginning in April 2012, Student experienced a series of suspensions at Journey due to his disruption, defiance, foul language and physical violence against Journey staff and his peers. In response, District conducted a functional behavior assessment to determine if Student's behaviors impeded his learning and necessitated a revised BIP. Student's behaviors continued and he remained very angry, uncooperative and defiant with adults, unwilling to participate, disruptive in class, and unresponsive when asked what was bothering him. These disruptions also impacted the learning of his peers. As example, on May 14, 2012, between 8:30 a.m. and 12:30 p.m., Student was non-compliant 10 times, made noises or blurted out inappropriate words 16 times, and was asked to do his work and stop disrupting the class 24 times. These behaviors necessitated his removal from the classroom. On May 17 and 18, 2012, Student eloped from the RSP room and locked himself in a bathroom stall. He used the "F word" towards a staff member and used a racial slur towards a peer.

12. The functional behavior assessment results were presented to the IEP team on June 14, 2012, and resulted in the BIP, which is currently in place. Generally, the behavioral antecedent begins when Student is asked to perform a non-preferred task or he is in a large group setting with minimal direct supervision. Student initially makes noise, disengages from instruction, and/or fiddles with inappropriate materials at his desk. These behaviors, if not successfully redirected, increase to hitting, throwing objects, or eloping, and continue to escalate.

13. The function of Student's maladaptive behaviors primarily appears to be intended to gain attention or obtain an object. Student demonstrates a desire to interact with his peers, but his underdeveloped social skills prevent him from engaging appropriately with them or responding appropriately when angry or frustrated during an interaction. Student's eloping is believed to be either to obtain attention or is avoidance. Student frequently demonstrates difficulty with engaging in non-preferred tasks in the classroom setting and when in a large group setting. It is noted that ecological or environmental factors contribute to Student's behaviors, specifically, the general education classroom, 30 students with one teacher, participation in pull-out specialized academic instruction, and visible aide support. A total of 23 positive behavior interventions were reported to be sometimes successful with Student, which ran the gamut from taking breaks, to one-to-one assistance, to a positive reinforcement/reward system.

14. To support the findings of this functional behavior assessment, District crafted a new BIP which was designed to enable Journey teachers and staff to direct Student towards desired replacement behaviors. The BIP contained 27 suggestions for positive modifications of antecedent events and ecological factors for Student. It also contained consequential behavioral interventions if Student's behavior escalated. Mother consented to implementation of the BIP.

15. On December 3, 2012, Student was suspended for defiance and calling his teacher a "jerk" in front of his peers. On December 6, 2012, Student was again suspended for defiance, yelling at staff, threatening and harming a peer, and eloping. The specific events involved in this suspension are disputed by Mother, Student, and Student's sister, suggesting Student was provoked, and events were possibly a manifestation of his disabilities. Mother's correspondence with Journey administrators on this subject indicated a growing concern that Journey staff was failing to sufficiently supervise Student, failing to recognize Student's known behavior triggers, and failing to effectively implement his BIP. Further, Mother contended Student was being singled out, treated unfairly, and was no longer welcome at Journey. While the circumstances leading to this event are hotly contested between District and family witnesses, Student nevertheless, held a pencil to the neck of another student, eloped, and threatened to harm others.

16. District held another IEP meeting on January 14, 2013, largely to discuss Student's recent suspensions. Linda Cox, District mental health and behavior support specialist attended this meeting to address Mother's concerns. Mother stressed the need to make certain that staff understood what triggered Student's behaviors and knew how to react or not react to those triggers. As example, Student reacts negatively when someone tries to take away his personal items. Mother suggested positive strategies which work with Student; however, she believes her strategies and contributions were ignored. Further, Mother believes Student's behaviors which led to his suspensions were intensified by Journey staff. Student's BIP was reviewed, and the strategies discussed were already in place.

17. On March 1, 2013, Student was again suspended, this time for "pantsing" another student in front of their peers. While Student may have done this at the request of

another student, Student knew it humiliated the child, yet he remained defiant and non-compliant with Journey instructional staff, threatened to elope, repeatedly commented inappropriately and used disrespectful language.

18. On June 4, 2013, in violin class, Student would not participate and caused a disturbance while the teacher was speaking. After being given appropriate behavior options, Student continued to disrupt the class, defy teacher requests, and subsequently hit her with his violin bow.

19. Student's behaviors continued to escalate at the beginning of the 2013-2014 school year. On September 6, 2013, in his hand work class, Student drew an inappropriate picture of the movie character "Chucky." Mother contends this was an innocent event, due to Student's viewing television. The assigned event, however, was to draw a bereavement card for the family of a staff member who had recently died. Student was given appropriate behavior options to avoid triggering his behaviors. Instead, Student opted to continue his inappropriate behaviors, resulting in his being escorted out of the classroom. Also on September 6, 2013, Student locked his aide out of the fifth grade classroom, and then crawled under a desk.⁴ He also called the aide a "dumb-ass, old man."

21. On September 9, 2013, Student received a "reflection card" which indicated Student understood he was removed from class for failing to follow directions after one reminder, disrupting the class, failing to listen when expected to do so, failing to join in the group activity, and being disrespectful to authority. Of more concern than merely the "reflection card," Student's behavior on September 9, 2013, included him kicking another student as hard as he could, and grabbing two other students in headlocks. Appropriate interventions were attempted, and when told his behavior was unacceptable, Student laughed. When a staff member told Student to accompany her to the office, Student started dropping "F bombs," eloped to a garden area, and refused to go to the office. When asked why he kicked the child, Student responded, "Because I hate him." Student also indicated in his own written statement, that if these children touched him again, he was "going to beat the crap out of them."

22. On September 10, 2013, during the main lesson, Student refused to leave his desk to go outside with the class. While it is known that Student has difficulties with transitions, it took the aide 10 minutes to convince Student to leave the room. Once outside, Student indicated he wanted to kill himself because he wanted to die. While Student's statements were later found to be hyperbole based upon upsetting events at home⁵, they

⁴ As of the 2013-2014 school year, it has been necessary to have an additional program support aide accompany Student during every transition.

⁵ Student resides in a joint legal/joint physical custody arrangement. Based upon additional information submitted into evidence, it is clear that Student continues to suffer from disturbing events in his home life and at various times is extremely angry with his

necessitated a District suicide investigation. Further, each of these events required a conference with either Mother or Father, and apparently the information was not communicated between them.

23. On September 11, 2013, Mr. Faltas, the Executive Director of Journey, issued a memo to all staff regarding Student's behavior protocol. This memo included instructions that: (1) Student was to obey all directions; (2) staff was to ensure they were following Student's behavior plan closely; (3) staff was to provide incentives for positive reinforcements; (4) staff was to contact the RSP team for guidance, if needed; and (5) staff was to immediately ask Mr. Faltas for assistance if Student defied authority or continued with similar behavior as in the last few days.

24. On September 18, 2013, Student was suspended for two days. The behavior events began when Student eloped from the main lesson group. He was asked to stop and return to the class. Student refused and continued to walk away, requiring a staff member to follow him. Student was again asked to return to class, and was provided multiple warnings of consequences. Student then threw a rock at the staff member which hit her in the leg. Student stated he did not care a tiny bit if it hurt her; he did not care as long as it (the rock) did not hit him. Student later indicated he threw the rock because he didn't want to go back to class and the rock was really small. Mother and Mr. Faltas had a heated discussion regarding Student's suspension. When Mother arrived at school to pick up Student, he was in the front of the RSP room, and was defying the RSP teacher.

25. It is clear that Student and his new RSP teacher, Mr. DeSalvo did not get along well. Mr. DeSalvo, as might be expected, could easily get frustrated with Student when non-compliant. Student indicated that Mr. DeSalvo would yell at him when annoyed with him. As a result, Student no longer felt safe in the RSP room. This was of particular concern to Mother as the RSP room was Student's primary break room when he needed to deescalate or calm down from sensory overload. Mother believes that since Student no longer viewed the RSP room as his "safe haven," his leaving the classroom or walking around was viewed as elopement rather than Student merely taking a break pursuant to his IEP. On the other hand, as explained by Pamela Ender, District school psychologist, in the new school year, Student's behaviors increased as his academic demands increased.

26. On September 26, 2013, a Behavior Plan Summary was prepared. This summary contained things to remember regarding Student's behaviors, suggested replacement behaviors, positive reinforcements, and a list of what to do when Student acts out, along with what not to do. A supplemental memo was drafted on September 27, 2013. This document described behavior protocols to be initiated for specific behaviors Student exhibited frequently, such as eloping, refusing to transition, refusing to initiate or engage, going under his desk, and physical aggression. Staff was reminded Student was a big

parents. It serves no purpose in this Decision to further describe family interactions, except to indicate that Student's relationships at home contribute to his destructive behaviors.

attention seeker, and the more attention he was given, the more he was being reinforced for inappropriate behavior. It was emphasized that staff should not take items away from Student or put hands on him unless he was in imminent danger. It was also suggested that Student's classmates be reinforced for ignoring Student behaviors and continue doing what was expected of them during Student's outbursts.

27. On October 4, 2013, Student was suspended for five days for possessing a knife at school, and using threatening language during class.⁶ During main lesson singing, Student changed the song lyrics to "I'm going to cut them up with a knife, cut and bloody." Later, his teacher overheard him saying he had a knife in his backpack. When she asked about the knife, Student denied having one, but subsequently, a small knife was found in Student's backpack.

28. As the possession of a knife at school is grounds for expulsion, Ms. Ender investigated the incident and prepared a Manifestation Determination Report which was reviewed at an IEP meeting on October 14, 2013. After interviews with relevant parties, including Student, both parents and Student's teachers, Ms. Ender determined that Student's disabilities had a direct and substantial relationship to his actions, as he made the decision to bring the knife to school to show a friend, not thinking through the consequences of having a knife at school. While Student acknowledged the wrongfulness of his actions, he did not have sufficient insight and understanding as to the potential serious consequences. Ms. Ender also determined Student's BIP was not being implemented with consistency and fidelity at the time of the incident. Ms. Ender explained Student has a good BIP; however, even with highly-trained staff, it is impossible to implement the BIP with consistency, due to the Waldorf program and nature of the Journey environment itself.

29. The October 14, 2013 IEP team meeting was primarily held for the manifestation determination. In addition to the manifestation determination, the IEP team reviewed Student's proposed goals. Goals were modified based upon Mother's input and further clarification from the staff. Examples of strategies were presented to Mother. Mother consented to all goals and services contained in the IEP.⁷

30. Also on October 14, 2013, the IEP team initiated a discussion offering Student placement in the behavior intervention class at Wood Canyon. Wood Canyon is a comprehensive middle school site within District. There are approximately 10 students in the behavior intervention classroom, which is staffed by a credentialed teacher and three aides. The staff is trained in intensive positive behavior strategies. Feedback on behavior is reported every 15 minutes and the students work on a level system in which different levels offer different incentives and privileges. Formal social skills classes are offered in the classroom weekly. Students in the behavior intervention class go to lunch and recess with typical peers and the support of an aide; they mainstream for parts of the day when they are

⁶ (See Ed. Code, § 48915(a)(2).)

⁷ Father approved the goals and services on October 16, 2013.

behaviorally ready. Because of the small group environment, and the staff-to-student ratio, instruction can be individualized among the students, based upon their learning needs. The goal of the behavior intervention classroom is to teach students to build upon their own success so they can control their own behaviors and return to the general education setting.

31. The October 16, 2014 meeting, repeated much of the information presented on October 14, 2013, as Father had not previously been present. With both parents present, District made its formal offer of placement in the behavioral intervention classroom at Wood Canyon. Interestingly, the IEP notes indicate Student's therapist was a member of the IEP team. She explained that while some of Student's behaviors may look like defiance, Student may really be on overload. Nevertheless she indicated she was very familiar with the behavior intervention class at Wood Canyon, and she agreed with the IEP team that District's offer of placement was appropriate for Student.

Consensus of District and Journey Staff

32. Alyson Smith, Student's general education class teacher at Journey for four years, indicated Student had not made appropriate academic progress in her class. Although Student has completed the fifth grade, he remains at the second grade level academically. His fifth grade progress reports consistently indicate emerging skills rather than developing or achieved skills. Student struggles with following instructions. He remains on task only 10 percent of the time even with the assistance of a classroom aide. Student had difficulties with interaction. He can be defiant, exhibit inappropriate behavior, and use foul language.

33. Ms. Smith noted that typically Student arrives late for school, which is detrimental at Journey.⁸ The beginning of the school day at Journey is very important, and sets the mood for the whole day. The daily schedule is front-loaded, and sets the daily transitions and rotations. Missing this sets Student up for failure, and he ends up playing catch up. He is frustrated before his day begins, and will refuse to participate.

34. There are 29 other students in Ms. Smith's class. Student's work has been modified and, as a result, he is frequently working on parallel instruction. However, even with modified assignments, Student is always behind. He has difficulty with transitions and is easily overwhelmed. As a result, Student does not always do his work, and will become defiant and disruptive. Ms. Smith regretfully emphasized that Student's defiance and disruptions take up so much of her time that it is hard to teach the rest of the class, which takes away from the educational experience of the other students.

35. The staff at Journey has tried to support Student's maladaptive behaviors. District conducted a functional behavioral assessment and developed a BIP for Student. Ms. Smith received behavior training from District's autism specialist and behaviorist. She reviewed Student's BIP and learned how to implement it on a daily basis. Additionally, she utilized the BIP regularly, reviewed it and shared strategies with Student's other teachers.

⁸ Student was tardy 64 days during the 2012-2013 school year.

The BIP was implemented across environments at Journey. Ms. Smith found positive reinforcements to be the most effective with Student. She emphasized, however, that many, many strategies were utilized, and nothing worked all the time.

36. Ultimately, Ms. Smith concluded that the Journey environment is not conducive to Student learning. The Journey classroom itself is visually stimulating with items on the walls and boards. With 30 students, the classroom is crowded. Additionally, Student has five main line classes, with 18 additional classes each week. This presents too many transitions for Student. Further, Student needs continuous attention with extrinsic behavioral motivations, i.e. earning rewards. Journey is the opposite, and seeks to look intrinsically. Instead, Ms. Smith opined that Student required a smaller and calmer education environment than Journey, with access to small groups and one-to-one instruction.

37. Davida Mayfield, Student's RSP teacher for two years, indicated Student remains below grade level academically, and exhibits significant behaviors. Ms. Mayfield crafted Student's prior academic goals, and believes them to have been appropriate for Student. Although Student made some progress on his goals in the RSP classroom, he needed lessons modified for him in the general education classroom. General education was very frustrating for Student. He was not successful in group settings. Student did not want help from the aide, but he could not stay on task or keep up with his peers. Some days Student became very distraught. Student did better in the smaller setting of the RSP room. He was more successful working alone, and his own private "office" area was created for him.

38. Ms. Mayfield described Student's BIP as very thorough; still there were days when nothing was going to work with Student. Student's resistance to positive reinforcements could depend on his mood. Everything on the BIP could not be done in a large, general education setting. There were too many students, and the teacher could not continually stop class to implement the BIP.

39. Ms. Mayfield also concluded Journey was no longer an appropriate placement for Student. Student needs more time on academics. He needs more work on group behaviors. Transitions remain difficult for Student, and Journey is full of daily transitions and rotations.

40. Karen Teskey, a program specialist for District, initially believed in June 2013, Student did not need a self-contained special day class. She felt District needed to exhaust their possibilities before changing Student's placement. By October 2013, however, Student still maintained his pattern of maladaptive behaviors, and those behaviors were escalating. At that time, she changed her mind and agreed that the behavior intervention class was appropriate for Student. Student required a high level of support, especially on transitions. It was now clear to her that Student's BIP could not be implemented with fidelity due to programmatic impossibilities. The nature of the Waldorf program itself prohibited a complete and consistent implementation of Student's BIP. Ms. Teskey believes the Journey staff did everything they could to implement the BIP. They tried extremely hard and

provided lots of support to Student. Student had a good BIP, however, it was being implemented in an inappropriate environment. Journey simply could no longer provide Student what he needed.

41. Ms. Teskey was an excellent witness and responded to Mother's questions and concerns well. She does not believe the change in placement will make Student feel like a failure. Student is already experiencing failure at Journey. Student would get a fresh start at Wood Canyon, and would be given the opportunity to learn to be a successful learner. Additionally, Student's social needs are increasing as his peers mature. Socially, Student is no longer on the same level. Student should immediately fit in at Wood Canyon, with peers who also are having major difficulties functioning in general education. The typical students in the behavior intervention classroom are capable of grade level academic progress, but they require intensive behavioral support. Although Student will not have the same classmates, he can still maintain his current friendships outside of school.

42. Linda Cox, is the mental health/behavior support specialist for District. It is her job to observe disruptive students, make recommendations and develop behavior strategies for them. She also trains District staff in implementing appropriate behavior interventions. Ms. Cox has followed Student since 2011, and has observed him in all types of classes at Journey. Ms. Cox has worked with the teachers and staff at Journey to implement Student's BIP as best as can be done at Journey. Student requires immediate intervention and attention which is not always possible in the general education setting. Student requires constant prompting and reinforcements. Adding a one-to-one aide support in general education would be counter-productive. Student does not like to stand out and does not like an aide hanging around him. Ms. Cox finds the behavior intervention classroom to be a perfect fit for Student.

43. Jennifer Cartisano, District autism specialist, also believes the behavior intervention classroom to be an appropriate placement for Student. Student takes things personally. He is sensitive to criticism and sensitive to directions. He does not know how to handle group settings. Student becomes frustrated and anxious when he cannot control his environment, and he acts out when he is unsure. Ms. Cartisano knows Student is struggling. He does not want to stand out. When he cannot keep up, he becomes embarrassed and then acts out. Student needs what is described as behavior momentum. Student needs to feel success in moving forward, which the behavior intervention classroom strives to provide. Student does not get positive momentum at Journey. Additionally, Student has low self-esteem. Student requires clarity of what is expected of him. In the behavior intervention classroom, routines structure predictability. Students can work at their own paces to build self-confidence.

44. Finally, Ms. Ender conveyed similar observations of Student. Student has difficulty with impulse control, attention, self-regulation, and understanding social interactions, as well as academics. Again, the structure of Journey is not good for Student. There is no consistency in routines. There are multiple transitions daily. The classes are too large, and Student requires more structure.

45. Student has had significant behavior support from a behavior team, consultations from school psychologists, and autism specialists, and staff trainings to implement his BIP. Student's academic and behavior goals are appropriate. Student's BIP cannot be implemented with fidelity in the Journey environment. Student requires intensive behavior interventions and continual reinforcement which cannot be implemented across all settings at Journey. The higher rate of interventions required by Student cannot be provided in a general education classroom without taking away from the education of the other students.

Mother and Student's Perspectives

46. Mother testified on Student's behalf at hearing. In addition to being "mom," Mother describes herself as an expert in human behavior, and "helping people change" has been her profession for 30 years. There is no dispute Mother knows Student better than anyone else. While Mother has always been allowed to speak at Student's IEP team meetings, she feels the IEP team has automatically dismissed her contributions. The IEP team may hear what she has to say, but they do not listen to what she says and what she knows best. She does not want Student removed from Journey.

47. The crux of Mother's contentions revolve around her belief that Student's IEP has not been fully followed, and this, in turn, has led to Student's escalated behaviors. If Student's BIP were "tweaked" a bit, and clearly and consistently followed, Student could stay enrolled at Journey. In order to properly implement Student's BIP, Mother believes Journey staff needs to change the way they implement it. In other words, the adult behaviors need to be modified in order to successfully implement Student's BIP. Adult behaviors that do not serve Student well need to be changed. As example, Mother believes Student's teachers are too controlling and do not understand the impact this has on Student. Student's teachers should consider it a success just to get Student to do the work, and should not criticize him for not doing it properly. Further, Student reacts for a reason. The adults do not have to agree with the reason; they only need to acknowledge the reason to get Student to deescalate. Rather than remove Student from Journey, Mother suggests more positive training for the teachers.

48. Mother contends that Journey failed to give Student the tools he needed to be successful in the general education classroom. His accommodations were not always provided when needed. Mother cites Student's need for breaks which assist him in refocusing in large groups. Student was not given a desk in a preferred area. Student can handle directions, but he needs to know the rules. The classroom rules were not made clear to him, so he was made to feel he had done something wrong. This frustrates Student. Student has negative reactions to certain foods, such as sugar, yet the staff at Journey uses these foods as rewards. Student is often forbidden his manipulatives or "figits" which are taken away from him or viewed merely as toys, and not necessary sensory tools authorized by his IEP.

49. Mother explained that Student's distrust of his new RSP teacher has resulted in Student no longer feeling safe in the RSP room and he no longer seeks to take his breaks there. Further, Student is lacking in the skills he needs. Isolation is not good for Student, and creates a vicious circle; mishandling Student's behaviors lead to more isolation and more RSP. This creates a failure for Student to learn socialization skills for large group settings and in turn, creates more isolation.

50. Mother also expressed grave concerns about the big changes and transitions for Student involved in attending Wood Canyon. Student would age out of Wood Canyon in one year, and then would be required to transfer to another behavior intervention classroom at another school. Student has lots of friends and interacts with other children at Journey now. Mother believes the IEP team did not consider the magnitude of these changes on Student. She does not believe Student's behaviors warrant upsetting his whole world.

51. Mother believes the highly structured behavior intervention class program will send the wrong message to Student, specifically, that he had failed. Student does not want to be in a special education classroom. He does not want to be seen as different. Student will view his change of placement as a punishment.

52. Mother wants the adults to work together to see if there is another way to make Student successful at Journey. She believes the BIP is trying to do too much. Sometimes simple things can make a big difference. As example, Student's reading improved when he got glasses. Further, the IEP team never indicated Journey could not successfully implement Student's BIP. Had the IEP team done so, Mother would have asked the team to "go back to the drawing board" to create a BIP which could work. As it stands, placement in the behavior intervention classroom represents a lose/lose scenario. If the IEP team adopts some of Mother's positive suggestions, and allows Student to remain at Journey, they can change things to a win/win and maximize Student's potential.

53. Mother visited the behavior intervention classroom at Wood Canyon. She was distressed at what she viewed. As described by Mother, one child was placed in a closet and left to tantrum. While the behavior intervention classroom does not place students in a "closet," the classroom does have a "time out" room, a secluded area where a student may go to decompress or deescalate his behavior when needed. Mother does not feel the behavior intervention classroom is a right fit for Student, and seeing other children's behaviors and interventions will negatively impact Student even further. Additionally Mother believes District is required to educate Student in the least restrictive environment, which Mother views as Journey.

54. Student also testified at hearing. While Student rationalized the behavioral events which led to his suspensions, he nonetheless confirmed them. Student gets frustrated with his teachers and does not always understand the rules or directions. Student stated he could understand "a tiny bit" of things in the general education classroom, and can "kinda read." If he does not understand things or feels he is falling behind in the class, he gives up and shuts down.

55. Student admitted he did not like changes in the Journey staff, and feels the new staff “is not on his side.” Student does not like being in the RSP class because the lessons are taught differently than in general education. He blames the RSP class for his being academically behind.

56. Student’s demeanor during his testimony was interesting. Student remained seated next to his mother, rather than answer questions from the witness chair. While he was fidgeting in his seat, Student broke his glasses and fixated on the pieces while he spoke. Student listened to the questions and attempted to provide thorough answers. He even expounded on a few behavioral incidents of which Mother was unaware and surprised.

57. Student wants to remain at Journey. He does not want to leave his friends there. Unfortunately, it is apparent that Mother negatively described the educational setting at Wood Canyon to Student. Student’s only comment about Wood Canyon was an emphatic statement that he did not want to be locked in a closet.

58. As indicated earlier, Journey is a one-of-a-kind charter school in which admission is determined by a lottery system. Of great concern and high priority to Mother and Student is the recognition that once placed at Wood Canyon, or any other placement for that matter, Student cannot automatically return to Journey, even if his behaviors and academics greatly improve. Student will once again be subject to the lottery to gain readmission to Journey.

LEGAL CONCLUSIONS

Statutory Framework

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000 et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically

developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.) Further, educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1497.)

3. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031.) A “related service” is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) Related services typically consist of individualized services tailored to address a disabled pupil’s particular needs. (*C. G. v. Five Town Community School* (1st Cir. 2008) 513 F. 3d 279, 285). An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child’s potential. (*Rowley, supra*, 458 U.S.176 at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, District has the burden of persuasion.

Issue: Did District's offer of placement in the behavior intervention classroom at Wood Canyon as offered in its October 16, 2013 IEP constitute a FAPE in the least restrictive environment for Student?

5. The centerpiece of a child's special education program is the IEP. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

6. 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.) 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.*) 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 District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*))

7. An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progression, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2nd Cir. 2005) 430 F.3d 595, 598.) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21.) Instead, "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

8. There is no dispute Student continues to qualify for special education and related services under: 1) other health impairment due to his ADHD; 2) autistic-like behaviors due to his sensory issues and behavior problems; and 3) specific learning disability due to his average cognitive abilities and below average academic success. These disabilities have affected Student's abilities to access and make progress in the general education setting, making it necessary to modify his subject areas, and provide additional support in a smaller group or individual setting of the RSP room, and create an extensive BIP.

9. In order to appropriately support Student, the October 16, 2013 IEP was created with such goals and supports. The IEP team crafted 12 academic goals to support Student in reading, mathematics, and written expression. An additional six goals were created to address Student's behavior and ADHD deficits. Each of these goals addressed an area of Student's unique needs. The October 16, 2013 IEP also provided Student with two counseling sessions per month as an additional support service, along with several monthly counseling sessions for Mother. Both Mother and Father consented to the IEP goals and services. Further, no evidence was presented at hearing to suggest the goals and services did not comport to Student's unique needs.

10. Student's placement remains the only issue of disagreement. It is obvious that, as of the October 16, 2013 IEP, Student could not successfully function in a general education setting, let alone in the alternative curriculum-based general education program at Journey. Regardless of detailed BIP's, the hard work of trained teachers and staff, the addition of extra aides, and the best of intentions of everyone involved with Student, Student has made minimal progress both academically and behaviorally in the Journey environment. It is repeatedly noted by Student's teachers and District staff that Student rarely functions in the general education setting, attending to task only about 10 percent of the time. Further, each has indicated that the Journey program itself does not provide Student with an environment in which he can be successful. The Waldorf style of education requires Student to transition several times a day. No two days are alike in a given week. The Journey general education class has too many other students, and Student cannot keep up with the lessons, resulting in parallel teaching, at best. Student, himself, indicates he simply gives up and shuts down.

11. While Student does not like the current RSP teacher, Student learns significantly better in a small group or individual settings, where Student has demonstrated, less offensive behaviors, more participation, and work completion. Prior to the October 16, 2013 IEP, Student's only academic success resulted from curriculum modification and re-teaching in the RSP setting. Even so, Student's behaviors continued to impede his progress. Further, in little more than the 12 months preceding the October 16, 2013 IEP, Student's maladaptive behaviors failed to abate with the creation and modifications of his BIP, and instead continued to escalate. While Student's suspensions and other removals from class may well be manifestations of his disabilities, they nevertheless caused injuries to other students and staff, and continually disrupted the school day at Journey. Mother misunderstands the District's "failure to implement" Student's BIP. It is not that the teachers and staff at Journey do not know how to implement the BIP or provide positive reinforcements or choices to Student. Rather, it is the sheer number of reinforcements and replacement behaviors Student requires that cannot be accomplished in the general education classroom, without devoting extraordinary time to Student at the expense of the other 29 students in class. Additionally, the physical atmosphere and continual transitions required at Journey do not assist Student with his impulses or self-control. Journey can no longer provide Student a FAPE. The IEP team's consideration of other placement options was necessary. Student's placement in the behavior intervention classroom at Wood Canyon is appropriate, and Student's IEP goals and services can be effectively implemented there.

12. In determining whether a student has been provided with a FAPE, a school district must ensure that “to the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled.” (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114 (2006); Ed. Code, § 56342, subd. (b).) This “least restrictive environment” provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*)).

13. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom.⁹ (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; (*Rachel H., supra*, 14 F.3d at p. 1404).) These considerations are discussed separately below.

14. The behavior intervention classroom is designed to provide educational benefit to Student. By October 16, 2013, Student could no longer function in the general education classroom. Academically, Student was not making appropriate progress, and by any legal standard, Student was not receiving sufficient educational benefit at Journey. While cognitively capable, Student requires a modified curriculum at Journey, and still remains academically behind at the second grade level. Student requires more academic assistance than can be realistically provided in the general education setting at Journey. The behavior intervention classroom will provide Student with a smaller classroom setting, more individualized teaching, and intensive behavior interventions. Further, the program is designed to teach Student behaviors which will allow him to return to a general education setting.

15. The behavior intervention classroom is designed to provide Student with non-academic benefit. Student’s teachers and staff at Journey consistently report that Student almost always prefers to be alone, has his own “office” space, and will refuse to participate in large group activities. As evidenced by Student’s suspensions and behavior reports, Student’s aggression towards peers and staff has escalated. It does not go without notice that several of Student’s suspensions resulted during non-academic time. Mother has also expressed her concern about Student’s isolation. Although Journey offers significant non-traditional activities, Student rarely participates in non-preferred activities, and when he does participate, he acts out.

16. Student’s behaviors have a negative impact on the teacher and other students in the general education classroom. Student’s impact on the others in the general education classroom represents a significant concern. Student has been aggressive and violent towards his peers. He has used profanity, eloped from class, threatened to hurt others, and pulled

⁹ Cost of placement in general education is not an issue in this matter.

down a classmate's pants. Mr. Faltas had to prepare a school wide protocol to address Student's behaviors, which occurred across school environments. As reported by Ms. Smith, Student's defiance and disruptions took up so much of her time it was hard to teach the rest of the class. Student's behaviors negatively impacted his peers and took away from their education time. Even assuming some of Mother's behavioral methods could be introduced into Student's BIP, the BIP still could not be implemented with fidelity and consistency because Student requires continual attention which cannot be provided in the general education setting.

17. 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.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (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].) (*Gregory K.supra*, 811 F.2d at p. 1314.)

18. Mother does not want Student to leave Journey. She has purposefully exercised great thought in selecting the Waldorf methodology for her children's education. Student's sister also attends Journey. It is unfortunate that Student may not qualify by lottery to return to Journey if and when he learns positive behavior replacements for his current behaviors. It is also uncertain if the Journey curriculum and environment will ever again be appropriate for Student. Nevertheless, as of October 16, 2013, it is evident that Journey can no longer appropriately address Student's unique needs.

19. Upon consideration of all the above factors, District's offer of placement in the behavior intervention classroom at Wood Canyon is appropriate, and represents the least restrictive environment for Student as of October 16, 2013. District's offer of placement, program and services finalized in its October 16, 2013 IEP constitutes a FAPE in the least restrictive environment for Student.

ORDER

District's requested relief is granted. The entirety of District's offer of placement, program and services finalized on October 16, 2013 constitutes a FAPE in the least restrictive environment for Student.

PREVAILING PARTY

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

RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a) (2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b) (2006); Ed. Code, § 56505, subd. (k).)

DATE: July 17, 2014

/s/

JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings