

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FULLERTON JOINT UNION HIGH SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2010050439

DECISION

The due process hearing in this matter convened on September 13, 14, and 15, 2010, in Fullerton, California, before Administrative Law Judge (ALJ) Darrell L. Lepkowsky from the Office of Administrative Hearings, State of California.

Karen E. Gilyard, Attorney at Law, represented the Fullerton Joint Union High School District (District). Gregory Endelman, the District's Director of Special Education, attended all three days of hearing.

Student was represented by her Mother. Student, her Mother, and her Father (Mother and Father are collectively referred to as Parents) also attended all three days of the hearing.

The following witnesses testified on behalf of the District at the hearing: Sean Kitchin, William Wallace, Leticia Scott, Dr. David Gould, and Gregory Endelman. Student, Father, and Mother testified on Student's behalf.

The District filed its request for a due process hearing on May 17, 2010. On June 9, 2010, at the initial prehearing conference in this matter, the ALJ granted Student's request for a continuance for good cause. At the close of the hearing, the ALJ continued the matter so the parties could file written closing briefs. Student did not file a closing

brief. The District timely filed its brief on September 29, 2010, at which time the matter was submitted and the ALJ closed the record.

ISSUE

Does the District's most recent offer of placement and services, developed at Student's March 4, 2010 individualized education program (IEP) team meeting, constitute a free appropriate public education (FAPE) for Student in the least restrictive environment (LRE)?

CONTENTIONS

The District contends that Student required, and continues to require, placement at a residential treatment center (RTC) in order to access her education. It asserts that it has attempted a variety of less restrictive placements for Student but that none have been successful. The District states that it made its recommendation for placement based upon the findings of the Orange County Health Care Agency (OCHCA), which it was statutorily obligated to follow, after consideration of all factors concerning Student, and based upon the recommendations of the educators and mental health care professionals who have assessed Student and been involved in her education and mental health care during her high school career. The District asserts that it can only meet Student's needs through her placement at an RTC. The District contends that the March 4, 2010 IEP offered Student a FAPE both procedurally and substantively in all respects.

Although Student originally took the position that the March 4 2010 IEP was deficient in all respects, at hearing Student narrowed her contentions to disputing that she required placement at an RTC and to disputing the number of reimbursable family visits provided in the IEP. Student contends that although Parents originally agreed to place her at an RTC, they withdrew their consent after determining that the educational

level was not appropriate for Student. Father also believed that it was more appropriate for Student to remain at home since she was approaching her 18 birthday and would soon legally be able to leave home. Student also contends that as of the time of the hearing in this matter her mental health issues had stabilized to a point where she no longer required placement at an RTC. Rather, Parents and Student believe that the appropriate placement for Student is in all general education classes with accommodations and modifications to support her in the classroom and related mental health services to address her emotional needs. With regard to the issue of family visits, Student contends that the four visits provided by her IEP and funded by the District were inadequate although she has never indicated the amount of visits she believes to be necessary or appropriate. At hearing, other than her disagreement with placement at an RTC and undefined disagreement with the amount of family visits provided, Student offered no other objections to or disputes with the March 4, 2010 IEP.

Based upon the following Factual Findings and Legal Conclusions, this Decision determines that the District's March 4, 2010 IEP offered Student a FAPE in the least restrictive environment at the time the District developed it, and continued to offer Student a FAPE at the time of the hearing in this matter.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 17-year-old young woman who at all relevant times resided within the District, and was eligible for special education under the eligibility category of emotional disturbance (sometimes referred to herein as ED) based upon a diagnosis of bipolar disorder, oppositional defiant disorder, polysubstance abuse, anxiety, and due to being unable to maintain satisfactory relationships with peers, teachers, and her family.

She presently attends the District's Buena Park High School (Buena Park) on an interim placement.

2. Student has at least average intelligence and has adequate academic skills. Her difficulties at school stem from her lengthy history of emotional difficulty caused by her mental illnesses. Student ran away from home at age 14 or 15 and was gone for seven months. She continued a pattern of eloping¹ from home until the time of the IEP meeting on March 4, 2010. Student also has a history of truancy from school, which has continued to the present. In addition to substance abuse, her self-injurious behaviors included cutting and burning her skin. Additionally, Student has a history of hiding and purging medication prescribed to treat her mental illnesses.

3. Prior to June 2010, the District tried various placements for Student to meet her educational and emotional needs. For the first semester of ninth grade, in the fall of 2007, the District placed Student in a non-public school (NPS). The placement was not successful. Student continued having difficulties at home and at school. Her highest grade for the semester was a "D+". The District then placed Student in a county-run program for emotionally disturbed students. Student successfully passed all her courses with a grade of "C".

4. However, the county ceased operating its program for emotionally disturbed students after Student finished ninth grade. The District therefore placed Student in its own program for ED students, which is operated on the campus of Buena Park High School.

¹ In the context of special education, the term "to elope" means that a student leaves a place, such as home or school, without knowledge or permission of supervising adults.

5. Gregory Endelman has been the District's Director of Special Education for four years. Previously, he was employed by the Orange County Department of Education as a Special Education Local Plan Area Coordinator. He has been a school principal, a lead school psychologist, and a school psychologist. He has two master's degrees: one in counseling with an emphasis in school counseling, and one in educational psychology with an emphasis in school psychology. He also holds three pupil personnel services credentials in child welfare and attendance, school counseling, and school psychology, as well as having his Tier 1 and Tier 2 administrative credentials. He is licensed in California as an educational psychologist. In addition to his public employment, Mr. Endelman maintains a private practice in which he consults with other school districts, assesses students, and gives behavior intervention case manager training to other educators. Mr. Endelman has extensive experience with special education students, and specifically with emotionally disturbed students. He is highly qualified as both an educator and a school psychologist. His testimony evidenced a strong dedication to his work and, most significantly, extensive knowledge and concern regarding Student's educational and mental health needs.

6. Mr. Endelman explained that the District's ED program is similar but not identical to a mental health day treatment program. The program covers students from 11 cities. It employs experienced teachers and instructional aides who are specifically trained to educate emotionally disturbed children and address both their educational as well as emotional and mental health needs. The program also has a school psychologist assigned to it. Therefore, the ability to focus on the students' mental health and emotional needs is embedded in the program. The students operate on a point-level system; at the lowest range of points are students who have not demonstrated enough maturity to be independent of any adult supervision. These students remain in the "line of sight" of an adult at all times.

7. Student was ultimately not successful during the time she was enrolled in the District's ED program. Sean Kitchin, who has a master's degree in special education, was and is the teacher assigned to the program. He was Student's instructor for the 2008-2009 school year and is her instructor now. He testified that Student was volatile and hostile. She consistently subjected him, the aides, and classmates to verbal abuse. Although her grades were all in the "C" to "C+" range for the fall semester, Student's grades went down beginning in the spring semester. Her behavior in class deteriorated as did her behavior at home. She was psychiatrically hospitalized several times in the year prior to spring 2009, the last time in April of that year. Student's health insurance privately placed Student twice in an RTC. Finally, in the spring of 2009, after Student's hospitalization in April, the District referred her to OCHCA for assessment and for a treatment and/or placement recommendation.

JUNE 17, 2009 IEP AND DECISION TO PLACE STUDENT IN AN RTC

8. The District convened an IEP meeting for Student on June 17, 2009, to discuss OCHCA's placement recommendation. The District had administered the Woodcock-Johnson – Third Edition (WJ-III) to Student on January 2, 2009. The WJ-III assesses a student's academic achievement. The results of the assessment were memorialized in Student's June 17, 2009 IEP, and consisted of the following standard scores:

Broad Reading	94	Reading Fluency	89
Broad Math	87	Calculation	95
Broad Written Language	93	Math Fluency	91
Math Calculation Skills	93	Spelling	96
Written Expression	92	Writing Fluency	94
Academic Skills	97	Passage Comprehension	102

Academic Fluency	89	Applied Problems	85
Academic Applications	88	Writing Samples	83
Letter-Word Identification	100		

9. Dr. David Gould is the psychologist from OCHCA who assessed Student and made the original recommendation for an RTC placement. Dr. Gould has a doctorate degree in psychology from the University of California at Irvine. He has been a licensed psychologist since 1987. He was and is presently Student’s case manager at OCHCA. Prior to the June 17, 2009 IEP meeting, Dr. Gould had sent what are called “referral packets” to several RTCs to see if any would accept Student into its program. The packets include information concerning the prospective student’s educational, emotional, and mental health history. One of the RTCs to which Dr. Gould had sent Student’s packet was located in California. However, due to her history of elopement, Dr. Gould believed that Student needed a placement in an out-of-state RTC, which are more secure than the placements available in California.

10. Student was accepted at two out-of-state RTCs. After considering Student’s needs, OCHCA recommended, and the District agreed to, placement for Student at Yellowstone Boys and Girls Ranch (Yellowstone) in Billings, Montana.

11. Yellowstone is a non-profit RTC certified by the state of California which provides psychiatric and educational services for emotionally disturbed young adults. It consists of 10 lodges on a 400-acre campus. Each lodge provides a different level of care. It includes a secure and locked unit for those young people with safety concerns. Each child is assessed when admitted to Yellowstone and placed in a level of care according to the results of the assessment. As the child progresses, she becomes eligible to move to a less restrictive lodge and to receive more privileges and responsibilities. Each child has an individual treatment plan, including medication management and chemical dependency treatment if needed. Mental health services include individual,

group, and family therapy, as well as recreational therapy. The teachers who give academic instruction are certified in special education. The curriculum includes core academic classes as well as electives. Vocational training is available to the children who can safely participate in it on campus. Dr. Gould believed the program at Yellowstone was appropriate for Student. He felt it would address those issues of Student's which necessitated placement in an RTC: her need for structure to take her medication as directed; to attend school every day; to be a productive student; to take responsibility for her behavior; to learn to show respect for authority figures; to manage her anger and frustration when things did not turn out as she wanted; and to learn life skills by participating in vocational training and recreational activities.

12. In addition to the District providing transportation for Student from home to Yellowstone using an escort service, Student's June 17, 2009 IEP indicated that the District would reimburse Parents for round-trip air fare for up to a total of four trips a year either for Parents to visit Student at school or for home visits for Student. The District also agreed to provide reimbursement for hotel lodging for up to two nights per visit and reimbursement for a rental car for up to three days for each visit.

13. Although Mother had urged the District to consider an RTC placement for Student, Father initially opposed placement at Yellowstone. However, Parents ultimately both consented to Student's placement there as well as to all other portions of the June 17, 2009 IEP. Student was transported to Yellowstone and admitted on June 23, 2009. Yellowstone indicated on Student's Master Treatment Plan that Student's anticipated discharge date from its program would be June 2010.

JULY 21, 2009 IEP

14. On July 21, 2009, the District convened an IEP meeting to conduct a 30-day review of Student's placement at Yellowstone. The IEP team noted that Yellowstone staff believed that Student was appropriately placed there. Student was putting effort

into some of her academic classes but not enough effort into others. The team reviewed and modified some of Student's goals.

15. The only concerns Parents expressed at this time regarding the placement at Yellowstone was with the amount of visitation permitted under Student's IEP. The District IEP team members informed Parents that the amount of visitation indicated in the IEP was pursuant to District policy as the minimum amount it would reimburse. However, the District also indicated to Parents that if Student's treatment team recommended additional therapeutic visits, the IEP team would reconvene to discuss the recommendation.

16. Leticia Scott is the District school psychologist who has been most involved with Student. Ms. Scott has a Master's degree in counseling psychology and is credentialed as a school psychologist. She has been Student's District case manager at various times since Student enrolled in the District. Ms. Scott, Dr. Gould, and Mr. Endelman all testified at hearing that the District provides each of its students who attend an RTC with a minimum of four therapeutic visits a year. This was the amount of visits provided to Student in each IEP in which an RTC placement was offered. However, the District witnesses credibly testified that there are times when a student's treatment team recommends additional visits if the team believes more visits are required for therapeutic reasons. The District has always followed those recommendations in the past. In Student's case, no member of her treatment team from the District, Yellowstone or OCHCA ever determined or recommended that she required more therapeutic visits with her family. To the contrary, as discussed below, the treatment team at Yellowstone believed that family visits were often too contentious for Student and should have been limited while Student was placed there.

17. Student's IEP team determined at the 30-day review that Student's progress at Yellowstone warranted her continued placement there.

DECEMBER 7, 2009 IEP: SIX-MONTH RTC PLACEMENT REVIEW

18. Father visited Student at Yellowstone during a weekend in late November, 2009. Student had requested permission from her therapist to stay overnight with him when he visited. The therapist had denied the request. However, Father decided to keep Student with him at his hotel during the evenings rather than returning her to Yellowstone for the night even though this was not in conformance with Yellowstone's rules and contradicted the specific directives of Student's therapist. Father disagreed with the rule particularly since the visit he had with Student ultimately proved to be very successful.

19. Parents were not happy with Student's placement at Yellowstone. They were concerned about whether Student's goals were being addressed. There also had been substantial conflict between Student's therapist at Yellowstone and Mother. Mother believed that by acting as an intermediary and interpreting statements made by Mother and Student during therapy sessions, the therapist was taking Student's side. Dr. Gould consulted with the Yellowstone therapist and suggested a different approach to the therapy by focusing on Student's progress toward her goals rather than on her communication with Mother. This helped to alleviate the conflicts between Mother and the therapist.

20. The District convened an IEP meeting for Student on December 7, 2009, for the purpose of Student's six-month placement review and to address concerns about the placement raised by Parents. Seven staff members from Yellowstone participated in the IEP by telephone. Although Student was progressing academically and receiving grades of all "A"s and "B"s she was not progressing as much in her therapy. Student's primary therapist indicated in her treatment summary and recommendations that Student often had been hostile, rude, and disrespectful in therapy, particularly when disagreeing with the therapist, such as the time the therapist

denied her permission to stay overnight during Father's visit. While most of the therapy sessions had been productive, Student continued to be rude and disrespectful to her therapy team members when they set limits for her. Student continued to struggle with sharing her feelings appropriately and continued to display a very low self-worth during therapy sessions. She also continued to purge (vomit) after meals.

21. With regard to interpersonal relationships, Yellowstone staff noted that Student had failed to make much progress during the six months she had been there. Student continued to show aggression with peers; on one occasion she provoked a peer to such an extent that the peer punched Student. Student continued to show a lack of judgment in decision making. She also continued to have difficulty with emotional regulation, which sometimes required several staff members to calm her down. Student continued to require redirection by staff several times a day and required a high level of monitoring when she was around a large group of peers as she continued to demonstrate very poor boundaries with others.

22. For these reasons, Yellowstone recommended that Student remain enrolled until June 2010 at her current level of care. Although Student had requested that she be moved to a group home off-site run by Yellowstone, her treatment team there did not believe that Student was ready for a less restrictive placement.

23. At this IEP meeting Parents requested that Yellowstone give permission for Student to have a home visit for 11 days during Christmas. Yellowstone, supported by Dr. Gould, did not believe that Student was ready for a therapeutic home pass. They believed that Student would be susceptible to returning to drug use, that she would elope from home, and that she had not progressed enough in family therapy.

24. Parents disagreed with the decision to disapprove a sanctioned home visit. They felt that Student would benefit from a visit and that it would reward her for the progress that she had made at Yellowstone. They believed that a visit would help to

reinforce her good behavior. Parents informed the IEP team that they intended to bring Student home for the Christmas holidays even if the visit was not sanctioned.

Yellowstone did not have an answer to Father's query as to whether it would discharge Student if Parents followed through with their plan to remove Student for the visit.

DECEMBER 17, 2009 IEP

25. On December 15, 2009, Dr. Gould wrote to Parents reiterating that OCHCA would not approve the visit since it was against medical advice. He informed Parents that home visits were for therapeutic reasons, were generally for periods not exceeding three to five days, and that Parents would be responsible for paying for Student's daily costs at Yellowstone for the time they removed her for an unsanctioned visit.

26. OCHCA, Yellowstone, and the District were highly concerned about the possibility of Parents removing Student for an unapproved visit. The District therefore convened another IEP team meeting for Student on December 17, 2009. By this time, Student's Mother had visited her at Yellowstone for family week which had taken place from December 10 through 13. Mother's visit with Student was not entirely successful. Mother broke the Yellowstone rules by leaving the campus with Student. She and Student also argued a lot during the visit. Yellowstone indicated that Student had become more defiant after her visit with Mother.

27. At the December 17 meeting, Parents reiterated their intention of bringing Student home for a visit for the Christmas holidays. Parents believed the reports from Yellowstone were false, instead they felt that Student was not making progress and that the lack of a visit would negatively affect Student's mental health as well as affect the mental health of the family.

28. When asked again by Parents why Yellowstone would not sanction a visit, Yellowstone staff reiterated their belief that Student might elope and return to using drugs and that she was a long way from discharge from the program. The staff also

stated that another reason for denying the request for a visit was that Student believed she had not gained anything positive from family week. Student was also showing signs of regressing; she had become more argumentative, was not getting along with peers, and was not participating in daily lodge programs. Additionally, Yellowstone staff informed the IEP team that Student had been caught cheating on a test and had stolen a pencil to change answers on the test.

29. It was Dr. Gould's opinion that Student was still struggling to reach her goals and was only in the middle of the program offered by Yellowstone. However, he believed that Student was making strides since her grades had improved, and she was attending classes and not falling asleep in class as she had previously done while in her high school ED placement.

30. All District witnesses who testified at the hearing participated in Student's December 17, 2009 IEP meeting. All expressed their concern that Parents refused to follow the treatment plan developed for Student with regard to the home visits. As Mr. Endelman eloquently explained, District staff felt vexed, disappointed, and frustrated by Parents' unwillingness to follow the recommendations of Student's treatment team. Mr. Endelman, Dr. Gould, and Ms. Scott stated that the purpose of home visits was for therapeutic reasons to see if a student could implement at home coping strategies learned in therapy, not for a family to just "feel good" by having the visit. Additionally, RTCs such as Yellowstone have a point system for privileges where the students have to earn a privilege by earning points. Student's treatment team believed that Parents were sabotaging what Yellowstone was trying to accomplish with her rather than supporting the program. However, Parents, particularly Father, remained convinced that having Student home for Christmas was the appropriate thing to do.

31. Sometime during the December 17 IEP meeting, Mother requested that Student be re-assessed in order to determine her continued mental health needs.

However, by the time the meeting ended the IEP team determined that what Parents really wanted was for OCHCA to search for an alternate residential placement for Student. It was apparent at this meeting that the relationship between Parents and Yellowstone was strained, particularly since they did not believe that Student was making adequate progress and because they did not agree with how the therapy was conducted. Dr. Gould, on behalf of OCHCA, agreed to look for other placement options for Student.

32. Against the advice of Student's treatment team, Parents brought Student home for 11 days during the Christmas holidays. During normal, authorized therapeutic visits from an RTC, a student's parents are supposed to implement all rules applied by the RTC to the student, such as constantly ensuring that a student is in the line of sight of a supervising adult. Parents did not make sure that this happened during Student's home visit. Rather, Student's behavior at home during this time was similar to her past behavior that had resulted in the original need for placement at an RTC. She left home one night, telling Parents she was going to her grandmother's house. Instead, she spent the night with a boy. Student also called Yellowstone during her home visit, informing staff that she had suicidal thoughts and that she was craving drugs. There is no evidence, however, that Student took any drugs during her visit.

33. Parents returned Student to Yellowstone on January 2, 2010, after an 11-day visit. Student returned home again on January 28, 2010, in order to undergo dental surgery and treatment.

FEBRUARY 1, 2010 IEP MEETING

34. The District convened an IEP meeting for Student on February 1, 2010, in order to hold her annual IEP review. By the time of this meeting, Student's grades from Yellowstone were all "A"s and "B"s, other than a "C" in English; her grade point average placed her on Yellowstone's honor roll. Other than stating that Student was still dressing

inappropriately and refusing to conform to Yellowstone's dress code, Yellowstone staff reported that Student had met all but one of her goals and that her behavior was improving. Parents also reported that Student's behavior at home had improved. Yellowstone staff's report of Student's behavior was significantly different from that indicated at the December 17, 2009 meeting, where Student's behavior had been reported as being non-compliant, argumentative, and irresponsible.

35. Dr. Gould had conducted a search for another RTC placement for Student pursuant to Parents' request at the December 17, 2009 IEP meeting. He had discussed the results of the search with Mother prior to the February 1 meeting. Student had been accepted by various out-of-state placements. Dr. Gould had recommended to Mother that Student attend one of two RTCs: either Cinnamon Hills or the Mingus Mountain Academy (Mingus). Mother had indicated to Dr. Gould that she preferred Mingus because it was less restrictive than Cinnamon Hills.

36. Mingus is located 25 miles outside of Prescott, Arizona on a 120-acre campus. It is an accredited, non-profit RTC for emotionally and behaviorally at-risk adolescent girls aged 12 to 18. It is certified by the State of California as a non-public school. In addition to offering a high school math and English curriculum, Mingus offers a vocational preparation curriculum. It has a unique equestrian program in which students train and maintain horses on the campus site. Students may even earn academic credit for training, grooming, and riding instruction. The school also offers extra-curricular clubs to encourage learning, development of positive peer relationships, and involvement in the campus community.

37. Mingus also has a strong therapeutic program whose goal is to motivate students to make positive, healthy choices. The major treatment goal is to assist students in internalizing permanent change by developing positive behavior norms that are meaningful, attainable, and allow the students to hold themselves and peers

accountable for their actions. The Mingus program provides an opportunity for the students to progress through various stages of supervision, from only being permitted to participate in activities on campus to living in an off-campus therapeutic home, if the student is found trustworthy. Medication monitoring and family, group, and individual counseling are all provided to the students.

38. Dr. Gould believed that Student continued to require a restrictive RTC placement because she had a history of returning home and then deteriorating. He did not believe that Student could function through an entire school semester outside of an RTC. He had some concerns that Mingus was not restrictive enough for Student but believed that it was necessary to offer a compromise placement that was acceptable to Parents. In balancing the programs offered, he believed that Mingus would be an appropriate placement for Student and would address all of her needs. He had intended to offer Student placement there at the February 1, 2010 IEP meeting.

39. However, at the February 1 meeting, Yellowstone staff reported that Student had met all but one of her goals and Parents reported that Student was doing well at home. Student's IEP team therefore determined that it would be appropriate for OCHCA to search for, and the team to consider, a placement in California closer to Student's residence such as a group home that had connections to an off-site non-public school. A local placement would permit Parents to participate in family therapy personally instead of by telephone.

40. Dr. Gould was perplexed by Yellowstone's report of Student's progress since its report six weeks earlier had indicated that Student was not complying, was arguing constantly with her therapists, and was refusing to accept the responsibility and consequences of her actions. He believed that Yellowstone was "white-washing" its description of Student's behaviors by saying that she was ready to transfer from the facility. However, it was apparent that Parents had no intention of returning Student to

Yellowstone and that OCHCA had to find another appropriate placement for her that would be acceptable to them. Dr. Gould therefore agreed to search for a local placement organized as a group home, which was a less restrictive environment than the out-of-state RTCs. The IEP team agreed to meet again on February 11, 2010, to review the placements.

FEBRUARY 11, 2010 IEP MEETING

41. The District re-administered the WJ-III to Student on February 4, 2010, a little over a year after the previous assessment. Student's standard scores on the re-tested subsections of the WJ-III, which were memorialized in her February 11, 2010 IEP, consisted of the following:

Broad Reading	105	Reading Fluency	110
Broad Math	90	Calculation	88
Broad Written Language	109	Math Fluency	88
Math Calculation Skills	94	Spelling	108
Written Expression	112	Writing Fluency	116
Academic Skills	102	Passage Comprehension	86
Academic Fluency	112	Applied Problems	88
Academic Applications	88	Writing Samples	103
Letter-Word Identification	110		

42. The District convened an IEP meeting for Student on February 11, 2010, as planned. The District reviewed Student's scores on the recent WJ-III assessment. Student's scores had decreased slightly in calculation and math fluency, and decreased a fair amount (from 102 to 86) in passage comprehension. However, her scores had remained fairly consistent in the areas of broad math, math calculation skills, academic skills, academic applications, and applied problems. Additionally, Student's scores had increased 10 or more points in the areas of broad reading (11-point gain); broad written

language (16-point gain); written expression (20-point gain); academic fluency (23-point gain); letter-word identification (10-point gain); reading fluency (21-point gain); spelling (12-point gain); writing fluency (22-point gain); and writing samples (20-point gain). Parents expressed no concerns to other IEP team members during this meeting about Student's educational progress.

43. Dr. Gould sent referral packets for Student to three RTCs in California. The first was Girls and Boys Town, which is basically a group home setting where the children either go to a non-public school or to a local comprehensive high school, depending on each child's needs. The second was the Linden Center, which was also organized like a group home. The children there are bussed to a school operated by the Center. The third school to which Dr. Gould had sent a packet was Oak Grove, which has a school on its grounds. Student had an appointment for an interview with Girls and Boys Town the day of this IEP meeting and Linden had also offered her an interview. However, Oak Grove had a waiting list with six children in front of Student. Therefore, it was not possible to place Student there.

44. The IEP team discussed the fact that Student had been doing well at home. At this time, because of Parents' reports of Student's improved behavior at home, Dr. Gould did not consider her a flight risk and was still willing to recommend placement in one of the less-restrictive RTCs located in California.

45. Placement for students at RTCs sometimes has to be changed either because the child's needs change or because it becomes evident that the placement is not suitable. Generally, the appropriate mental health agency begins a search for a new placement while the student is still attending the former placement. When a new placement is found and the IEP team agrees to it, the child is transported from the former to the new placement without any interruption in services. This did not happen in Student's case. She was at home on a medical leave while OCHCA conducted the

search for a new placement. Additionally, it was apparent to all IEP team members that Student would not return to Yellowstone based upon Parents' aversion to the placement. The team therefore agreed that Yellowstone would discharge Student as of the date of the February 11 IEP team meeting.

46. Father was somewhat resistant to considering a new RTC for Student, but agreed to have the search continue for an alternate placement. The remainder of Student's IEP team, including Mother, believed that that Student still required some type of RTC placement. Nevertheless, Student needed to be educated while her new placement was finalized. The District therefore offered her a temporary interim placement at Buena Park in Mr. Kitchin's ED classroom, with one period of general education in a Spanish class, and including counseling and guidance to be provided at the high school for a minimum of 60 minutes a week. OCHCA agreed to temporarily continue Student's group, individual, and family therapy services on an out-patient basis while a new RTC placement was finalized. Parents consented to this interim IEP.

MARCH 4, 2010 IEP AND OFFER OF PLACEMENT AT MINGUS ACADEMY

47. To paraphrase Robert Burns, the best laid schemes of mice and men often go astray. Between the February 11, 2010 IEP team meeting and the next meeting, which convened on March 4, 2010, Dr. Gould determined that a local RTC was not possible or appropriate for Student.

48. Twelve people participated in Student's IEP team meeting on March 4. Mother and Father both attended the meeting, although Father participated by telephone. Student did not participate. District IEP team members included Assistant Principal William Wallace, who was the administrative designee at the meeting, special education teacher Sean Kitchin, general education teacher Karen Mikkelsen, Special Education Director Gregory Endelman, guidance counselor Cynthia Chow, and school psychologist Leticia Scott accompanied by another school psychologist named Heather

Linane. Dr. Gould attended on behalf of OCHCA. All necessary IEP team members attended the meeting.

49. The IEP team reviewed Student's present levels of performance. The team reviewed her assessments and oral reports from Parents and Student's teachers regarding her behaviors at home and at school. The team noted that Student had continuing symptomology of bipolar disorder that resulted in behavioral and social/emotional difficulties including poor interpersonal relationships and the inability to make and maintain appropriate interactions with adults and peers. Student's mental health issues continued to adversely affect her educational performance. Her IEP team determined that Student still qualified for special education under the category of emotionally disturbed.

50. The team then reviewed the eight goals and objectives proposed by the District IEP team members for Student, all of which were based on her present levels of performance as determined by recent assessments and input from the IEP team members, including Parents.

51. The first goal determined that Student had an area of need in passage comprehension, based upon her decreased score on the passage comprehension portion of the most recent WJ-III assessment. Since Student had passed the English language arts portion of the California High School Exit Exam but not the mathematics portion, the IEP team developed Student's second, third and fourth goals to have her work on those areas of mathematics in which she was deficient.

52. Student's fifth, sixth, seventh, and eighth goals addressed her social/emotional deficits, on which her eligibility for special education was based. Goal five addressed her inability to accept responsibility for her behavior on a daily basis. The goal's objective was for Student to exhibit greater self-management and to learn to control her behavior. Goal six addressed Student's inability to accept blame for her

inappropriate behaviors. The goal's objective was to have Student accept the consequences of her inappropriate behavior without angry outbursts or otherwise over-reacting. Goal seven stated that Student had an inaccurate perception of realistic situations. The objective of the goal was for Student to learn to identify three possible responsible decisions when given hypothetical situations requiring actions or decisions to be taken. The eighth goal addressed Student's lack of motivation to attend school on time and to follow school rules. The objective of the goal was to have Student exhibit motivation and positive attitudes toward learning and her own academic achievement by having Student initiate academic activities and turn in completed assignments in a timely manner.

53. All of Student's goals included appropriate baseline information, were measurable, and addressed all her deficits. Parents did not suggest any changes to the goals proposed by the District and did not suggest any additional goals for the IEP team to consider. After discussion of the proposed goals, Parents acknowledged their agreement with them.

54. Since Student was over age 16 at the time of the IEP meeting, her IEP team also developed an individual transition plan to address her post-secondary goals. In preparation for developing the plan, Student took an interest inventory assessment to help in planning her goals. She was interviewed by a school psychologist as to her goals. Student indicated that she wanted to graduate high school and then attend college, but that she also wanted to work after graduation. Student also indicated that she was concerned about her future and requested guidance to help plan her future needs. To aid Student in her transition goals, her transition plan proposed that Student would work on completing her high school graduation requirements, would research job requirements for those jobs in which she was interested, and would explore financial aid and scholarship opportunities as well as begin to develop a transition portfolio

addressing her post-secondary education and employment goals. The transition plan also proposed that Student would begin preparing to take her driver's test and would learn skills related to learning to live independently. The transition plan was appropriate and adequately addressed all of Student's post-secondary goals.

55. The IEP team then focused on discussing placement for Student. Parents wanted to know if there were any services or resources that were available and appropriate for Student so that an RTC placement could be avoided. The District team members reviewed the continuum of placements and services that had been previously attempted with Student, including partial general education placement, placement in the District's ED program, and non-public school placement. None had been effective for Student.

56. Dr. Gould then discussed his recommendation that Student still required an RTC placement based both on her inability to effectively access her education in any other setting and her behavior problems at home. He indicated that Student still needed a structured environment in order to be successful, and that a local RTC was not appropriate for her. He reviewed all the reasons behind his decision.

57. The Oak Grove RTC's waiting list was too long and therefore could not be considered for Student. Although Mother had scheduled an interview at the Linden Center RTC for her and Student, she had to cancel the appointment because of a work conflict and then did not reschedule the visit. Linden therefore never accepted the referral for Student to be placed there. With regard to Girls and Boys Town, Mother and Student had visited as planned. However, that facility is a group home set up in a neighborhood to function as much as possible as a family environment. The group home is run by a family with children of its own. During the visit, Student informed the personnel at Girls and Boys Town that she hated children and did not want any child to touch her. Additionally, Student told staff that she had no need for mental health

services and would not participate in the program. As a result of Student's comments, Girls and Boys Town felt that the other children would not be safe with Student and that they would not be able to serve her. They therefore rejected the referral for Student's placement there. Consequently, no local RTC was available for Student by the time of the March 4 IEP team meeting.

58. Moreover, in the three weeks between the February 11 IEP team meeting and the March 4 IEP team meeting, Student's behavior and emotional state had deteriorated substantially. She reverted to being oppositional and defiant at home. She again started staying away from home all night without permission or informing Parents of her whereabouts. On March 1, 2010, Mother emailed District members of Student's IEP team informing them that Student had disappeared for an entire weekend, that she believed Student was not taking her medication regularly, and that she was requesting that Student see a counselor that day when and if Student arrived at school. Mother informed the District that she and Father would listen to and probably adopt any recommendations made by the IEP team.

59. At school, in her interim placement, Student was also not functioning appropriately. She was missing most of the first three class periods, was failing her Spanish general education class, and would have failed all of the subjects covered in Mr. Kitchin's class if he had not modified the grading system to account for Student's disability. She was also not taking her medication and was not taking advantage of her OCHCA therapy sessions.

60. Finally, and most significantly, Student had demonstrated a complete loss of control one day in response to Father's attempt to take the house key away from her: she threatened Father with a knife. Father was so upset by the incident that he went to OCHCA for an emergency counseling session after work hours. Although previously very

resistant to returning Student to an RTC, after this incident Father admitted to Dr. Gould that perhaps Student really did need a residential placement.

61. Dr. Gould believed that he had no choice but to revert to his previous recommendation for an out-of-state RTC for Student. Not only were no local placements available, either because of lack of space or rejection of Student's referral, but he no longer believed that any local RTC would accept Student once they discovered she had threatened Father with a knife. Moreover, irrespective of whether a local RTC would still accept Student, he believed, based upon her deteriorating behavior and the major conflicts at home, that the only appropriate placement for her was at a secure facility, all of which operate outside of California. Dr. Gould therefore arrived at the March 4, 2010 IEP team meeting with a formal offer of placement for Student at Mingus Academy, which had previously accepted the referral for Student to enroll there. Dr. Gould offered Mingus instead of Cinnamon Hills based upon Mother's earlier expressed preference for it and because Mingus only enrolls girls, which he saw as beneficial to Student given her past inappropriate dress and behavior involving boys.

62. Likewise, by the time the IEP team convened on March 4, all District IEP team members believed that Student would not be able to obtain any meaningful educational benefit outside of an RTC. Buena Park Assistant Principal William Wallace, who is in charge of guidance, counseling, and special education services at the school, believed that Student's behaviors during the three weeks prior to the March 4 meeting indicated that she was a threat to herself and to others. He therefore concurred with Dr. Gould's recommendation that Student be placed at Mingus.

63. School psychologist Leticia Scott had provided counseling services to Student during the three weeks before the meeting. Based upon what she discussed with Student in the counseling, Student's behavior during the sessions, the major fluctuations in Student's moods, and Student's behaviors at home, Ms. Scott believed

that Student's emotional state would negatively impact her educational progress. Student's moods fluctuated from calm and passive to over-excited, inappropriate, and hyperactive. In her professional opinion, Student required intensive therapy services by a licensed social worker or family therapist in a therapeutic environment that could only be provided in an RTC setting. Ms. Scott also believed the all-female student body at Mingus was the more appropriate placement for Student given Student's propensity for inappropriate dress and prior inappropriate relationships with boys.

64. Mr. Endelman, had been very involved with Student's IEP process. He had regularly reviewed her files, had observed her in class, had participated in her IEP meetings, and communicated extensively outside of the meetings with Mother through exchanges of emails. He was convinced that Student's inability to attend school regularly, to pass her classes, to regulate her emotions, and to refrain from eloping from home, indicated that the only appropriate placement for her was at a secure facility in an out-of-state RTC.

65. The March 4 IEP also included residential placement case management services for Student by OCHCA, four times a year for 60 minutes each session, individual therapy and family therapy at the RTC one hour a month, and group therapy one hour a week. Extended school year services were also offered to prevent Student from regressing. The District acknowledged that it would be responsible for Student's transportation to Mingus utilizing an escort services.

66. Finally, the IEP included a provision for reimbursement to Parents for up to four visits each school year, either for a home visit by Student or a school visit by one of Student's parents. The IEP indicated that Parents had already used two of the four yearly visits so that only two more were available for the present school year. There was no indication, from any IEP team member including Parents, that Student required more visits for therapeutic reasons.

67. At the end of the meeting, Mother signed her consent to the March 4, 2010 IEP in its entirety.

EVENTS SUBSEQUENT TO THE MARCH 4 IEP MEETING

68. Parents initially contacted the escort service and arranged to have Student picked up on March 12, 2010. However, on March 11, Father called the service and cancelled the transport. Parents did not reschedule the transport.

69. On April 22, 2010, Student was suspended from school for five days after school staff determined that she had brought a bottle containing liquor to school. The staff determined that Student had been drinking it all day and was under the influence of alcohol when staff confronted her with their suspicions regarding her drinking. Student abruptly left the school campus without permission after the confrontation.

70. Concerned that Student's IEP was not being implemented due to the failure to transport her to Mingus, the District decided to convene another IEP meeting for Student to discuss placement issues with Parents. After two attempts to hold the meeting in late March and early April, the meeting was finally scheduled for April 23, 2010.

71. At the meeting, Mr. Kitchin informed the IEP team that Student's school attendance had regressed. In the 43 days since she had re-enrolled at Buena Park, Student's attendance ranged from a low of less than 10 percent attendance in her physical education and science classes to a high of 48 percent attendance in her language arts class. Student was failing her general education Spanish class and was only passing her other academic classes because Mr. Kitchin was modifying grade requirements for her to take into account her disability. He explained that in general education classes the students lose a credit for every three absences. Had Mr. Kitchin applied this policy to Student she would have failed the courses in his ED classroom as well.

72. Student continued her pattern of leaving the school campus anytime she did not want to be there. Because of Student's behavioral issues at school, including the drinking and refusal to remain on campus, the District believed that it could not keep her safe at school even though staff was attempting to keep her in line of sight at all times. After reviewing Student's behavior, lack of attendance and deteriorating grades, Dr. Gould and the District IEP team members reiterated their belief that Student required an RTC placement to meet her educational needs.

73. There was open disagreement between Mother and Father at the meeting as to whether Student should be placed at the RTC. It was a continuation of the disagreement that had been expressed during the time Student had attended Yellowstone. Mother recognized that Student was regressing at home and that while in treatment Student received medication support, counseling, and group therapy. Mother stated that she did not believe that Student could make progress outside of an RTC.

74. Father disagreed. He stated that he did not want Student to be placed at an RTC. He wanted to keep Student at home because she would turn 18 in less than a year and he wanted to spend time with her before then since he believed she would leave home as soon as she was legally able to do so.

75. Father also believed that Student was receiving a better education at Buena Park than she had received at any of the RTCs she had attended. He testified sincerely at hearing that he was convinced Yellowstone had not provided Student with an adequate education and that no RTC could do so. However, although Father may have been convinced of that fact, the evidence does not support his contentions. The District had administered the WJ-III academic achievement tests to Student before she began attending Yellowstone and after she returned. Significantly, Student had improved her standard scores by 10 or more points in a year's time in nine out of 17 of the areas tested on both assessments, demonstrating she had made considerable

academic progress during the some seven months she attended Yellowstone. Furthermore, Father had never visited Mingus and there is no evidence that he was aware of its academic program. Therefore, even assuming that Yellowstone had been deficient in some way in meeting Student's needs, there was no evidence that Mingus would not have been able to meet Student's needs or that its academic program was inappropriate.

76. Parents indicated to the rest of the IEP team that they wanted to discuss the placement issues amongst themselves and would contact the District within a week to again discuss Student's placement at Mingus. This never occurred. Parents did not contact the District and never agreed to place Student at Mingus, or any other RTC. The District filed the instant due process request in response to Parents' refusal to permit the District to implement the March 4, 2010 IEP by refusing to place Student at Mingus.

77. At the time of the hearing in this matter, Student was still enrolled at Buena Park in Mr. Kitchin's ED program. She also had one period of general education in an Economics class as her first period in the morning. Parents and Student continue to believe that Student does not require placement at an RTC. Parents testified that Student has done better at home and that the appropriate placement for her would be in a full-time general education curriculum with supports such as a one-on-one aide and sufficient mental health therapy. Student testified that she completed independent study over the summer to make up school credits and that all she needs is the motivation of being in general education in order to succeed.

78. Student presented no evidence at hearing addressing the District's contention that the March 4, 2010 IEP placing Student at Mingus offered her a FAPE in the least restrictive environment. Neither Student nor Parents addressed Student's needs as of that time in their testimony. Rather, their testimony focused on what they believe to be Student's needs as of the date of the hearing. Their testimony was the only

evidence presented by Student in support of her belief that an RTC is no longer the least restrictive environment for her and that the District instead should place her in a full general education program with supports.

79. The evidence, however, does not support Student's contention that she does not require placement in an RTC, no matter how sincere her beliefs or those of her Parents. First, Student's behavior during the spring 2010 school semester continued to deteriorate at school. Between April 22, 2010, and May 27, 2010, Student was involved in four episodes of misbehavior that required school intervention. As discussed above, she was suspended on April 22, for bringing liquor to school, being under the influence of alcohol, and leaving campus without permission when confronted with the alcohol use. On May 7, Student had a confrontation with another Student who started calling her names. In response to the name-calling, Student threw water on the other child. Mr. Wallace counseled Student on proper responses to verbal conflicts. On May 19, school staff approached Student and discussed their suspicion that she had scratched another student's car after having had a confrontation with the student. Student denied having done so although other students had overheard her taunting the girl whose car had been damaged. Then, on May 27, Student was again suspended, this time for three days, after threatening to beat up other students. After being given the suspension notice and being excused from school to go home, Student left campus using profanity to express her displeasure. After these incidents, she continued to leave school at whim. District staff was unable to keep track of her because she kept slipping off of campus.

80. In spite of her contentions to the contrary, the evidence indicated that Student continues to be withdrawn, lethargic, and melancholy in class – when she attends. As of the first day of this hearing, school at Buena Park had been in session for two weeks. Mr. Kitchin indicated Student had missed three days of school during the

first week of classes. She is the only student in his ED program who has an attendance problem.

81. For the present school semester, the District initially placed Student in a general education English class. However, during the first five or 10 minutes the first day of class, Student tried using her cell phone in class in violation of school policy. When the English teacher sought to confiscate the phone, Student left the class. The District had to switch Student to a general education Economics class because of her conflict with the English teacher.

82. Student's emotional state continued to be volatile from March through the hearing in this matter. Student continues to suffer from bipolar disorder. Her mood changes are extreme and are only controlled by medication. She cannot control her emotions. This is why she threatened Father with a knife when she became angry with him although she loves him. Dr. Gould was specific that no RTC in California would accept Student after this incident.

83. Student also continues to suffer from oppositional defiant disorder, which is made much more extreme because of her bipolar condition. When she is angry, she continues to rage, her decision-making and judgment are poor, she is impulsive and does not consider consequences. All of these issues prevent Student from benefitting from her education in a traditional setting. Her truancy has put Student at risk for being referred to the district attorney's office.

84. Although Student's interim IEP provides her with 60 minutes per week of counseling by the District, Student has actually been seeing Ms. Scott and Ms. Linane, the two school psychologists available at Buena Park, on almost a daily basis since the start of the 2010-2011 school year. During these counseling sessions, Student would cry and was distraught and emotional. She was using the counseling sessions in part to avoid going to class. On one morning, Student spent two and a half hours crying in Ms.

Linane's office. According to Mr. Endelman, it took Ms. Linane the entire time to convince Student to return to Mr. Kitchin's classroom. Student finally returned to class, then asked to use the restroom, and disappeared again. Student was found wandering around the campus. Mr. Endelman credibly testified that it was like a "cat and mouse" game trying to keep Student under observation and on campus when she was supposed to be there.

85. Lastly, a week before the start of this hearing, Student again tried to find a way to leave campus, this time for an undefined extended period. She presented to Ms. Linane a note asking that Student be excused from school due to the unexpected death of Student's sister. Student had forged Mother's signature on the note. Her sister had not passed away.

86. The District's witnesses all testified that Student's ED issues far exceed the District's ability to address them through its ED program. The District's program at Buena Park includes full-time psychologists who have masters' degrees and who have been trained as behavior intervention case managers, and the ED class is structured so that the students' problems can be addressed in the class environment or through group and/or individual counseling. However, Student has far greater need for therapeutic intervention than the District can provide. She is at the highest level of need of all the 40 to 60 children who are enrolled in the District's ED programs. Student was not successful previously at a non-public school, was not successful in an out-patient day program, and has not been successful in the Buena Park ED program. Even with instructional aides in the classroom, and after spending many months in the program, Student still has maximum line of sight supervision status because she refuses to remain in class and refuses to remain at school. She leaves whenever the opportunity presents itself.

87. The evidence presented by the District was persuasive that the least restrictive environment for Student at the time the District developed the March 4, 2010 IEP was in an RTC. The District has also proven, by a preponderance of the evidence, that an RTC was the least restrictive environment for Student up to the time of the hearing in this matter.

LEGAL CONCLUSIONS

BURDEN OF PERSUASION

1. The sole issue in this matter is whether the District offered Student a FAPE in its March 4, 2010 IEP. The District contends that its offer to Student of placement at the Mingus Academy, with corresponding mental health services and the provision of four family visits each school year, constituted a free appropriate public education in the least restrictive environment for Student both procedurally and substantively. The District contends that Student required, and continues to require, placement at an out-of-state residential treatment center because it has exhausted all lesser restrictive placements for her. The District asserts that it is not able to keep Student safe and that she is only able to obtain meaningful educational benefit from placement at an RTC.

2. Although at the prehearing conference Student contended that she was disputing the entirety of the District's March 4, 2010 IEP offer, at hearing Student only addressed whether the proposed placement at Mingus was the least restrictive environment for her and whether the IEP was inappropriate because it did not provide enough reimbursement for visits. Student contends that presently she is capable of participating in a fully mainstreamed program in a general education environment as long as she has adequate supports. She contends her emotional issues stem from the District's failure to permit her to be fully mainstreamed and that if given the opportunity she will be motivated to take her medication and attend school regularly. She also

contends that she was entitled to more visits than those offered in the IEP. Student did not define how many visits the IEP should have contained.

3. As the petitioning party, the 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].)

ELEMENTS OF A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

4. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction that meet the state's educational standards and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of a child and with a disability and permits him or her to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include transportation, and developmental, corrective, and supportive services, such as mental health counseling services, that may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

5. Local educational agencies such as school districts are not required to provide special education students with the best education available or to provide instruction or services that maximize or optimize a student's abilities. The seminal case explaining this principle is *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), in which the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit. The Court also stated school districts are only

required to provide a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. (*Id.* at pp. 198-201.) The Ninth Circuit has referred to the “some educational benefit” standard of *Rowley* simply as “educational benefit.” (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*); *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, 949-951.)

6. 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.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U.S.C. § 1401(9).) The IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff’d on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

7. There are two parts to the legal analysis of whether a local educational agency (LEA), such as a school district, offered a student a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Ibid.* at p. 207.)

8. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

THE IEP

9. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

10. Federal and State special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the

initial assessment or most recent assessment of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

11. Whether a student was denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed rather than in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*)).

LEAST RESTRICTIVE ENVIRONMENT

12. The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2);² Ed. Code, § 56342.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A child with a disability should not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).) In determining the program placement of the student, a school district is charged with ensuring that the placement decisions are made in accordance with federal requirements regarding placing the child in the least restrictive environment in which

² All references to the Code of Federal Regulations are to the 2006 version.

the child can meaningfully benefit from his or her education. (Ed. Code, § 56342, subd.(b).)

13. To determine whether a special education student can 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 (*Daniel R.R.*)]; 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].)

RELATED SERVICES

14. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS may include the provision of transportation and developmental and mental health services if required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. Smith* (9th Cir. 1994) 15 F.3d. 1519, 1527 (*Union*).) The regulation that defines "mental health services" for the purpose of Chapter 26.5 includes psychotherapy. (Cal. Code Regs., tit. 2, § 60020, subd. (i).)

15. The rights and responsibilities concerning the placement of students in residential treatment centers is government by Government Code sections 7572.5 through 7576, as implemented by California Code of Regulations sections 60100 and

60110. These sections provide specific procedures that an IEP team must follow before a student is placed in an RTC. Prior to determining that an emotionally disturbed student requires residential placement, the student's IEP team, which is expanded to include the appropriate community mental health service, first must consider less restrictive alternatives. If the IEP team cannot determine an appropriate less restrictive placement, the community mental health case manager is charged with searching for and identifying a satisfactory placement that addresses the student's educational and mental health needs and that is acceptable to the student's parents. The mental health case manager is required to first search for an RTC located in the county or a county adjacent to the residence of the student's parents. Only if the case manager is unable to identify an appropriate local RTC or an RTC located in the State of California can he or she then search for and recommend an out-of-state placement. There is no statutory authority for permitting a school district or mental health department to force a student's parents to place the student at an RTC over the parents' objections.

16. The related service of transportation may, when educationally appropriate, include transportation costs and expenses related to family visits to a distant residential placement. In *Union, supra*, 15 F.3d. at p. 1527, the Ninth Circuit found that a student's parents were entitled to reimbursement for transportation costs of a unilateral private school placement, including transportation costs between the parents' city of residence and the city where their child's private school was located as well as for the parents' lodging costs where the school was located.

17. The federal Office of Special Education Programs (OSEP; formerly the Bureau of Education for the Handicapped) found that transportation costs were reimbursable under a case-by-case analysis in *Letter to Dorman* (Bureau of Education for the Handicapped, Oct. 4, 1978) 211 IDELR 70, 211 LRP 6641. OSEP stated that transportation for a student to and from one of the State of Wisconsin's two residential

schools on the weekends was a related service under the Education of the Handicapped Act (EHA), the precursor to the IDEA. However, the need for transportation was to be determined on a case-by-case basis depending on the needs of the child in question. In *Letter to Anonymous* (OSEP, Sept. 12, 1988) 213 IDELR 164, 213 LRP 9070, OSEP found that under the EHA, part B, the number of trips to and from a residential placement for a student would have to be determined on a case-by-case basis. OSEP also found that transportation for parents to and from the facility to attend conferences, etc., would also have to be determined on a case-by-case basis as part of the IEP process, as would other costs incurred by parents in conjunction with the student's residential placement.

18. Administrative tribunals and district courts have also found that transportation may be a necessary related service for a disabled child. The theme running through all these cases is that transportation in the form of family visits may be required if the student needs them in order to receive a FAPE. For example, in *Aaron M. v. Yomtob* (N.D. Ill. 2003) 38 IDELR 122, 103 LRP 5105, the district court found that six parental visits to the child's RTC placement provided the child with a FAPE as a related service because the visits were specifically included in the child's IEP and the parents had not proven that their child needed more visits in order for him to receive a FAPE. Similarly, in *Luke P. v. Thompson R2-J School District* (D. Col. 2006) 46 IDELR 70, 106 LRP 46353, the court denied reimbursement to the parents for three visits to their child's RTC for purposes of parent training and two visits for attending school events. The court found that there was no evidence in the record that the training trips or parent attendance at school events were supportive services required to assist the student in benefiting from his education.

DETERMINATION OF ISSUE

The District's March 4, 2010 IEP Offered Student a FAPE in the Least Restrictive Environment

PROCEDURAL REQUIREMENTS

19. In the instant case, the District has met its burden of demonstrating that its offer of placement and services in the March 4, 2010 IEP procedurally offered Student a FAPE in the LRE.

20. The District met all procedural requirements in formulating Student's IEP. All necessary IEP team members were present at the meeting. The team discussed Student's present levels of performance and used those present levels of performance to develop goals that were measurable, concrete, and which addressed all of Student's deficits. The team reviewed Student's past and present WJ-III assessments and determined that her primary academic deficits were in specific areas of mathematics and in passage comprehension. The IEP team developed goals to address those areas. Based upon Student's continuing designation as an emotionally disturbed child who required mental health intervention, the IEP team developed appropriate goals to address Student's social and emotional deficits. There is no evidence that these goals were not based upon appropriate baselines, that they were not measurable or that they failed to address Student's needs. Nor is there any evidence that Student had deficits that the District failed to address in the eight goals it developed for the March 4 IEP. (Factual Findings 34 through 57, and 67; Legal Conclusions 4, 7 through 10, 19, and 20.)

21. The evidence also demonstrates that the District did not predetermine Student's placement or fail to permit Parents to otherwise participate in the IEP process. To the contrary, all of the District's and OCHCA's actions in attempting to find an alternative placement to Yellowstone were in response to Parents' concerns. In January 2010, when it became apparent that Parents were not happy with Student's placement at Yellowstone, Dr. Gould began searching for an alternate placement. He sent referral packages to two other RTCs, both located out of California, because he believed Student still required the security level provided by RTCs located out-of-state. However, in

February 2010, when urged by Parents to consider a less restrictive local placement, and based upon their assurances that Student was behaving better at home, Dr. Gould immediately began searching for placements close to Parents' home. Although he did not totally believe that Student was ready for a less restrictive environment, Dr. Gould sought out alternative placements as a compromise in order to meet Parents' concern. He ultimately sent Student's referral packets to three local RTCs that he believed could meet Student's needs. There was no violation of Parents' procedural rights. (Factual Findings 13, 19, 20 through 57, and 67; Legal Conclusions 4, 7 through 10, 19, and 21.)

SUBSTANTIVE REQUIREMENTS

22. The District's March 4, 2010 IEP also substantively offered Student a FAPE in the LRE. The District (through OCHCA) preliminarily offered three local RTCs for consideration by Parents at the February 11, 2010 IEP meeting: Oak Grove, Linden, and Girls and Boys Town. Oak Grove resulted to be full with a lengthy waiting list. Mother cancelled her appointment with Linden and did not reschedule it. Student herself damaged her opportunities at Girls and Boys Town by informing staff that she had no mental health needs that required intervention and by informing them that she disliked children and did not like being touched by them. Girls and Boys Town subsequently rejected Student's referral for placement there.

23. However, even had any or all of the local California RTCs accepted Student prior to March 4, 2010, by the date of the IEP meeting on March 4, Student was no longer eligible for placement there. Her behaviors at home and at school indicated that she would not be able to access her education in an environment less restrictive than an out-of-state RTC. In the three weeks between the February 11 and March 4 IEP meetings, Student reverted to her prior behaviors. She left home without permission and stayed away for multiple days without informing Parents of her whereabouts. She lied as to where she was going. She left school without permission. Her mood swings

became more pronounced and she missed excessive amounts of class periods. Finally, in a fit of rage over being told to return her house key, Student threatened Father with a knife. According to Dr. Gould, this last incident in and of itself would have prevented Student from being accepted at a non-public school or RTC located in California.

24. Father contends that no RTC was appropriate for Student because the academic portion of the placements is deficient. However, Student failed to provide any evidence in support of that contention. The evidence is clear, through a comparison of Student's results on the WJ-III both before and after her enrollment at Yellowstone, that Student made significant gains in more than half the areas tested. Additionally, Student provided no concrete evidence, other than Father's testimony, that the academic standards at either Yellowstone, or, more importantly, Mingus, were not adequate to address Student's needs and permit her to make meaningful progress in the educational curriculum.

25. The District has also shown that the program at Mingus would address all of Student's needs. Its program contains an academic component as well as a vocational component that helps students prepare for post-secondary career opportunities. The program contains the individual, group, and family therapy Student requires to address her social and emotional needs. It also provides extra-curricular activities to encourage learning and positive peer relationships, both areas of need for Student. Finally, the all-female enrollment at Mingus is beneficial to address Student's inappropriate dress and behaviors. The District has demonstrated persuasively that its offer of placement at Mingus was not only appropriate but, in light of all facts and circumstances, was the least restrictive environment available to address the totality of Student's needs. (Factual Findings 34 through 87; Legal Conclusions 4 through 13 and 22 through 25.)

26. Additionally, the District has shown by a preponderance of the evidence that its IEP offer of reimbursement for a total of four family visits a year was adequate to

meet Student's needs. The evidence demonstrated that Parents' insistence on more visits, particularly to bring Student home, was contrary to the advice of the medical personnel treating Student. None of Student's treatment team members from the District, from any RTC placement, or from OCHCA believed that Student required more visits for therapeutic purposes. Although Parents may have wanted more visits with Student, the purpose for the visits delineated in a student's IEP is for purely therapeutic reasons rather than to merely provide family members an opportunity to spend time with each other. Therefore, reimbursement of transportation and related expenses for visits by a student's parents to an RTC in addition to those specified in the student's IEP must be supported by a finding that the student required the visits to achieve her goals and/or to receive a FAPE. In the instant case, Student has offered no evidence she required more visits than those offered in her March 4 IEP in order to achieve her goals. The District has therefore met its burden of proof as to the related service of transportation that its IEP offered Student a FAPE. (Factual Findings 12, 18, 23, 25, 25, 27, 28, 30, 32, and 66; Legal Conclusions 14 through 18, and 26.)

27. Finally, Student contends that she no longer requires placement at an RTC. However, the evidence presented by the District of Student's behavior and needs from March 4, 2010, to the date of the hearing, does not support her contention. From March to June 2010, Student was disciplined a number of times at school, including two suspensions, one of which was for bringing liquor to school and being under the influence while there. She consistently missed portions of her school day to such an extent that she failed her only general education class and would have failed her special education ED courses if her teacher had not modified her grades. She was unable to get along with other students at school, and was openly belligerent to them. She consistently left classes without permission, and left school without permission. Student's problems at home continued as well.

28. Although Student was able to complete independent study credits over the 2010 summer break, once she returned to school in fall to start the 2010-2011 school year her problems at school re-emerged. Student began the year flagrantly disobeying her English teacher and leaving the classroom when asked to relinquish her cell phone. In the first week of school, she missed three days of her ED classes. She left the campus without permission. Her moods were so mercurial that she needed to consult with the school psychologist on almost a daily basis; on one day it took two and a half hours to convince Student to return to class. Staff believed she was going to go back to class; instead, Student was found wandering around the campus. Finally, less than a week before the hearing started in this matter, Student forged a note in order to be excused from school for an indefinite amount of time, using as an excuse that her sister had passed away. Student's sister had not died. The preponderance of the evidence therefore supports the District's position that Student continued to require an RTC as of the time of this hearing.

29. Although Student and Parents sincerely believe that Student no longer requires an RTC, the evidence presented by the District is to the contrary. No professional who has dealt with Student or who has treated her was of the opinion that she could be adequately educated outside of an RTC. The preponderance of evidence supports the District's contention that its March 4, 2010 IEP offered and continues to offer, as of the hearing in this matter, a free appropriate public education in the least restrictive environment for Student. (Factual Findings 68 through 87; Legal Conclusions 4 through 18, and 27 through 29.)

ORDER

The District's March 4, 2010 IEP offers Student a free appropriate education in the least restrictive environment.

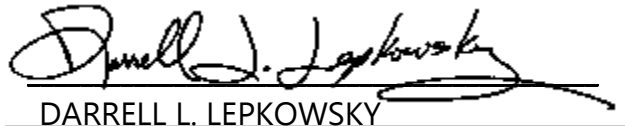
PREVAILING PARTY

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 prevailed on all issues heard in this matter.

RIGHT TO APPEAL THIS DECISION

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

DATED: October 13, 2010



DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings