

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MANHATTAN BEACH UNIFIED
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012070305

DECISION

Administrative Law Judge June R. Lehrman, from the Office of Administrative Hearings (OAH), State of California, heard this matter in Manhattan Beach, California, on October 9, 10, 17 and 25, 2012.

Ellyn Schneider, Executive Director of Student Services, represented Manhattan Beach Unified School District (District) and attended the hearing on all days. Student's father (Father) represented Student, and attended the hearing on all days.

District filed the request for due process (complaint) on July 11, 2012. District moved to continue the hearing, and the motion was granted for good cause on August 1, 2012. At hearing, the parties requested and were granted a continuance to file written closing arguments by November 8, 2012. Upon receipt of the closing arguments, the record was closed and the matter was submitted.

ISSUES

1. Whether District's offer of residential placement at Devereaux, a residential treatment center (RTC) located in Texas, constituted a free appropriate public education (FAPE) in the least restrictive environment.
2. Whether District may implement its offer of residential placement at Devereaux without parental consent.

FACTUAL FINDINGS

Background

1. Student is a 17-year-old boy who is eligible for special education and related services under the eligibility category of emotional disturbance.

2. In 2000 and 2001 while in second grade, Student attended court-ordered counseling twice per week. His initial assessment for special education and related services occurred in April 2003. Student's individualized education program (IEP) team found him eligible, and recommended a District special day class (SDC).

3. In December 2004 while in fourth grade, Student was assessed by the Los Angeles County Department of Mental Health (DMH). Student presented with impulsivity, difficulty expressing anger appropriately, poor concentration and disrespectful behavior. Pursuant to an IEP dated January 19, 2005, he was offered outpatient counseling services.

4. During the 2005-2006 school year while in sixth grade, Student was hospitalized after writing down angry thoughts concerning his teacher and a friend he wanted to beat up. At or around that time, in late 2005, Student's IEP team moved him to a program for students with emotional disturbance operated by Los Angeles County Office of Education (LACOE) at Alan B. Shepard School (Shepard).

5. LACOE provides services to Districts, by providing programs for students with moderate to severe or mild to moderate disabilities, either housed in self-contained campuses, or housed within school district sites.

6. At an IEP team meeting on June 28, 2008, while Student was attending eighth grade at Shepard, Student's IEP team agreed to conduct a functional behavior assessment (FBA) to address target behaviors of disrespectful communication, physical aggression and noncompliance. The FBA report, dated August 1, 2008, noted that although Student demonstrated strengths in reading, and had average cognitive and language skills, he had social and emotional challenges, and had had many office referrals and suspensions due to his target behaviors.

7. In September 2008, Student was re-assessed by DMH. Student, who was 13 years old at the time, presented as being disruptive, defiant, and verbally and physically aggressive. Pursuant to an IEP dated October 28, 2008, he was again offered outpatient counseling services.

8. Student continued matriculating at LACOE placements throughout middle school.

9. While Student attended LACOE programs, LACOE and not District, sent out notices of IEP team meetings, ran those meetings, and developed Student's educational programming. Lindy Alley, District Program Specialist, was the liaison between District and students who had been placed in LACOE placements. She served in that capacity with respect to Student from approximately 2008 onwards. Ms. Alley did not attend all Student's IEP meetings. She did not keep closely apprised of his academic progress nor all disciplinary incidents concerning him. She received periodic reports from LACOE concerning Student's academic and social-emotional status.

High School Placement

10. During 10th grade in the 2009-2010 school year, Student attended LACOE's program at Torrance High School (Torrance). A disciplinary report dated May 20, 2010 indicates he was suspended for profanity and disruptive activities.

11. Student began the following 2010-2011 school year at Torrance for 11th grade. On or around October 1, 2010, Ms. Alley learned from Torrance that a driver had complained about Student's aggressive and disrespectful behavior during transportation. Ms. Alley wrote a letter to Father concerning this incident.

October 28, 2010 Annual IEP

12. On October 28, 2010, LACOE convened an annual IEP. The team discussed Student's present levels of performance. The IEP stated six proposed goals, in the areas of accepting responsibility, social emotional, organization, algebra, and written expression. The IEP offered specialized academic instruction at a LACOE program and four 30 minute individual school-based counseling sessions per month, for the period from October 28, 2010, to October 28, 2011, with modifications and accommodations including modified assignments, assistive technology, extra help with academics, and seating arrangements. It also offered vocational assessment and counseling once per month. The IEP contained an Individual Transition Plan (ITP) that indicated it was based upon an interview with Student in which he expressed a preference for working in the field of music in some capacity. The ITP suggested post-secondary goals to obtain training, education and/ or employment in that field. The IEP also contained a Behavior Support Plan (BSP), related to target behaviors in the areas of defiance, argumentativeness, disrespect and noncompliance. Parent consented to this IEP.

March 10, 2011, Change of Placement

13. On March 10, 2011, LACOE conducted an IEP meeting as an amendment to the October 28, 2010, annual IEP. LACOE administrator Vernon Wright, Lindy Alley, the LACOE school psychologist, and Father attended. The meeting was convened to discuss a suspension.

14. Although not specifically documented as such, the meeting included a manifestation determination. The team determined that the behavior giving rise to the discipline had been a manifestation of Student's disability.

15. The IEP team determined that Torrance was not an appropriate placement. Student's placement was changed from Torrance to Malaga Cove, another LACOE program. Malaga Cove was a self-contained LACOE campus devoted to students with a disability category of emotional disturbance who were either returning from residential placements or who were at risk of requiring residential placements. It provided a small structured environment consisting of small classes, usually not exceeding fifteen students. There were school psychologists on site. The teachers were all special education credentialed. There were a maximum of about 50 students in five classrooms on the entire campus.

16. The March 10, 2011, IEP amendment making this change of placement offered specialized academic instruction at Malaga Cove and four 30 minute individual school-based counseling sessions per month. Parent consented to the change of placement. Student was also referred for outpatient mental health services, to which parent also consented.

17. Vernon Wright was the assistant principal and administrator of the Malaga Cove program, and served as a member of Student's IEP team while he was at Malaga Cove. The IEP team was concerned for Student's safety during the remainder of 2010-2011 school year. Student received numerous disciplines and suspensions for behavioral incidents, and was often absent. Malaga Cove reported to Ms. Alley that Student was achieving minimal academic progress, attaining grades of D's and F's. Ms. Alley learned that Student was a disruptive influence due to bad language, elopements, anger and defiance; had thrown his skateboard through a window; and had failed to take advantage of the school-based counseling that had been offered. Members of the community had also reported to Ms. Alley that they had seen Student skateboarding, acting erratically, and fraternizing with known drug users.

18. From May 9 to May 17, 2011, Student was hospitalized at Del Amo hospital relating to use of the drug Xanax.

19. On May 1, 2011, and May 27, 2011, the Malaga Cove school psychologist referred Student for a mental health assessment by DMH because Student had been exhibiting defiant behavior, and often came to school appearing to be under the influence of drugs.

20. In June 2011, Student received his report card for the fourth quarter of the 2010-2011 school year, receiving D's and F's.

21. On June 9, 2011, the IEP team met to discuss Student's returning to school after the May hospitalization. The team offered summer school including academic instruction and counseling. The team agreed to meet again after the pending DMH assessment had been completed. Student attended summer school, receiving a grade of D.

22. Student returned to Malaga Cove for 12th grade at the beginning of the 2011-2012 school year.

October 24, 2011 Mental Health Assessment

23. In October 2011 DMH conducted a mental health assessment of Student pursuant to the referral that had been made in May. The assessor, Jean Wong, was a psychiatric social worker. She held a master's degree in social work, and was a Licensed Clinical Social Worker. Ms. Wong testified at hearing, thoughtfully and credibly, attesting to her assessment, her interview process, her views of Student, and her recommendations which she felt were proper at the time.

24. Ms. Wong reviewed Student's records including his current and prior IEP's, and prior assessments including the 2004 and 2008 DMH mental health assessments. She interviewed Student, Father, Student's teacher, the Malaga Cove school psychologist, and Mr. Wright.

25. Ms. Wong asked Student about depression, emotions, thoughts, and suicidal ideation. Student described himself as a "hippie" who did what he wanted to do, including leaving school and riding his skateboard. He denied depression, but stated that the reason he had been hospitalized at Del Amo in May 2011 was because he had attempted suicide by taking an overdose of Xanax. He also told Ms. Wong that he had cut himself over 30 times in an attempt to hurt himself. He refused to discuss these incidents further with Ms. Wong. He stated that he had anxiety and admitted to frequent drug use with marijuana to control it. He also stated that he had flashbacks from prior LSD use.

26. Student's teacher reported to Ms. Wong that Student missed a lot of school. Although Student and teacher had rapport, Student cursed at others and had a history of eloping. He had only completed about 5 percent of his coursework, consisting of only one assignment.

27. Mr. Wright reported that Student was disrespectful, did not follow directions, and had on one occasion hit at the wall with his skateboard. The school psychologist reported that Student was resistant to school-based counseling, was using drugs and was resistant to authority.

28. Father reported that Student was manipulative. Father's opinion was that Student was not suicidal but would threaten suicide in order to get his way.

Father felt Student's behaviors were worse at school. Student was social and good at making friends. Father was concerned about Student's anger and use of obscenities, and also his academics. Father was afraid Student would graduate without any real education.

29. Ms. Wong generated a written assessment report dated October 24, 2011. The report indicated Ms. Wong's concern about Student's substance abuse and the self-injurious cutting behavior, the hospitalization for the Xanax abuse, and the lack of academic performance. Outpatient services, which had been recommended in 2004 and 2008, had not been accessed or were ineffective. Ms. Wong felt that more intensive treatment was required for a period of six months, to be followed by a reevaluation.

October 27, 2011, Annual IEP

30. Student's annual IEP was dated October 27, 2011. Mr. Wright attended, as did the LACOE school psychologist, LACOE special education teacher, Father, and a school nurse.

31. The draft IEP document, prepared in preparation for the meeting, indicated that Student had been administered California Standards Testing, with accommodations, in the areas of English language arts, math, science, history and writing, but it did not indicate the results of this testing. It also indicated that Student had been administered the Woodcock Johnson III Brief Battery and Brief Achievement assessment instruments on October 29, 2009, and it stated the raw scores. It stated present levels of performance in the areas of pre-academic, academic and functional skills, communication development, gross/fine motor development, social emotional/behavioral issues, and vocational interests. It stated seven proposed goals, two in the areas of written expression and one each in the areas of social emotional, algebra, mathematics, organization, and accepting responsibility. According to Mr. Wright, the goals had been updated from the previous year's IEP by Student's teacher. The IEP contained an ITP that indicated, as previously, that it was based upon an interview with Student in which he expressed a preference for working in the field of music in some capacity. The ITP again suggested post-secondary goals to obtain training, education and/or employment in that field. The IEP also contained two versions of a BSP. The first was copied verbatim directly from the previous year's IEP without modification of either content or dates. The second was dated in the future, stating the date May 24, 2012. According to Mr. Wright, the BSP had been updated from the previous year's IEP by Student's teacher.

32. The IEP stated a proposed offer of specialized academic instruction at a LACOE program and four 30 minute individual school-based counseling sessions per month, for the period from October 27, 2011 to October 27, 2012, with modifications and accommodations including assignments, assistive technology, extra help with academics, and seating.

33. The Notes of this meeting indicated that Father expected DMH to attend to review the results of their October 2011 assessment. Father also requested that academic testing be performed on Student. The team agreed, and decided to delay the meeting to a future date to invite District and DMH, and to conduct testing. Father was given a copy of the IEP to review the proposed goals and objectives.

IEP Amendment Meeting November 28, 2011

34. In November 2011, Student received his report card from Malaga Cove for the first quarter of the 2011-2012 school year, receiving D's, an F and one C.

35. Student's IEP team met on November 28, 2011, to review Ms. Wong's DMH assessment. Ms. Wong, Father, Mr. Wright, the LACOE school psychologist, a DMH residential placement coordinator, and Ms. Alley attended. At that IEP, the team recommended RTC. Pending a suitable RTC placement, in the meantime, it continued the offer of specialized academic instruction at a LACOE program and four 30 minute individual school based counseling sessions per month, made in the October 27, 2011, annual IEP. In addition it offered weekly individual therapy, family therapy and case management services to be provided by DMH.

36. Father signed, indicating consent to the October 27, 2011 annual IEP as amended, and indicating consent to begin a search for a suitable RTC placement.

December 16, 2011, IEP

37. By December 2011, Student had still not been residentially placed and was attending Malaga Cove.

38. An IEP amendment meeting was held on December 16, 2011. Father, Mr. Wright and Ms. Alley attended. At this IEP it was reported that Student had broken a window with a guitar and attempted to dive through the window in order to fight with another student. Father asked about the progress on RTC placement and the team telephoned Devereaux, a RTC located in Texas. Devereaux stated it would have space available for Student in January. The team decided to follow up in January, when the placement became available.

39. Meanwhile, however, Student would be without a placement, because it was reported at that IEP meeting that "the LACOE SDC program at Malaga Cove will be officially exiting from the LA County program as of 12/16/2011." Thus, as of the date of the meeting, Student was without an educational placement; the prior offer of specialized academic instruction at a LACOE program and four 30 minute school-based individual counseling sessions per month, ended on the day of the IEP, December 16, 2011, which was also the day of the termination of the Malaga Cove LACOE program. On a going forward basis, the only continuing offer was

continuing weekly individual therapy, family therapy and case management services to be provided by DMH.

December 2011-February 2012

40. After LACOE's program discontinued as of December 16, 2011, Lindy Alley considered the responsibility for convening IEP meetings to have reverted to District.

41. Student was without any placement or program from December 16, 2011, until February 21, 2012, the date on which he was admitted to Devereaux. No document indicates where he was, or why. At hearing, Ms. Alley, testified that "there were some issues with finding" Student; at some point Student was hospitalized, and the transport team was sent to the hospital to pick him up there and transport him to Texas.

Student's Admission to Devereaux

42. Student was admitted to Devereaux on February 21, 2012.

43. Devereaux is an in-patient RTC for adolescents with diagnoses of trauma, mood disorder, drug use or oppositional defiance.

44. Student's Devereaux case coordinator was Dianna Rosales, whose duties were to communicate between Devereaux, families and school districts.

45. Student's counselor while he was at Devereaux was clinical therapist and licensed social worker Laura Robinson. Student's treatment program during the first 30 days at Devereaux consisted of individual weekly counseling sessions, family therapy every other week, a boys' group, and a chemical dependency group.

46. Devereaux identified phases in its therapeutic program. The first phase was acclimating to the new environment and learning the rules. The second phase was committing to the treatment program. The third phase was meeting treatment goals, and preparing for discharge.

47. While in residential treatment, Student's DMH case manager was John Donato, a psychiatric social worker. At the time, Mr. Donato's duties at DMH were to serve as a residential case manager to oversee the treatment of students who had been placed in RTC's. Mr. Donato communicated with the RTC clinical teams, attended IEP's, and visited students at their RTC placements.

48. Mr. Donato learned about two behavioral incidents during Student's first week at Devereaux. Mr. Donato discussed the incidents with the Devereaux

clinical team, but felt that behavioral incidents were common during the initial adjustment period.

49. Mr. Donato visited Student at Devereaux on March 7, 2012, and March 21, 2012.

March 21, 2012, IEP

50. Ms. Alley scheduled and sent notice for an IEP team meeting to review the Devereaux placement. The IEP team met on March 21, 2012. The meeting was an amendment to the October 27, 2011, annual IEP. Certain attendees attended in Texas and others at District offices in Manhattan Beach, via teleconference. Father and Lindy Alley attended from Manhattan Beach. Student, Mr. Donato, Devereaux Principal Lynn Luther, Devereaux teacher Erica Mares, and therapist Laura Robinson attended from Texas.

51. Student stated that the adjustment was rough but he was focusing on work. He did not feel he needed to be in RTC. He just felt he needed a drug rehabilitation program. He missed home and his girlfriend, and was having trouble sleeping.

52. Devereaux teacher Erica Mares reported on Student's present levels of academic performance. Student was taking English, algebra, physical science, world history, physical education and career technology. He was in the process of being assessed for academics to determine placement. He was still adjusting to Devereaux but was starting to do classwork, was eager to get credits for graduation and was motivated.

53. Therapist Laura Robinson reported that Student was engaging well in individual and group therapy and was soon to undergo chemical dependency group therapy. Socially, it was reported that Student had positive peer interactions.

54. Mr. Donato recommended a continuation of the RTC placement. Mr. Donato found that Student was in the early stages of treatment and although focused on being discharged, it was too early to make such recommendation. Mr. Donato recommended continuing RTC with individual, group and family therapy, medication support and case management services. Mr. Donato recommended treatment goals to address social interactions, family relationships and issues, communication skills, substance abuse, aggression, depressive symptoms, oppositional defiance, impulse control, independence and discharge planning.

55. The team at that meeting agreed that Devereaux was the appropriate placement for Student. The team offered RTC, with individual, group and family therapy, and six hours per day specialized academic instruction in a special day class.

Except as so modified, the annual IEP was not altered. Parent consented to the IEP amendment.

March 22, 2012 Individual Service Plan

56. Devereaux generated an Individual Service Plan (ISP) on or around March 22, 2012, the day following the IEP. Ms. Robinson generated the therapeutic component of the ISP, based upon her work in therapy with Student during his first 30 days, and review of documents she was provided upon Student's admission, including IEP's, school history, and medical diagnoses. She also assessed Student using a Devereaux-generated assessment tool called the "Admission Assessment Addendum," which consisted of a checklist with questions concerning family history, substance abuse and peer group issues. Student's answers enabled Ms. Robinson to generate the following therapeutic clinical treatment goals: to follow rules and regulations, to reduce mood intensity, to decrease physical aggression, to develop healthy coping skills rather than self-harm, and sobriety. Ms. Robinson worked on these goals with Student while he was at Devereaux. The goals were appropriate and Student was making progress on them, but had not yet met them by the time of discharge.

Events while Student was at Devereaux

57. While Student was at Devereaux, Father heard information that gave him concerns, and on about five or six occasions notified Ms. Alley of these concerns. On March 5, 2012, Father spoke to Student by telephone. Student reported that he was feeling good, and was working out and doing well. However the next day, March 6, 2012, Student reported to Father that he had been lying the previous day because Devereaux staff made him say what he had said. This made Father concerned about Student's well-being.

58. On another occasion, a family friend who lived in Texas visited Student at Devereaux. He reported to Father that Devereaux staff had told him they "did not think Student was going to make it." This increased Father's concern about Student's well-being.

59. When District contracts with RTC's, District ensures that the RTC has an internal procedure to handle complaints. Ms. Alley's policy, when receiving a complaint from a family about a RTC, was to simply forward the complaint to the RTC. District did not thereafter do any follow-up, nor undertake any independent investigation. When Father expressed concerns about Student's well-being at Devereaux, Ms. Alley simply forwarded Father's concerns to Devereaux staff.

60. Devereaux policy is for staff who are aware of any allegations about danger or mistreatment, to report these to the unit supervisor who handles the investigation from there on. Ms. Rosales did so when Ms. Alley informed her about Father's concerns. Ms. Robinson also did so when alerted by Student to roommate

problems. Neither of these witnesses was familiar with the details, or results, of any such investigations

61. In April, 2012, Student's girlfriend received a threatening handwritten letter from an anonymous writer, indicating an intention to harm Student. Father forwarded the letter to Lindy Alley. Ms. Alley was concerned enough about the letter to call Devereaux's night supervisor. She read the letter to him over the telephone. They agreed he would investigate. The night supervisor called Ms. Alley the next day and advised her that Devereaux had investigated a couple of students they had concerns about, had checked their handwriting, and had determined the handwriting was Student's himself. Ms. Alley did no follow-up, and undertook no independent investigation. At hearing, the night supervisor was not called as a witness; Ms. Rosales confirmed that she had seen the supervisor comparing the letter to the handwriting of one other student. To her recollection, it was assumed, but not definitively determined, that the writing was Student's, but she was unaware of any further details of the supervisor's investigation.

62. Both Ms. Rosales and Ms. Robinson confirmed that Devereaux students are often lonely, have difficulty adjusting, want to go home, and may try to manipulate adults to achieve that.

Discharge from Devereaux on June 3, 2012

63. Father discharged Student from Devereaux on June 3, 2012. It was reported to Lindy Alley that, during an on-site family visit from Father, Father announced Student was not returning, and that Devereaux had requested Father to sign a document indicating that the discharge was against medical advice.

64. Devereaux staff, Mr. Donato, and District did not agree with Father's decision. In their opinion, Student had started to make progress at Devereaux and the discharge was premature. In their experience, students adapt to the program slowly.

65. After returning home, Father asked Ms. Alley where Student could attend school. District replied that its offer of FAPE remained Devereaux.

LEGAL CONCLUSIONS

Parties' Contentions

1. District contends that Student required residential treatment, and that its offer of Devereaux constituted a FAPE in the least restrictive environment. District seeks an order allowing it to implement its offer of residential placement at Devereaux without parental consent.

2. Father contends, based upon Student's history of emotional challenges, his prior DMH assessments in 2004 and 2008, and his hospitalizations, that if RTC were appropriate it was long overdue when offered in 2012. Father contends that when finally offered, RTC was no longer appropriate given the fact that Student was already 17, and it would be more difficult for him to adjust. Father further contends that Student was being mistreated at Devereaux, was unhappy and wanted to come home, so Father removed him.¹

Burden of Proof

3. As the petitioning party, District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Definition of FAPE

4. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) A FAPE means special education and related services, under public supervision and direction that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs.

¹ Father further contends that LACOE's programs had passed Student along from grade to grade without educating him or helping him to meet any IEP goals; that Student's placements at LACOE programs had been inappropriate due to distance from home; and that Father would have preferred Student to attend his home public school near his residence for high school, rather than Torrance or Malaga Cove. These contentions all relate to alleged denials of FAPE in the past at LACOE's programs. Since Father never filed a Student-initiated due process proceeding to raise these contentions, and since District filed this case to defend its October 27, 2011, IEP as subsequently amended, Father's contentions are not at issue in this due process proceeding.

Rowley expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

Procedural Compliance

6. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

7. Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) (2006)²; Ed. Code, § 56304; 56340-44.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*) [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

8. The IEP team is required to include one or both of the student's parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

² All subsequent references to the Code of Federal Regulations are to the 2006 edition, unless otherwise stated.

9. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) An IEP must include a post-secondary transition plan during the school year in which the child turns 16 years old. (Ed. Code, § 56043, subd. (g)(1).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subs. (h) and (i).)

10. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

Least Restrictive Environment

11. Federal and state laws require school districts to provide a program in the least restrictive environment (LRE) to each special education student. (Ed. Code, § 56040.1; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see

also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

Residential Placement

12. An analysis of whether a residential placement is required must focus on whether the placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1464, 1467.) If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parent of the child. (34 C.F.R. § 300.104.)

Snapshot Rule

13. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.*, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

District Required to File for Due Process

14. Parent retains the right to revoke consent in writing for the provision of special education and related services. (Ed. Code, § 56346, subd. (d); 34 C.F.R. § 300.300 (b)(4) (2008).)³ In the absence of such written revocation of consent, if District determines that a proposed special education program component to which a parent does not consent is necessary to provide a FAPE, a due process hearing shall be initiated. (Ed. Code, § 56346, subd. (f).)

Analysis

15. The relevant time period for the analysis of District's offer is October 27, 2011, through March 21, 2012, the time of the annual IEP, and the subsequent amendments at which Devereaux was offered. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149.) Thus, even if overdue as Father contends, District's offer must be evaluated based on its procedural and substantive compliance with IDEA at the time this offer was made. (Factual Findings 23-56; Legal Conclusion 13.)

16. Here, in developing the October 27, 2011, annual IEP, as amended on November 28, 2011, December 16, 2011, and March 21, 2012, District complied with the procedural requirements of IDEA and California law. Father was provided with notice and an opportunity to participate, and he did participate and assist with the development of Student's educational program and discussion of the continuum of placement options. The IEP team, comprised of the necessary participants, developed an IEP which comported with the procedural requirements of IDEA and California law including a statement of present levels of performance, goals, education program, services, and ITP. (Factual Findings 23-56; Legal Conclusions 6-10.)

17. District also met its burden of showing that the October 27, 2011, IEP, as subsequently amended, substantively offered Student a FAPE. The October 27, 2011, IEP stated seven proposed goals, two in the areas of written expression and one each in the areas of social emotional, algebra, mathematics, organization, and accepting responsibility, as well as a BSP and ITP, which had been updated from the

³ If a parent does so, District, after providing prior written notice, may not continue to provide special education and related services to the child; District may not file for due process to obtain a ruling that the services may be provided to the child; District will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and is not required develop an IEP for further provision of special education and related services. (Ed. Code, § 56346, subd. (d); 34 C.F.R. § 300.300 (b)(4) (2008).)

previous year's IEP by Student's teacher at Malaga Cove. No evidence contradicted the appropriateness of these academic and non-academic goals. The IEP offered specialized academic instruction with modifications and accommodations, and school-based counseling. As amended in November 2011, it also offered individual therapy, family therapy and case management services. As amended in March 2012, in accordance with Ms. Wong's and Mr. Donato's recommendations, it offered specialized academic instruction in a SDC in a RTC setting with individual group, and family therapy to address additional therapeutic treatment goals in addition to the academic and social goals previously stated. While at Devereaux, prior to the March IEP, Student was taking English, algebra, physical science, world history, PE and career technology; he was in the process of being assessed for academics to determine placement; he was starting to do classwork; he was eager to get credits for graduation; and he was motivated. He was also engaging well in individual and group therapy. Thus, District has established that, in accordance with *Rowley*, it offered special education and related services that conformed to Student's IEP, were individually designed to provide educational benefit, and that did in fact provide access to an education sufficient to confer some educational benefit upon him.⁴ (Factual Findings - 1-56; Legal Conclusions 3-13.)

18. Under the facts and circumstances established at hearing concerning Student's emotional difficulties and self-injurious behaviors, District also established that its offer was the LRE. Although at hearing, Father argued that general education would be appropriate, at the time of the IEP's in question Father was not seeking a full time placement in general education for Student, and none of the District IEP team members believed such a placement would have been appropriate. In determining whether a child should be placed in general education, four factors must be considered: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect Student had on the teacher and children in the regular class; and 4) the costs of mainstreaming Student. The evidence at hearing showed that Student was getting minimal educational benefits in the SDC's at both Torrance and Malaga Cove, where he received grades of D's and F's and was often absent. He received minimal if any non-academic benefits there, as indicated by his profanity, disruptive activities, aggression, defiance, and his dangerous violent self-injurious behaviors as assessed by Ms. Wong in October 2011; breaking windows and fighting in December 2011, and hospitalization thereafter. Student's outbursts had been disruptive to the SDC, demonstrating that they would be disruptive to general education classes. No evidence regarding the cost, if any, of full time placement in a general education classroom or mainstreaming was presented. Based on the above, District demonstrated by a preponderance of the evidence that a

⁴ The brief gap in placement from the December 16, 2011, IEP, after LACOE's Malaga Cove program was discontinued, until Student was admitted to Devereaux in February, did not deprive Student of a FAPE. Devereaux was available starting in January; and Student's transfer there was delayed until February by virtue of his own unavailability.

full-time general education placement was not appropriate for Student. Because a full-time general education placement is not appropriate for Student, the focus must be on the continuum of placement options and the degree of mainstreaming, if any, that was appropriate for Student. (Factual Findings 1-56; Legal Conclusions 3-5; 11-13.)

19. Here, Ms. Wong's assessment and credible testimony at hearing established that a residential placement was necessary to meet Student's educational needs. Ms. Wong was reasonably concerned about Student's substance abuse and the self-injurious cutting behavior, the hospitalization for the Xanax abuse, and the lack of academic performance. Outpatient services, which had been recommended in 2004 and 2008, had not been accessed or were ineffective. Ms. Wong correctly felt that more intensive treatment was required for a period of six months, to be followed by a reevaluation. As discussed above, Student had not been academically or otherwise successful in an SDC, had not received social benefit, had disruptive behavior and outbursts which impacted his classmates and teacher, and was putting himself into danger. In evaluating placement options, District offered Devereaux after considering the restrictiveness of the placements and the suitability of each placement to implement Student's IEP, and the non-academic benefits of the placement. Specifically, Devereaux was reasonably calculated to provide Student with educational and non-educational benefit, to address his academic goals, and to address therapeutic treatment goals to address social interactions, family relationships and issues, communication skills, substance abuse, aggression, depressive symptoms, oppositional defiance, impulse control, independence and discharge planning. Thus, the placement was appropriate and was in the LRE. (Factual Findings 1-56; Legal Conclusions 3-5; 11-13.)

20. Father contends that at age 17, Student would have difficulty adjusting to Devereaux, and thus that District's offer to place him there was not appropriate. Father also was concerned that Student was being mistreated at Devereaux. District demonstrated that, contrary to Father's concerns, Student could have been expected to adjust to and benefit from Devereaux despite his age. The evidence established that Devereaux students are often lonely, have difficulty adjusting, want to go home, and may try to manipulate adults to achieve that. The evidence established that Student was adjusting to Devereaux, as he was starting to do classwork, was eager to get credits for graduation, was motivated, was engaging well in individual and group therapy and could be expected to benefit from chemical dependency group therapy as well. The evidence presented by both sides regarding the alleged mistreatment at Devereaux was overall not persuasive. Although District did not convincingly establish that Devereaux's investigation was thorough, neither did Father convincingly establish that the alleged events actually occurred. Overall, the evidence indicated that Student was not actually ever in danger, that Devereaux staff did investigate Father's concerns, and that the events had most probably been manufactured by Student himself in an attempt to come home. (Factual Findings 23-65; Legal Conclusions 3-5; 11-13.)

21. District met its burden of demonstrating that its offer of placement in Devereaux was appropriate. Parent retains the right to revoke consent in writing for the continued provision of special education and related services, thereby relieving District of its obligations to provide special education and related services. However, in the absence of such parental action, District was legally obligated to initiate due process to establish that its offer consisted FAPE. District has established that the offered RTC placement was necessary to provide Student a FAPE. It may therefore implement the October 27, 2011, IEP, as amended, without parental consent. (Factual Findings 1-65; Legal Conclusions 1-20.)

ORDER

1. District's offer of placement at Devereaux contained in the October 27, 2011, annual IEP, as amended on November 28, 2011, December 16, 2011, and March 21, 2012, offered Student a free appropriate public education in the least restrictive environment.

2. District may implement the October 27, 2011 IEP, as amended, without parental consent, unless and until Parent, in writing, relieves District of its obligations to provide special education and related services.

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. District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

Dated: November 21, 2012

/s/

JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings