

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MURRIETA VALLEY UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2016080027

DECISION

Murietta Valley Unified School District filed this due process hearing request complaint with the Office of Administrative Hearings, State of California, on July 25, 2016, naming Parent on behalf of Student. On August 12, 2016, OAH granted a continuance.

Administrative Law Judge Judith L. Pasewark heard this matter on August 30, 31, and September 1, 2016, in Murietta, California.

Peter Sansom, Attorney at Law, represented District. Zhanna Preston, Director of Special Education, attended the hearing on behalf of District.

Mother appeared on behalf of Student for the first two days of hearing. On September 1, 2016, Mother failed to appear to present her case and testify on behalf of Student.

Testimony was completed on August 31, 2016, as Mother failed to appear on September 1, 2016.¹ Following District's oral closing argument, the record closed and the matter was submitted on September 1, 2016.

¹ The hearing was scheduled to begin at noon on September 1, 2016, to accommodate Mother's schedule. The ALJ made several attempts to contact Mother, and commenced the last day of hearing at 1:00 p.m.

ISSUE AND REMEDY

The issue and requested remedy presented by District are:

Whether the November 10, 2015 individualized education program, as initially completed on December 3, 2015, and amended on May 3, 2016, and June 1, 2016, offered Student a free appropriate public education, such that District may implement the finalized June 1, 2016 IEP, without parental consent?

SUMMARY OF DECISION

Student's emotional disturbance and maladaptive behaviors impeded his education as well as the education of others. Student's directed physical aggression and verbal abuse towards his peers and adults alike, created an atmosphere of danger and intimidation. As a result, Student could not be appropriately educated in the mild/moderate special day class at Cole Canyon Elementary School. Rather, Student required the mild/moderate special day class at Monte Vista Elementary School, which emphasized behavioral controls and behaviorally related skills.

While Student's anticipated time on the school bus would be both significant and problematic, based upon Student's past experience, the benefits of the Monte Vista behavioral program outweighed Mother's concern regarding the lengthy bus ride. Further, Student would be accompanied by a one-to-one aide on the bus, and prospective behaviors could be addressed by modifying Student's behavioral plan, if needed.

District proved that the November 10, 2015 IEP, as amended on December 3, 2015 and May 3, 2016, and finalized on June 1, 2016, met necessary legal requirements for providing Student a FAPE in the least restrictive environment. District may therefore implement the finalized June 1, 2016 IEP, without parental consent.

FACTUAL FINDINGS

Background

1. Student is an eight year old boy, currently in the third grade at District's Cole Canyon Elementary School. Student and his family reside within the geographical boundaries of District.
2. Student has a medical diagnosis of attention deficit hyperactivity disorder and a history of serious behavioral problems at home and at school. Student is eligible for special education and related services under the primary category of emotional disturbance and secondary category of speech or language impairment.

3. Under “stay put,”² Student’s current placement is a mild/moderate special day class at Cole Canyon. This SDC is designed to remediate academic deficits for students. It does not have a behavioral focus and is not designed to address and support intensive maladaptive behaviors. Student is supported by a one-to-one aide for the entire school day, and receives related services of occupational therapy, speech and language therapy, and individual counseling as part of his last agreed upon IEP. Due to his severe behaviors, Student is not mainstreamed for any portion of the school day.

Student’s Behaviors

4. Beginning as early as 2012, Student exhibited a great deal of behavioral concerns, such as tantrums, non-compliance, hitting, kicking, eloping, and throwing objects. Student required a high level of prompting and adult guidance throughout the day to comply with instructions and engage in learning activities. Student did not like tabletop activities, and would often engage in escape and avoidance behaviors when presented with non-preferred tasks.

5. District conducted an assessment to determine if Student needed a one-to-one instructional aide to assist with behavioral concerns. At that time, District determined there was sufficient adult support in the classroom, and Student’s needs could be met with a tier II positive behavioral intervention plan.³ In May 2013, a formal Tier-II behavioral support plan was developed to target Student’s behavioral concerns.

6. Student’s problem behaviors increased during the 2014-2015 school year. In addition to behaviors exhibited in prior years, Student developed aggressive behaviors on the school bus, which on occasion required the bus driver to pull over and stop to ensure safety. Student did not have an aide on the bus. Mother subsequently elected to drive Student to school rather than utilize bus transportation.

7. For the 2015-2016 school year, District added full-time behavioral support to Student’s IEP. Student had a one-to-one aide, Elizabeth Attwood. Student remained in the mild/moderate SDC at Cole Canyon. Danielle Phillips was Student’s second grade teacher. Ms. Phillips’ SDC was a blended class, kindergarten through second grade, which provided a smaller setting, modified academics, and moderate behavioral plans for students. The class

² Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, § 56505, subd. (d).) This is referred to as “stay put.” For purposes of stay put, the current educational placement is typically the placement called for in the student’s individualized education program, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

³ A positive behavior plan, behavior intervention plan and behavior plan were phrases used interchangeably by District.

had 14 students, two classroom aides, and three one-to-one aides. Ms. Phillips is trained in PROACT behavioral strategies, which are designed to carefully defuse and deescalate extreme behaviors which may ultimately result in physical restraint for safety.

8. After a short “honeymoon” period for the first few weeks of school, Student’s behavior began to escalate. Ms. Phillips implemented Student’s Tier-II behavior plan, however, it was not always effective. Student remained disruptive. He refused to comply. He was defiant and disrespectful to teachers and adult staff. He was verbally abusive. Moreover, Student was physically aggressive, hitting, kicking, pushing, and physically intimidating other children. Ms. Phillips tried silent communication with Ms. Attwood to try to deescalate Student. Ms. Phillips went beyond her professional duties to provide positive reinforcements to Student. She purchased positive reinforcements and “super” tangibles with her own money to entice Student. Ultimately, it was never enough for Student. He wanted more and more. He wanted to negotiate his behavior. Student required constant behavioral intervention on a daily basis.

Triennial Assessments

9. District conducted Student’s triennial assessments for the November 10, 2015 IEP team meeting. Each assessment included a records review, observations, appropriate testing materials, and clinical observations. Mother would not participate or complete several of the rating scales. Nonetheless, sufficient information was obtained, and each assessor reported their assessment results as valid. Further, the assessment instruments and procedures were selected and administered so as not to be racially, culturally or sexually discriminatory. The assessments and their findings reports are not an issue in this hearing, and were relied upon in determining Student’s areas of strengths and weaknesses; developing Student’s present levels of performance; and crafting the goals contained in the IEP’s, commencing with the November 10, 2015 IEP.

10. Julia Tucker was primarily responsible for Student’s psychoeducational assessment. In addition to being a credentialed school psychologist, Ms. Tucker has completed the requirements and received a certificate as a Behavioral Intervention Case Manager. Student’s cognitive testing measured Student’s verbal abilities/verbal knowledge in the average range; his nonverbal abilities/nonverbal knowledge was also in the average range. There was no significant discrepancy between the verbal/nonverbal subtests. Student’s ability to visually perceive differences in shapes, ability to recognize same shapes, visually recognize the whole of an object, and recall characteristics and details of shapes was superior. On the other hand, Student demonstrated low auditory processing skills.

11. Student’s social/emotional rating scores, provided by his teacher, noted clinically significant concerns in the areas of: (1) conduct problems, described as frequently engaging in rule breaking behavior, such as cheating, deception, and/or stealing; (2) aggression, described as engaging in an unusually high number of aggressive behaviors, including being argumentative, defiant and/or threatening to others; (3) hyperactivity, described as engaging in a high number of behaviors that adversely affect other children in

the classroom, including being restless and overactive, and difficulty controlling his impulses; (4) atypicality, described as engaging in behaviors that are considered strange or odd, or in which he generally seems disconnected from his surroundings; and (5) adaptability, described as his extreme difficulty adapting to changing situations and taking much longer to recover from difficult situations than most others his age.

12. Student was rated “at risk” in the areas of: (1) depression, described as at times as withdrawn, pessimistic and sad; (2) learning problems, described as difficulty comprehending and completing school work in a variety of academic areas; (3) attention problems, described as difficulty maintaining necessary levels of attention at school, which at times disrupts the academic performance and functioning in other areas; (4) withdrawal, described as being alone, difficulty making friends, and/or sometimes unwilling to join in group activities; (5) functional communication, described as demonstrating poor expressive and receptive communication skills, and difficulty seeking out and finding information on his own; (6) study skills, described as demonstrating weak study skills, poor organization, and difficulty turning in assignments on time; and (7) social skills, described as difficulty complementing others and making suggestions for improvement in a tactful and socially acceptable manner.

13. Student’s academic functioning assessment was administered by Student’s second grade teacher, Ms. Phillips. Student scored in the average range in each math composite subtest. Student scored below average in all reading composite subtests. Student scored below average in written expression, with a score of lower extreme in the spelling subtest. Student’s oral language composite scores were below average. Student’s listening comprehension and phonological awareness scores were average. However, his oral expression scored in the lower extreme.

14. In consideration of all of the data collected in the psychoeducational assessment, Ms. Tucker opined Student remained eligible for special education under the category of emotional disturbance. Further, Student appeared to demonstrate attention and auditory processing disorders. Ms. Tucker recommended the IEP team also consider whether Student had a sensory processing disorder, and a severe discrepancy between his cognitive ability and academic achievement.

15. Amy Brennan, a registered occupational therapist with 23 years of experience, was qualified to assess Student in the area of occupational therapy. She has provided Student with occupational therapy services since preschool in District. Based upon her assessment results, Student demonstrated general visual perception in the average range; visual motor integration in the below average range; and motor reduced visual perception in the average range. Both Student’s manual coordination and fine motor control were average. Writing was a non-preferred task, and Student demonstrated decreased effort and persistence with written tasks. Student sought vestibular (auditory) input and demonstrated difficulties with organization of behavior and motor planning.

16. Samantha Tuten assessed Student in the area of speech and language for District. She was a certified speech and language pathologist with 14 years of experience working with children in all areas of speech pathology, including fluency, language, voice and articulation. She was qualified to assess Student in the area of speech and language. The articulation tests disclosed that while Student's oral motor skills appeared to be within the normal range for adequate speech production and conversation levels. Student demonstrated approximately 70 percent intelligibility with informed or familiar listeners, but less than 50 percent intelligibility with unfamiliar listeners. Student also exhibited some praxis difficulties and his /s/ sound presented with a frontal lisp. In assessing Student's language abilities, Ms. Tuten found a significant split of 20 points between Student's listening comprehension and his oral expression. Although Student's overall language scores were in the low average range, the split indicated Student was still demonstrating expressive language deficits, primarily in the area of syntax and grammar. Based upon these assessment results, Student continued to meet eligibility criteria for speech and language disorder in the areas of articulation and expressive language/grammar.

17. Xochitl Perez, District mental health therapist, conducted Student's Educationally Related Mental Health Assessment. Her observations of Student's behaviors commenced on September 11, 2015. During a 12-minute math lesson, Student remained focused and behaved appropriately until he was done with his work. When asked to review his completed work, Student had moderate difficulty staying still in his seat until dismissed for recess.

18. During recess observation, Student initiated a game of tag with three other boys. At one point in the game, the tagging looked more like pushing and one boy fell to the ground. The game stopped when Student's aide intervened. Student was observed giving the middle finger to his peers.

19. On September 22, 2015, Ms. Perez again observed Student in the classroom. During the lesson, Student shouted out questions to the teacher approximately every three minutes. He had great difficulty sitting still. When the class was asked to stand up and get in a line, Student complied, but he began pushing the student in front of him (holding his lunch box), to let him know it was not snack time. When the line began walking to another room, Student got out of line. When the aide requested Student to follow directions and get back in line, Student became agitated, and proceeded to walk faster to dodge his aide. Student continued to walk fast, cutting through a different path to get to the front of the line and arrive at the destination first. When his aide again requested that he follow directions, Student appeared angry and upset, and, in response, walked away from his aide. Student then joined other students on the floor awaiting directions, where he initiated contact with another student by flicking him repeatedly on the arm and leg. When directed to line-up to return to the classroom, Student again ran ahead of his classmates.

20. Ms. Perez interviewed Mother for the mental health assessment. Mother expressed concern over Student's lack of empathy, and poor ability to demonstrate caring or concern toward others when they are hurt. Student also demonstrated difficulty with

socializing and communicating with others. Mother relates this difficulty to Student's speech delays and his frustration when others cannot understand his speech. Student will frequently get angry when his is asked to repeat himself, and he lashes out in an aggressive manner.

21. Mother's primary concern relates to Student's aggressive behaviors at home, including hitting, pushing, throwing and destroying things. She was also concerned about Student's poor judgment and impulsivity. As an example, Student will run into parking lots with oncoming cars; he will frequently run from family members when they are on a family outing. Mother also noted Student's routine cursing and a new behavior of stealing. Mother recognized Student may be copying maladaptive behaviors from his two oldest brothers, who are no longer in the home. Mother utilizes positive reinforcements and daily routines with Student, which encourages positive behaviors in Student.

22. Ms. Perez made two attempts to interview Student. Student refused the first interview. On the second attempt, Student remained focused for the first 10 minutes. However, his responses were primarily shoulder shrugs. He did not complete the assessment questions.

23. Ms. Perez concluded Student's mental health condition of ADHD affected his academic performance. Student's observable symptoms impacted his ability to acquire and attend to information in his learning environment. In addition, there are other observable behaviors impacting Student's functioning within the school environment, including the disrupting behaviors of hitting, cursing, not following directions, and defiance towards authority figures. These behaviors impede Student's ability to socialize in a functional manner with peers and adults. Student lacks the skills to modify and improve these behaviors on his own. Additional supports such as mental health services that target social skill building would likely improve these areas of functioning. Student's inability to express his feelings into words can also be addressed with mental health services. Ms. Perez recommended Student receive school based counseling services.

November 10, 2015 and December 3, 2015 IEP Team Meetings

24. District held an IEP team meeting for Student on November 10, 2015. The meeting was attended by Mike Marble, Cole Canyon's principal; Daniel Baldwin, program specialist; Amy Brennan, occupational therapist; Ms. Phillips, Student's special education teacher; Samantha Tuten, speech therapist; Julia Tucker, school psychologist; Melissa Hacker, school counselor; Ms. Perez, mental health therapist; Jennifer Jimenez, school psychologist intern; and Mother. Although a required member of an IEP team, no general education teacher attended the IEP team meeting.⁴

⁴ A general education teacher did not attend any of the IEP team meetings between November 10, 2015 and June 1, 2016.

25. Each of the triennial assessors discussed their reports and findings with the IEP team members. Mother participated by asking relevant questions and providing informative comments. Mother also shared her concerns regarding Student's educational progress and aggressive behaviors.

26. Ms. Tuten reviewed her speech and language assessment. Student continued to have articulation difficulties. Although Student had progressed, it was slow progress. Student continued to need prompting, visual cues, and repetition to produce targeted sounds. Student continued to have deficits in expressive and receptive language. Student required directions simplified. Student needed encouragement to express his feelings so he does not keep those feelings and emotions inside.

27. Ms. Phillips reported on Student's academic achievement. Student's deficit areas overlapped, however, his math skills were higher. Student is stronger in math calculations which do not involve higher language skills. Student's difficulties understanding concrete language will impact his ability to perform math word problems and demonstrate math reasoning.

28. Ms. Brennan discussed occupational therapy. Ms. Brennan shared that Student's motivation and mindset was a huge component. Based upon assessment results, Student should not have writing difficulties. Mother asked if bouncing a ball would help Student attend to directions. Ms. Brennan indicated Student already utilizes a "hookie stool" which wiggles. Ms. Phillips reported the stool had become a distraction in the classroom.

29. The IEP team extensively discussed Student's behavior, which had gotten progressively worse in fall 2015. The IEP team explained they had seen a different side of Student this year. During the 2014-2015 school year, Student had been more compliant and willing to work at school. This year, 2015-2016, Student exhibited eloping behaviors, cussing at staff members, and hitting and kicking other students and staff.

30. Ms. Tucker reviewed Student's psychoeducational and behavioral assessments. She emphasized Student's greatest area of deficit was his behavior. Student's social emotional and behavioral health was a concern in the school environment. As of November 2015, Student presented with many maladaptive behaviors which included cursing, calling classmates names, pushing other students, disrespecting and mocking adults, and destruction of classroom materials (i.e., hitting computers). Student's attention, behavior, and auditory processing delays significantly impacted Student. As part of his behavioral plan, Student was asked to assess his own behavior at the end of each day, and discuss where he ended up on the behavioral chart. He consistently felt his actions did not warrant a negative outcome.

31. Ms. Perez reviewed the mental health assessment, and discussed home strategies and resources that could benefit Student. Mother shared her concern that Student had shown an increase in physical aggression and elopement this year. The IEP team discussed Student's escape behaviors.

32. Mother reported she did not understand Student's behavior at school, and she could not find a correlation to explain his moods. Mother shared that Student had a bond with his previous teacher, Mr. VanDeusen, and Student's behavior could be a reaction to the many changes in the new school year, including a different teacher and different aide.

33. Several options were discussed, including returning Student to Mr. VanDeusen's classroom for 60 days; taking Student to his pediatrician for additional referrals/assessments; and a possible change of placement to the mild/moderate SDC at Monte Vista Elementary School, which focused on developing behavioral skills. Mother found fault with each of the alternatives, and specifically expressed concern over the long bus ride required to attend Monte Vista. Instead, Mother requested a different one-to-one aide for Student, as she was concerned with the level of consequences Student received from Ms. Attwood. The IEP notes reflect Mother understood the services and placement offered would be what District felt was best for Student, but she believed ultimately it was her right as a parent to accept or refuse services offered by the IEP team.

34. To exhaust all options available to Student, Mother agreed to the addition of counseling services to Student's existing IEP. The IEP team meeting was continued to December 3, 2016, to complete the IEP, and offer of placement. In the meantime, Student remained in Ms. Phillip's SDC at Cole Canyon.

35. District reconvened Student's IEP team meeting on December 3, 2015. The same IEP team members from November 10, 2015, attended this meeting.

36. Student's strengths, preferences, and interests were reviewed. Student's present levels of performance were developed based upon the triennial assessments, and discussions held on November 10, 2015. The IEP team members crafted Student's goals. Each goal was discussed and amended as the team discussion took place. Each of the goals was measurable through observation, data collection and/or Student work samples.

37. The team created three speech and language goals. Two of the goals addressed articulation; one for sounding out multi-syllable words; the other for intelligibility of sounds. The third speech goal addressed expressive language, and required Student to produce grammatically correct utterance or sentences.

38. The IEP team crafted five academic goals. Three goals addressed reading. The first goal required Student to decode two-syllable words. The second reading goal required Student to increase his reading of sight words. The third reading goal required Student to increase his accurate reading speed and fluency. One goal addressed math facts, and required Student to independently complete math worksheets with mixed addition and subtraction facts. Another academic goal addressed writing, and required Student to write informative/explanatory texts in which he named a topic, supplied some facts about the topic, and provided some sense of closure.

39. The IEP contained a behavioral goal, which sought to have student accurately complete a self-monitoring sheet twice daily, to increase his positive classroom behaviors.

40. While no specific occupational therapy goals were crafted, direct occupational therapy services remained part of Student's IEP to accompany and support the sensory components needed to support Student's other goals, i.e., working on calming strategies for non-preferred activities such as writing.

41. Accommodations were created to assist Student, including (1) presentation of information visually; (2) behavioral chart and positive reinforcement; (3) breaks during instruction; and (4) parent training.

November 10, 2015 and December 3, 2015 IEP Offer of FAPE

42. To support Student's unique needs described above, District offered placement and related services in the December 3, 2015 IEP, as follows:

1. 370 minutes per day of specialized academic instruction;
2. Twenty-five, 30-minute sessions per year of group occupational therapy services;
3. Forty, 20-minute sessions per year of individual speech and language services;
4. Twenty, 30-minute sessions per year of group speech and language services;
5. Thirty minutes, three times per month of individual counseling;
6. Ninety minutes per month of group counseling and guidance;
7. 340 minutes per day of one-to-one aide support; and
8. Extended school year, including specialized academic instruction and speech and language services.

43. The IEP team discussed a continuum of possible placements. District determined Student's behavior significantly impacted his learning and the learning of his peers. Student currently had a one-to-one aide within the mild/moderate special day classroom, and his progress was minimal. District offered Student placement in the behavioral special day class at Monte Vista. All of Student's IEP could be implemented at Monte Vista. Further, Student required a highly structured small group environment that had a primary emphasis on mental health therapy to promote greater access to curriculum.

44. The Monte Vista campus is approximately nine miles from Student's residence. As it was not Student's home school, District offered curb-to-curb bus transportation. Student, however, would not be the only child on the bus, and it was estimated the school bus ride would run from 75 to 80 minutes each way.

45. Mother did not agree to the change in placement to Monte Vista. Mother had previously visited the Monte Vista campus and was not impressed. She did not like the behaviors exhibited by other students and did not want Student to model the others in the class. Of greater concern, Mother described the potential of over two hours on the bus as

inappropriate. Past attempts with school bus transportation for shorter periods had failed. Because of his behaviors, Mother currently transported Student to school. Monte Vista was nine miles from home. Mother felt that District did not consider the aftermath of the long bus ride; specifically, what happened once Student arrived home.

46. While the amount of time needed to transport Student to Monte Vista was not optimal, the transportation offer was not a substantive consideration for the IEP team. To the contrary of Mother's concerns, Ms. Phillips opined the lengthy bus ride might actually be beneficial for Student. Student's agitation often began before school at home. Time spent on the bus could allow Student to decompress and calm down. Student would have continual adult supervision until school started, so he would not have the opportunity to "get into trouble" before class started.

47. Mr. Baldwin indicated he would discuss Mother's concerns about Student's aide with Michael Marble, school principal. Mother reported that Ms. Attwood had no bond with Student. Mr. Marble investigated Mother's claims regarding Ms. Attwood. The one incident reported by Student involved an aide other than Ms. Attwood, and resulted when the aide made Student do something he did not want to do. To test Ms. Attwood's relationship with Student, District changed Student's one-to-one aide for a seven-to-eight week period in spring 2016. Ms. Attwood was not involved with Student during this period. The new aide and Student were familiar with each other. Student, however, did not like the new aide, and sought out Ms. Attwood. Student's behaviors escalated, and Ms. Attwood was reassigned to Student in May 2016.

48. Student required a higher level, Tier-III behavioral support plan. This required a functional behavioral assessment. Mr. Baldwin correctly requested a Tier-III behavioral plan and functional behavioral assessment at the December 5, 2015 IEP team meeting. Ms. Tucker forwarded several assessment plans to Mother for consent, who did not provide consent until March 4, 2016. Mother stated she never received an assessment plan from District.

Student's Behaviors Revisited 2016

49. Student's behaviors continued to increase over the 2015-2016 school year. Ms. Phillips "could not even count how many times he (Student) hit me." Ms. Phillips reported Student could hit hard; hit her with his fist; kicked her, and shoved her against a wall. Student acted out of anger. Ms. Phillips reported it was not a secret when Student was angry; he made an angry face, and used inappropriate language. He was physically aggressive daily, sometimes more extreme than others.

50. Student said degrading things to his peers. The "F-bomb", dumb ass, and "f-off" became three of his favorite phrases. His behaviors had a negative impact on others. Student's outbursts took away education time from others. He modeled bad behaviors for others in the class.

51. The other students in Ms. Phillips' class lost education time due to Student's behaviors. In spring 2016, Student was so disruptive that Ms. Phillips, on three or four occasions, removed the other students from the classroom for their own safety, and to prevent Student from harming them or himself. Many of his peers were afraid of him, and he intimidated other students in the class.

52. On March 4, 2016, District held an IEP team meeting to conduct a manifestation determination review based upon Student's misconduct. The incident involved Student eloping from the classroom; locking himself in the bathroom; then eloping to the bike gate when school was about to be dismissed, where he began throwing rocks, primarily at Ms. Phillips and the aide (not Ms. Attwood). Mr. Baldwin, Ms. Tucker, Ms. Phillips, Ms. Perez, Ms. Brennan, Ms. Tuten, and Mother attended the meeting. The IEP team discussed the relevant issues related to a manifestation determination. They determined: (1) Student's behavior was substantially related to his disability; (2) Student's last agreed upon IEP had been implemented, and (3) District's offer of placement at Monte Vista was appropriate.

53. Ms. Tucker reiterated she has sent Mother several assessment plans for the functional behavioral assessment, which had not been returned. District could not change Student's behavioral plan until he was reassessed.⁵ Mother continued to demand a new one-to-one aide for Student. Mr. Baldwin responded that the aide services pursuant to the IEP were being implemented; Mother could not control personnel decisions; and Ms. Attwood was not acting as Student's aide at the time. Mother made additional claims about another aide putting his hands around Student's neck. Mr. Baldwin chided Mother for not responding to District emails, and failing to pick Student up from school when serious assaultive behavior was occurring.

54. Mr. Baldwin asked Mother to visit Monte Vista again. The classroom was completely different, staff had received new trainings, and two additional teachers were added to the behavioral program. Mother stated she would not go back to Monte Vista, nor was she interested in observing other programs. Mother left the manifestation determination review meeting without finishing the discussion or signing the IEP team amendment page. District sent Mother a copy of the manifestation determination review documents and notes. Mother never returned for any further discussions or meetings with District.

May 3, 2016 IEP Team Meeting

55. On April 18, 2016, and again on April 25, 2016, Ms. Phillips sent Mother a Notice of IEP Meeting scheduled for May 3, 2016. Mother did not respond to Ms. Phillips. On May 2, 2016, Mother and Mr. Baldwin spoke by telephone.

56. Mother declined to attend the May 3, 2016 IEP team meeting. Mother received the two written notices of the IEP meeting, scheduled for May 3, 2016. On May 2,

⁵ Mother signed the assessment plan at the meeting.

2016, Mother spoke with Mr. Baldwin, and indicated she would not attend the IEP team meeting. Mother did not indicate that she was unavailable for the May 3, 2016 IEP team meeting; she did not indicate an interest or desire to attend the IEP team meeting; nor did she request District to reschedule the IEP team meeting to a more convenient date. Later, on May 2, 2016, District sent a follow-up email and formal letter to Mother, offering to reschedule the IEP team meeting, if Mother wished to attend. At the commencement of the IEP team meeting on May 3, 2016, Mr. Baldwin telephoned Mother, but was directed to her voicemail.

57. District held the IEP team meeting on May 3, 2016, as scheduled. Mr. Baldwin, Ms. Ciabattini, the assistant principal, Ms. Perez, Ms. Tucker, Ms. Phillips, Ms. Tuten, and Ms. Brennan attended the IEP team meeting. When Mother did not arrive for the meeting, Mr. Baldwin telephoned her and left a voicemail indicating the meeting was taking place as scheduled.

58. Ms. Tucker administered the functional behavioral assessment, and reviewed her report at the meeting. Data was collected, Student's teacher and service providers interviewed, and records reviewed, including prior assessments. The assessment was conducted because Student's behavior resulted in significant disruption to the learning of himself and others. His challenging behavior impeded his learning, since the behavior resulted in missing instruction and time completion. His behavior negatively affected the learning of other students, was disruptive and disturbed students in the classroom. Student was not completing classroom work, which negatively impacted his academic progress. Student's behavior interrupted whole-class instruction and reduced his exposure to curriculum during disciplinary actions. Safety issues presented due to Student's elopement and physical aggression. As a result, the functional behavioral assessment targeted Student's (1) physical aggression; (2) verbal aggression; and (3) refusal to follow directions/elopement.

59. The assessment provided an analysis of Student's behaviors. Antecedents of behaviors included transitions without preparation; changes in routine; large volume of printed material on page; long assignments; teacher's demand to do non-preferred tasks; less assistance; and teacher directions. The consequences thought to be maintaining Student's behaviors was that requests or demands would be postponed or terminated; and the activity would not be completed. Student refused to comply and engaged in physical, verbal aggression, and eloping to escape non-preferred tasks and transitions. Student demonstrated more behaviors of concern during reading and writing activities, and less during math. Student demonstrated less behaviors of concern during art activities and computer time. He struggled with transitions from one activity to the next, and from one place to another.

60. The functional behavioral assessment data and results recommended: (1) a change in the school environment to a classroom setting with a behavioral focus; (2) replacement behaviors be taught and reinforced; (3) revision of IEP goals to address areas of physical and verbal aggression, eloping and task refusal; and (4) development of a Tier-III positive behavioral support plan.

61. The Tier-III behavioral support plan was extensive. Part I dealt with environmental factors and changes required to remove Student's need to use his maladaptive behaviors. Such changes included, but were not limited to, breaking down assignments into smaller chunks; providing frequent teacher assistance; teaching Student to request alternate assignments; and teaching Student to transition properly.

62. Part II dealt with functional factors and replacement behaviors to be taught and reinforced, utilizing Functionally Equivalent Replacement Behaviors. Teaching strategies were proposed to teach Student appropriate replacement behaviors. Reinforcement procedures were proposed for establishing, maintaining, and generalizing the replacement behaviors.

63. Part III dealt with reactive strategies to be employed if the problem behavior occurred again. A series of steps were designed to deescalate Student, beginning with becoming aware of early warning signs of escalating behaviors. Next, adults would initiate reactive strategies, such as using positive verbal supports and/or offering an alternative task. If Student continued to escalate and develop aggressive behavior, he would be guided to the "time out" area, to calm down. Once calm, Student would debrief with his teacher to understand why the behavior escalated. If removed from class, the school psychologist and Mother would be notified. Finally, consequences would apply, along with school disciplinary procedure if Student was in violation of school rules.

64. Part IV provided new replacement behavior goals to support the behavioral plan: (1) Student would pick a safe alternative activity (from a field of five alternate activities) as replacement for task avoidance, defiance, or aggression during classroom activities; (2) Student would increase his positive behavior, and have no episodes of physical or verbal aggression or elopement during non-preferred tasks, staff directives and transitions; (3) weekly behavior summaries would be provided to Student's case carrier and Mother describing the frequency which Student engaged in maladaptive behaviors and when he demonstrated the use of replacement behaviors, both prompted and independently; and (4) two-way communication between Student's case carrier and Mother was proposed to allow Mother to respond and report on use of replacement behaviors in the home, behavior changes in the home, and any new information regarding Student's health, stressors, medications.

65. The IEP team also developed four new behavioral goals. The first goal addressed eloping behaviors; the second goal addressed verbal aggression; the third goal addressed task refusal; and the fourth goal addressed physical violence. Each goal was based upon the baselines obtained in the functional behavioral assessment, and each goal mirrored the targeted behavior addressed in the Tier-III behavioral support plan.

66. Ms. Tuten proposed two new goals. A goal of self-expression was created to address Student's need to calmly identify and communicate what is wrong when he becomes upset. The second goal sought to assist Student identify his feelings, i.e., overwhelmed, worried, afraid, angry, lonely, confused and jealous.

67. District sent Mother a copy of the May 3, 2016 IEP team amendment, functional behavioral assessment report, and proposed Tier-III behavioral support plan. Mother did not respond or consent to implementation of the IEP or Tier-III behavioral support plan.

68. Without the ability to implement the Tier-III behavioral support plan, Student's behavior continued to run amok. On May 19, 2016, Student's behavior culminated in District filing of a Behavioral Emergency Report. Student was scheduled for pull-out speech and language services. He was resistant to going to the speech room, and was very upset, physically violent, and used foul language. Student's behavior escalated, he flipped desks and destroyed the room. The adults in the room, including Ms. Tuten, tried providing behavior choices, but became concerned Student would hurt himself or others. Student kicked adults and tried to elope from the room. PROACT strategies were initiated and it took four adults to physically place Student in a prone position until he decompressed.

69. District sent Mother a copy of the behavior emergency report and a request to attend an IEP team meeting, scheduled for May 23, 2016. Mother did not respond or attend the IEP team meeting. On May 23, 2016, Mr. Baldwin sent Mother a letter requesting Mother's attendance at an IEP team meeting to discuss the May 19, 2016 incident.

70. District sent Mother another request to attend an IEP team meeting, for either May 26, 2016, or June 1, 2016. District requested for Mother to select which date she would attend, or inform District of an alternate date on which she would be available. The letter also informed Mother that if she did not respond, the IEP team meeting would be held on June 1, 2016, without her participation. A Notice of Procedural Safeguards and Parent's Rights was also attached. This correspondence was also provided to Mother via email. Mother did not respond to District's various invitations to attend the June 1, 2016 IEP team meeting.

The June 1, 2016 IEP Team Meeting

71. Mother did not respond to District's correspondence or attend the June 1, 2016 IEP team meeting. Mr. Marble attempted to contact Mother, the morning of the IEP team meeting, but Mother did not answer the telephone. District held the IEP team meeting in Mother's absence. The IEP team members included Mr. Baldwin, Ms. Phillips, Ms. Tucker, Mr. Marble, Ms. Tuten, and Ms. Brennan.

72. The IEP team discussed the behavioral incident of May 19, 2016, and reviewed the functional behavioral assessment and Tier-III behavioral support plan. At Mr. Baldwin's suggestion, an extension to Student's one-to-one aide service to the entire duration of the school day, and the extended school year, was added to the IEP. The team also offered a one-to-one aide during bus transportation, s curb-to-curb.

73. The proposed behavioral goals from May 3, 2016, were reviewed again, and remained appropriate as drafted. They could be most effectively implemented at Monte Vista.

74. The proposed speech and language goals remained appropriate and did not need updating. Ms. Tuten opined Student's present levels and goals remained valid. Student had made minimal progress with speech and language due to noncompliance. Student did not need changes in his speech and language goals. He needed changes in his behavior to make progress. Ms. Tuten also confirmed the speech and language goals could be implemented at Monte Vista.

75. Ms. Tuten continued to support Student's placement at Monte Vista. She had observed Student at Cole Canyon on a weekly, if not daily basis. Student was aggressive and violent in his special day class. Ms. Tuten opined the behavioral program at Monte Vista would be extremely beneficial for Student.

76. With regards to occupational therapy, Ms. Brennan considered the November 2015 data still valid, and Student's present levels of performance still accurate. Occupational therapy service would still benefit Student to provide alternative sensory support for his behaviors. He did not require occupational therapy in the extended school year, as regression was not an issue in his sensory needs. Ms. Brennan also opined Monte Vista was the appropriate placement for Student, and could address his sensory needs.

77. The academic goals did not require updating. Ms. Phillips indicated the goals were still appropriate and addressed Student's academic weaknesses.

78. As Student's teacher, Ms. Phillips' observations and opinions are most important. She reiterated the primary focus of the Cole Canyon mild/moderate special day class was academics. The process of trying to teach Student escalated his behaviors. Ms. Phillips reported that in September 2015, Student was on task 60 percent of the time. By May 2016, Student remained on task a mere 10 percent of the time. That was not enough time to gain skills. Ms. Phillips noted, although Student made some progress in math, trivial progress in her words, and no meaningful progress in reading or writing. Student did not work up to his potential, nor would she expect him to make real academic progress unless he developed skills to control his behavior. Student's placement at Monte Vista was necessary if Student were to make academic gains.

79. Ms. Perez felt the counselling services, and behavioral and speech goals in the proposed IEP, would assist Student in developing skills to modify his behaviors and express his emotions appropriately. She observed Ms. Attwood on nearly a weekly basis, and found that Ms. Attwood had performed her duties appropriately. Nevertheless, even with a one-on-one aide, the special day class at Cole Canyon could not adequately address Student's behaviors.

80. As the mental health therapist for District, Ms. Perez strongly feels Student needs the Monte Vista program, which is behavior and counseling driven. Monte Vista also has a family therapy component. Monte Vista can provide more opportunities for Student to improve his behavioral skills. He can learn from his behaviors and be provided constant reinforcement, with clear expectations. Student requires systematic behavioral instruction where he can learn and model other peers' structured behaviors. Monte Vista provides its own "culture," in which all students are part of the behavioral system, and the students motivate each other to improve their behaviors. This mindset and structure cannot be implemented at Cole Canyon.

81. Further, Ms. Perez had provided nine counseling sessions to Student during the 2015-2016 school year. She noted Student was unwilling to leave the classroom for counseling, and he noticed he was the only one receiving counseling. As a result, she had a difficult time establishing a rapport with Student. Ms. Perez opined, at Monte Vista, Student would be one of many students receiving counseling, and she anticipated he would be more receptive to therapy when others were doing likewise.

82. Ms. Tucker also felt the existing goals remained viable for Student. She also emphasized the importance of Student attending the Monte Vista program. Succinctly put, Student's behaviors impede his learning. He must learn skills to control his behaviors before he can learn academics.

Additional Testimony

83. Mr. VanDeusen is currently Student's third grade teacher at Cole Canyon. He was also Student's teacher in the kindergarten through first grade class. Mr. VanDeusen bonded well with Student during the first grade. Based upon his prior teaching experience with Student, his opinion was given significant weight. Mr. VanDeusen does not believe the mild/moderate special day class at Cole Canyon is appropriate for Student. Student requires more support than can be provided in this class. Student's behaviors interfered with his education and the education of others on a daily basis. Mr. VanDeusen has observed the Monte Vista program, and noted it focused on behavior. Academics were intertwined with stress on behavioral skills, whereas at Cole Canyon, behavioral skills are intertwined with an emphasis on academics. Monte Vista provides a smaller staff to student ratio, and has break rooms, safe rooms, and sensory equipment not available at Cole Canyon. Mr. VanDeusen agreed with Ms. Phillips; Student's learning could not fall into place until his behaviors were under control.

84. Leroy Miyazaki, a mild/moderate special day class teacher from Monte Vista, provided a description of the behavioral program at Monte Vista. Monte Vista is a learning center where therapeutics are imbedded in weekly social skills lessons. The curriculum has a behavioral component. Individual counseling is provided to all students. There are ten students in the third through fifth grade class, with a special education teacher and three classroom aides. All staff is PROACT trained and trained in applied behavior analysis.

85. The behavioral program utilizes social/emotional learning, which District staff considered just as important as academics. Through mind-set strategies, students are taught to focus on the present to make good choices. They are taught to put effort into solving problems. Additionally, a functional behavioral assessment model is utilized to look for reasons for behavior to proactively prevent such behaviors. Behavior is a constant learning event. Behaviors are monitored hourly, and students are provided positive behavioral reinforcements and/or consequences. The students are made accountable. Data is collected through a daily point sheet utilized throughout the school day, curb-to-curb. This allows parents for communicate daily to monitor and support behavioral skills.

86. Mr. Miyazaki is confident placement at Monte Vista is appropriate for Student. Student's academic goals can be implemented. His behavioral goals and behavioral support plan will correspond nicely with the Monte Vista program, and all IEP support services and accommodations can be easily implemented.

87. Mother initially requested to testify on August 30, 2016. Mother was sworn in, but then decided she preferred to testify on September 1, 2016, as the last witness. The ALJ granted this request, however on September 1, 2016, Mother failed to appear for the hearing and did not testify. In the cross-examination of District witnesses, however, Mother provided narratives that Student was not given appropriate tools at school to deal with his audio processing deficits, i.e., visual supports. District did not provide computer based programs. Mother was pressured into obtaining medication for Student's ADHD, which resulted in Student's meltdowns. Mother again stressed that Ms. Attwood had no bond with Student, mistreated him, and made him feel like he stood out in the group. Since Mother did not return to the hearing to provide further testimony, these claims were not supported by other evidence, and were contrary to the preponderance of the evidence which was provided.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA⁶

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq; 34 C.F.R. §300.1 (2006)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁷ All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

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. 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.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, 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. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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. 49, 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 had the burden of proof on the sole issue presented, whether its IEP's offered Student a FAPE

Appropriateness of District's IEP Offer

5. Under the IDEA, a FAPE is defined as follows: special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the school standards of the state educational agency; (C) include an appropriate pre-school, elementary school, or secondary school in the state involved; and (D) are provided in conformity with the IEP required under section 1414(d) of the Act. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

REQUIRED PARTIES FOR IEP TEAM MEETINGS

6. An IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, no less than one special education provider of the student; (4) a representative of the district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum, and who is knowledgeable about the availability of resources of the District; (5) an individual(s) who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414; 34 C.C.R. § 300.321(a)(1)(2); Ed. Code, § 56341.) The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom. (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F. 3d 840.) The failure to include required parties in the IEP team may represent a procedural violation of the IDEA.

7. The Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. The analysis of whether a student has been provide a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the Act, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Rowley, supra*, at p. 198.) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d at 977, 892.) To constitute a denial of FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parent's opportunity to participate in the IEP process. (*Ibid.*)

8. A general education teacher was not present at any of the four IEP team meetings, conducted between November 10, 2015, and June 1, 2016. At least one general education teacher is a mandatory member of an IEP team unless his/her presence is waived by parents. Although Mother did not object to the absence of a general education teacher at

the November 10, 2015, and December 3, 2015 IEP team meetings, she did not provide a waiver of their attendance. The absence of the general education teacher represents a procedural violation of the IDEA. This violation, however, had no impact on the fundamental issues and discussions for the IEP team meetings. Student was not a general education student; placement or mainstreaming in a general education setting was not subject to practical discussion due to Student's maladaptive behaviors. Regardless of whether Student attended Cole Canyon or Monte Vista, his time spent with typical peers was limited to short, non-academic time frames, such as snack, and lunch. The lack of a general education teacher's attendance at the IEP team meetings neither resulted in deprivation of educational benefit for Student nor hindered Mother's opportunity to participate in the IEP process. District's failure to have a general education teacher attend the IEP team meetings was harmless, and did not result in a denial of FAPE. (See *A.G. v. Paso Robles Joint Unified School Dist.* (9th Cir. 2014) 561 Fed.Appx. 642, 643.)

REQUIREMENTS OF AN INDIVIDUALIZED EDUCATION PROGRAM

9. An IEP is a written document which details the student's current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

10. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability.

11. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Id.* at p. 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP 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 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 child. (*Ibid.*)

12. Federal and state law require that an IEP team must consider certain information, including the results of the initial or most recent evaluation of the child. (20 U.S.C. § 1414(d)(3)(A)(iii); 34 C.F.R. § 300.324(a)(1)(iii); Ed. Code, § 56341.1, subd. (a)(3).)

13. The November 10, 2015 IEP team meeting was adjourned due to time constraints and reconvened on December 3, 2015, to complete Student's triennial/annual IEP. As such, the combined meetings and finalized December 3, 2015, constitute District's completed offer placement and related services. The 2016 IEP contained all statutory elements. The IEP team members utilized the information and recommendations provided in Student's triennial assessments which were conducted for the November 10, 2015 IEP team meeting. The assessments, including psychoeducational, academic, speech and language, occupational therapy, behavior/social skills, and mental health, addressed all areas of suspected disability. The assessments provided current information regarding Student's strengths and weaknesses, as well as provided the basis for Student's present levels of performance and goal baselines. While Mother failed to participate in several of the psychoeducational rating scales, she nonetheless contributed information to the assessors and IEP team members. She did not dispute the findings and recommendations of the assessors, except regarding the proposed placement at Monte Vista. The information on which District based its determinations were based upon sound information and recommendations as contained in the triennial assessments and reported to the IEP team.

14. The completed December 3, 2015 IEP provided five academic goals covering Student's reading, writing and math deficits; and three speech and language goals, which addressed Student's articulation and grammar. A behavior goal was developed to teach Student behavior skills of self-monitoring. Admittedly, District might have drafted more extensive behavioral goals, based upon Student's conduct. His behaviors, however, at the time of the IEP team meeting, had not yet dramatically escalated, and District anticipated a new behavior assessment would be completed. Each of the goals related to Student's disabilities and unique needs. Each of the goals was measurable through observation, data collection and/or Student work samples. The IEP included a list of accommodations for Student, as well as an offer of parent training for Mother. The goals and accommodations offered to Student were appropriate.

15. Appropriate related services which could support the proposed goals were offered. The IEP team offered a full day of specialized academic instruction in a self-contained special day class. Speech and language goals were supported by both individual and group speech and language therapy. Group occupational therapy was offered to address Student's need for sensory support. Both individual and group counseling was offered. A one-to-one aide was offered for the school day.

PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

16. An IEP team must consider whether a child's behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

17. In addition to providing 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; 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.*)) Under the LRE mandate, a school district must consider a continuum of alternative placements..." (34 C.F.R. § 300.115(b); Ed. Code, § 56342, subd. (b).)

18. 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. (*Rachel H., supra*, 14 F.3d at p. 1404.)

19. The IEP team appropriately considered a continuum of placements for Student. Student's behaviors have limited the options. The factual findings are replete with examples of the impact of Student's maladaptive behaviors. Student exhibited a great deal of behaviors such as tantrums, non-compliance, hitting, kicking, eloping, and throwing objects. He required a high level of prompting and adult guidance throughout the day to comply with instructions and engage in learning activities. Student's maladaptive behaviors prevented him from accessing his education, and further prevented consideration of placement in a general education setting, which Mother never sought. There was no dispute Student required a smaller classroom setting with more individualized instruction and adult supervision. Mother did not disagree, and expressed her concern regarding Student's escalating behaviors.

20. Each of District's witnesses described their personal observations of Student's aggressive and disruptive behavior. Ms. Phillips, Student's teacher, dealt with Student daily. Student's behaviors began to escalate and did not always respond to positive behavior strategies. He was defiant and disrespectful to teachers and adult staff, and verbally abusive. Student's physical aggression, hitting, kicking, pushing, and physical intimidating of other children, created significant safety concerns. Student's continual defiant and disruptive behaviors impeded his ability to learn. Equally important, Student's daily disruptive behaviors took teaching time away from his classmates, thereby impeding the education of the other children in his class as well. The mild/moderate special day class at Cole Canyon

was designed to emphasize academic content over behaviors. The presence of Student's one-to-one aide, a well as two additional classroom aides, could not remediate Student's behaviors.

21. District appropriately considered the *Rachel H.* criteria in determining placement and least restrictive environment. Monte Vista is a public elementary school within the geographical boundaries of District. Overwhelmingly, the disruptive and dangerous effects the presence of Student had on the teacher and children in the classroom, prevented Student from remaining at Cole Canyon, and required the District IEP team members to recommend placement in the more restrictive behavioral program at Monte Vista. Further, the IEP goals and related services could be effectively implemented at Monte Vista. The Cole Canyon special day class was no longer an appropriate placement for Student. The Monte Vista placement represents the least restrictive environment for Student, before considering more restrictive placements. District could implement Student's IEP at Monte Vista.

22. Mother's concerns regarding the proposed bus transportation to Monte Vista are legitimate. It is undisputed that prior attempts to have Student ride the school bus failed due to his maladaptive behaviors. A 90-minute commute to and from school is less than optimum for any child. While Mother feels the commute will be a disaster, Ms. Phillips more persuasively testified that it may be beneficial, and allow Student time before school starts to calm and focus on his day. While bus transportation may create problems, there are prospective contingencies for addressing such problems if they arise, such as convening an IEP team meeting to modify the IEP, adding additional behavioral strategies, or having Mother provide transportation, if she preferred. When balancing all considerations for selecting an appropriate placement, Student's need for the behavioral program at Monte Vista outweighed the concerns over his travel time.

23. The November 10, 2015 IEP, as completed on December 3, 2015, met the legal standards for creation of an IEP, contained goals supported by services which addressed Student's unique needs, and was reasonably calculated to provide Student with educational benefits.

The May 3, 2016 IEP

PARENTAL PARTICIPATION

24. The IDEA and state law explicitly require that parents be part of the IEP team which is charged with developing and implementing a student's IEP. (20 U.S.C. §§1401(14), 1414(d)(1)(B)(i); Ed. Code, § 56342.5.) Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. §1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of

the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].)

25. A school district must take steps to ensure that one or both parents of a disabled child are present at the IEP meeting by “(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place.” (34 C.F.R. § 300.322(a).) “If neither parent can attend an IEP team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls” (34 C.F.R. § 300.322(c).) “A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place” (34 C.F.R. § 300.322(d).)

26. The Ninth Circuit has found that school districts must make every attempt to secure the presence of a student’s parents at IEP meetings. In *Shapiro v. Paradise Valley Unified School Dist.* (9th Cir. 2003) 317 F.3d 1072, 1077, *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B) (*Shapiro*), the Ninth Circuit noted that “[t]he importance of parental participation in the IEP process is evident.” In *Shapiro*, the school district refused to reschedule the child’s IEP meeting to a date requested by the parent who was not available on the date convenient to the district. The court in *Shapiro* held that the failure to reschedule the meeting constituted a procedural violation that amounted to a denial of FAPE. (*Id.* at p. 1075.) The court further held that the fact that the school district subsequently sent the IEP to the parent for approval did not cure the violation. (*Id.* at p. 1078.)

27. The Ninth Circuit reiterated its ruling in *Shapiro* in the case of *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*). There, the school district was faced with either missing the statutory deadline to hold the child’s IEP team meeting or holding the meeting without the parent, who had cancelled a few meetings and then had informed the district that he was ill and could not attend the latest scheduled meeting, but indicated that he would attend a later meeting when scheduled. The Ninth Circuit found that it was more important to ensure the parent’s presence at the IEP meeting than it was to meet the deadline to hold the meeting, because the former was the procedural requirement that most benefitted the Student and Parent indicated he would attend a later meeting. (*Id.* at pp. 1043-1047.)

28. In instances when parents fail or refuse to cooperate, the school district is not relieved of its obligation to provide a FAPE to publically enrolled IDEA-eligible students. Therefore, the IDEA permits school districts to conduct IEP meetings without parental participation when the school district is unable to convince the parents to attend. (34 C.F.R. 300.322(d); *Cupertino Union School Dist. v. K.A.* (N.D. Cal. 2014) 75 F.Supp.3d 1088, pp. 1100-1102.)

29. Mother declined to attend the May 3, 2016 IEP team meeting. Mother received two written notices of the IEP meeting, scheduled for May 3, 2016. On May 2,

2016, Mother spoke with Mr. Baldwin, and indicated she would not attend the IEP team meeting. Mother did not indicate she was unavailable for the May 3, 2016 IEP team meeting; she did not indicate an interest or desire to attend the IEP team meeting; nor did she request District to reschedule the IEP team meeting to a more convenient date. Later on May 2, 2016, District sent a follow-up email and formal letter to Mother, offering to reschedule the IEP team meeting if Mother wished to attend. At the commencement of the IEP team meeting on May 3, 2016, Mr. Baldwin telephoned Mother, but was directed to her voicemail.

30. The circumstances in this matter can be distinguished from *Doug C.* In *Doug C.*, parent had expressed his desire to attend the IEP team meeting, and had worked with the school district to obtain a convenient date for the IEP team meeting. When parent was unable to attend the meeting due to illness, he objected to the school district holding the IEP team meeting without him, and attempted to work with the school district to reschedule the meeting. The school district held the IEP team meeting in parent's absence only because it wanted to hold the IEP team meeting in a timely fashion and not disrupt its personnel's schedules. Here, Mother openly stated she would not attend the IEP team meeting. She did not have a scheduling conflict. She did not request the IEP team meeting be rescheduled so she could attend. District made reasonable attempts to have Mother attend and documented its attempts to gain Mother's cooperation.

31. The May 3, 2016 IEP meeting was necessary to review the functional behavioral assessment, adopt a Tier-III behavior support plan, and review and/or amend Student's behavior goals, which was mandated by Student's aggressive behavior and resulting manifestation determination review. Given Student's escalating behaviors, it was imperative that District develop a Tier-III behavioral support plan and modify the behavioral content of the November 10, 2015/December 3, 2015 IEP. Mother refused to attend. The best interests of the child, in this case, the mandated review of Student's functional behavioral assessment and the development of a corresponding Tier-III behavioral support plan, outweighed Mother's arbitrary decision not to attend or participate in the May 3, 2016 IEP team meeting, and further delay Student's access to an appropriate educational program. It was appropriate to conduct the May 3, 2016 IEP team meeting without Mother present.

THE BEHAVIOR PLAN AND AMENDED GOALS

32. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a) (2)(i); Ed. Code, § 56341.1, subd. (b)(1).) If an IEP team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd.(b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit., 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of

problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *Escambia County Bd. of Educ. V. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

33. District's functional behavioral assessment provided an accurate analysis of Student's maladaptive behaviors, and complied with statutory law and regulations. The assessment resulted in recommendations involving: (1) a change in the school environment to a classroom setting with a behavioral focus; (2) replacement behaviors be taught and reinforced; (3) revision of IEP goals to address areas of physical and verbal aggression, eloping and task refusal; and (4) development of a Tier-III positive behavioral support plan. This, in turn, resulted in development of an extensive, four part, Tier-III behavioral support plan.

34. The IEP team developed four new behavioral goals which addressed Student's identified behaviors of eloping, verbal aggression, task refusal, and physical violence. Each goal was based upon the baselines obtained in the functional behavioral assessment, and each goal mirrored the targets addressed in the Tier-III behavioral support plan. Additional goals of self-expression and identification of feelings were also crafted.

35. The May 3, 2016 amendments provided a Tier-III behavioral support plan for Student, which addressed the behaviors that were impeding Student's learning. The Tier-III behavioral support plan identified Student's problem behaviors, and crafted positive behavior interventions that were designed to present Student with options to appropriately modify his behaviors and express his needs. The May 3, 2016 amendments to the IEP were appropriate.

The June 1, 2016 IEP

36. The June 1, 2016 IEP team meeting was held to discuss the Behavior Emergency Report and incident involving physical restraint on Student. Once again, Mother declined to attend the June 1, 2016 IEP team meeting. On May 19, 2016, Ms. Phillips sent Mother an email, as well as a hard copy of a Notice of IEP Meeting scheduled for May 23, 2016. Mother did not respond, therefore the IEP team did not meet on May 23, 2016. Instead, on May 23, 2016, Mother was sent a letter requesting her participation in an IEP team meeting, with two alternate dates for the meeting, May 26, 2016, or June 1, 2016. Again, Mother did not respond or request a different date to attend. The IEP team meeting was held on June 1, 2016. At that time, District again attempted to telephone Mother. Mother did not answer the telephone. The IEP team meeting proceeded without Mother's presence. District made reasonable attempts to obtain Mother's attendance.

37. The legal analysis of the requirement of parental participation in an IEP team meeting is fully explored in Legal Conclusions 24 through 31. District adequately attempted to include Mother in the IEP team meetings. Mother declined to attend.

38. 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 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885.) 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].) The focus is on the placement offered by the school district; not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at p. 1314.)

39. While Mother may or may not be justified in her absences, District remains responsible for providing FAPE. Mother has expressed the belief it is her right to ultimately accept or reject District's offer of FAPE. Clearly, she does not agree with placement at Monte Vista. She may not, however, hold District hostage, because she does not agree with District's offer of placement, by simply refusing to participate in required special education procedures. By June 1, 2016, District had little choice but to conduct the IEP team meeting without Mother.

40. The June 1, 2016, District's IEP team discussed the behavioral incident of May 19, 2016, and again reviewed the functional behavioral assessment and Tier-III behavioral support plan. At Mr. Baldwin's suggestion, the extension of Student's one-to-one aide service to the entire duration of the school day and the extended school year was added to the IEP, as an additional service, along with two and one-half hours of one-to-one aide transportation services for Student's curb-to-curb bus transportation. Increasing aide services was appropriate in light of Student's continually escalating aggression.

41. Each of Student's goals was reviewed. Due to his behaviors, Student had made little progress on his goals since December 2015. Therefore, each goal remained appropriate as previously written.

42. The IEP team maintained its offer of placement at Monte Vista. The legal analysis of placement at Monte Vista as contained in Legal Conclusions 16 through 22, apply to the June 1, 2016 offer of placement as well. Student's behaviors continued to escalate. He could not effectively be educated in the mild/moderate special day class at Cole Canyon. It was unlikely Student would make academic progress until he developed appropriate skills to control his behaviors. Student required the more structured and intensive behavior program available at Monte Vista.

43. In summary, in each of the relevant IEP's, District acted in compliance with the procedures set forth in the IDEA, and therefore, pursuant to *Rowley*, it is presumed that

Student's program is appropriate. Beyond this presumption, the IEP team developed Student's IEP's based upon valid assessments and information relating to Student's cognitive abilities, academics, social/emotional and behavior skills, speech and language deficits, and occupational therapy/sensory needs, which represented all areas of suspected disability related to his education. Each of the IEP goals comported with these needs, and the IEP was reasonably calculated to enable Student to receive educational benefit. Further, Student's IEP goals could easily be implemented in the placement at Monte Vista. The November 10, 2015 IEP, as completed on December 3, 2015, as well as the May 3, 2016 and June 1, 2016 amendment IEP's, offered Student a FAPE in the least restrictive environment.

ORDER

1. The November 10, 2015 IEP, completed on December 3, 2015, and amended on May 3, 2016, and June 1, 2016, is appropriate and offers Student a FAPE in the least restrictive environment.
2. District may implement the IEP, finalized on June 1, 2016, without parental consent.

PREVAILING PARTY

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

RIGHT TO APPEAL DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56505, subd. (h).) 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); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

Dated: September 23, 2016

/s/

JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings