BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Consolidated Matter of: STUDENT, Petitioner, v. BYRON UNION SCHOOL DISTRICT, CONTRA COSTA COOUNTY OFFICE OF EDUCATION, and CONTRA COSTA COUNTY SELPA, Respondents.	OAH NO. N 2006030866
BYRON UNION SCHOOL DISTRICT, CONTRA COSTA COUNTY OFFICE OF EDUCATION, and CONTRA COSTA COUNTY SELPA, Petitioners, v. STUDENT, Respondent.	OAH NO. N 2006010892

DECISION

Gary A. Geren, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, heard this matter on May 24, 25, 26, 30, and 31, June 1 and 2, 2006, in Byron, California.[1]

The Student (Student) was represented by Geralyn M. Clancey, Attorney at Law, Clancy and Varma. Student's parents and Student attended all, or portions of, the hearing.

The Byron Union School District (Byron), Contra Costa County Office of Education (COE), and Contra Costa County Special Education Planning Agency (SELPA)[2], were all represented by Jan E. Tomsky, Attorney at Law, Lozano Smith. Elena Watson attended as the representative for Respondents.

Oral and documentary evidence were received. At the hearing's conclusion the parties were permitted to simultaneously file closing briefs by June 19, 2006, and the record was held open until then. The briefs were received and added to the record. The record was then closed.

Student called the following witnesses to testify: Paula Gardner, Ed. D. (educational specialist, expert witness); Jodi Ramage (behavioral analyst, Byron Union School District);

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[1] The hearing was commenced on May 23, 2006, before Administrative Law Judge, Sherianne Laba. The first witness called to testify in the matter was a professor and adviser in a graduate program in which ALJ Laba was presently enrolled as a student. Upon learning of this, ALJ Laba recused herself from hearing the matter because of her concern with a potential conflict of interest. ALJ Geren listened to the audio recording of the portion of the hearing over which ALJ Laba presided. With the consent of the parties, ALJ Geren presided over the remainder of the hearing on the days noted.

[2] The three parties are collectively referred to as "Respondents," unless separately identified.

Maria Morales (instructional aide at Discovery Bay Elementary School); Student's mother; Joan Zoravich (special education teacher at Discovery Bay Elementary School); Dale Curry (instructional aide at Discovery Bay Elementary School); Adrienne Wooley (special education teacher at Spectrum School, Pittsburg campus); Patricia Gibson, Ed. D. (administrator at Spectrum Schools); Patricia Zanotelli (special education teacher at Bristow School); Delores Long (former principal at Discovery Bay Elementary School); Cynthia Smith (special education teacher, Miami, Oklahoma); Henry Dauber (program specialist at the Contra Costa County SELPA), Christine Ploszaj (behavioral consultant, formerly with Byron Union School District); Amy Herrington (special education teacher at Kimball School); Allan Petersdorf (principal at Discovery Bay Elementary School); and Lucille Madden (principal at Contra Costa County of Education).

Respondents questioned witnesses called by Student, as well as, calling Cheri Ann Worcester (behavioral consultant at Byron Union School District); and Elena Watson (Director of Student Services for Byron Union School District).

ISSUES

1. From August 9, 2005 through September 15, 2005, did Respondents fail to offer Student an interim placement that included occupational therapy (OT), speech and language therapy (S/L), behavior support services, a trained aide, and appropriate classroom placement pursuant to a prior settlement agreement between the parties?

2. From September 15, 2005 through November 16, 2005, did Respondents fail to make a free appropriate public education (FAPE) in the least restrictive environment (LRE) available to Student by:

   A. Failing to identify all appropriate available programs resulting in the parents being denied the right to meaningfully participate in the IEP process;
   B. Failing to offer an appropriate special day class (SDC) placement;
   C. Failing to offer appropriate behavior goals and objectives;
   D. Failing to implement behavior consultant services;

E. Failing to implement functional academic goals and objectives while Student attended Discovery Bay Elementary School, and;

F. Failing to offer a mainstreaming component?

3. Does Respondents' written offer of placement made on November 16, 2005 offer Student a FAPE in the LRE?

FACTUAL FINDINGS

GENERAL FINDINGS OF FACT

1. Student was an eleven-year-old girl in the fifth grade with Down's syndrome. She was eligible for special education and related services as a child with mental retardation. She resided within the jurisdictional boundaries of Byron. Student was originally enrolled in Byron in 1999.

AUGUST 9, 2005 THROUGH SEPTEMBER 15, 2005:

Respondents' alleged failure to offer Student an interim placement pursuant to a prior settlement agreement (Issue 1)

2. A prior disagreement between Parents and Byron led to Parents filing a due process complaint in February 2004. The matter was resolved and a settlement agreement was executed between the two parties on February 4, 2005 (approximately one year after the matter was initiated). Within days of signing the agreement, Parents withdrew Student from Byron, and moved to Oklahoma.

3. Approximately 5 months later, on July 19, 2005, Parents' educational advocate sent Byron a letter advising that on August 9, 2005 Student was returning to the district. The letter further requested that Byron schedule an IEP meeting. On July 21, 2005, Byron responded with a letter advising the advocate that prior to scheduling an IEP Parents first needed to establish residency within the district. Byron further requested Parents provide a copy of Student's most recent IEP. (Student's latest IEP was from the Miami School District, located in Oklahoma).

4. The 2005-2006 school year started on September 1, 2006. Parents enrolled Student in Byron on September 8, 2006. Student began school on September 9, 2006, attending the Discovery Bay Elementary School (DBES). Parents did not provide a copy of Student's Oklahoma IEP to Byron at the time of Student's enrollment (or anytime thereafter). Mother did, however, sign a release on August 9, 2005, which permitted Byron to obtain the IEP and related documents directly from Oklahoma. Byron promptly attempted to obtain Student's records; however, Byron erroneously faxed its request for her records to Roosevelt Elementary School, Miami School District, located in *Kansas*. The fax should have been sent to Roosevelt Elementary School, Miami School District, located in *Oklahoma*. Byron was diligent in its attempt to obtain the records, immediately contacting what it thought was the correct District. Almost daily, Byron followed-up on its request for the records. As set forth at Legal Conclusion No. 10, a district making such a request is held to a reasonable standard, not one of strict liability. Byron acted reasonably, although imperfectly, in this regard. Also, any loss of Student's educational opportunity caused by Byron's delay in obtaining the records must be balanced against the Student's loss of educational opportunity caused by Student's absenteeism during the period in question. Parents did not explain why Student was not enrolled in Byron prior to August 8, 2005 (not on August 1, 2005 when the school year started) thus causing her to miss six days of instruction. In the 27 school days that followed Student's first day of attendance, Student was absent for 15 of those days, 13 of which were noted as unexcused. Student attended 12 school days during the time at issue. Her infrequent and irregular attendance precluded her from obtaining meaningful education benefit from either the interim program developed prior to Byron's receipt of the Oklahoma IEP or after the interim placement was modified once it was received. Lastly, Parent's failure to provide the Oklahoma IEP, as requested by Byron on July 21, 2005, caused unnecessary delay in Ms. Watson developing an interim placement based on the Oklahoma IEP. Mother testified that she offered to provide a copy of the Oklahoma IEP to Ms. Watson. Ms. Watson

testified that Mother made no such offer. Regardless of whether such an offer was made, Mother's testimony established she possessed the Oklahoma IEP, but did not provide it in response to Byron's request.

5. Pending receipt of Student's records from Oklahoma, Byron developed an interim placement for Student. The interim placement was based on Student's agreed upon and implemented IEPs in place when Student was enrolled in Byron. The IEP's were dated October 28, 2003, December 2, 2003, and January 12, 2004. Parents contend that Byron should have fashioned Student's interim placement based on the terms of the settlement agreement, not these IEPs.

6. Elena Watson, Director of Student Services for Byron, developed the interim placement. Ms. Watson presented as a well-qualified and candid witness. She testified in a manner that conveyed her concern for meeting Student's needs. Her decision to develop the interim placement based on the IEP's was appropriate. As set forth in Legal Conclusions Nos. 8-10, special education students who transferred to a district from outside the state during this time were to receive interim placements prepared in conformity with an IEP. Ms. Watson followed this mandate in developing Student's interim placement.

7. Based on her review, Ms. Watson placed Student in Byron's Instructional Support Program (ISP). Byron's ISP is similar to what other districts call a resource specialist program (RSP). Student's interim placement provided a full-time, one-to-one instructional assistant for the duration of Student's day at school, speech and language services twice a week in 30 minute sessions, and "mainstreaming" (placement in a general education setting), at the beginning of each school day in a general education fifth grade class, as well as two days per-week in a physical education class. Student also had the opportunity to interact with typical peers during lunch and recess although it was established that little or no interaction took place, principally because of Student's behavioral issues.

8. Ms. Watson received the Oklahoma IEP in late August 2005 (approximately two-weeks after Student's enrollment). She reviewed it and then spoke with Student's special education teacher in Oklahoma. Thereafter, she added 60 minutes per-week of occupational therapy (OT) to Student's interim placement. This change to the placement was made so that, in the opinion Ms. Watson, the interim placement was in conformity with the Oklahoma IEP.[3]

9. For the reasons stated above, Byron was not obligated to follow the terms of the settlement agreement as alleged by Student. California law required an interim placement developed in, "conformity with an individualized education program…" By drawing upon prior IEPs to draft the interim placement, Ms. Watson ensured Student's interim placement conformed to an IEP. Furthermore, the agreement, by its own terms, established that it expired (with one insignificant exception) at the end of the 2004-2005 extended school year. For that reason as well, Student did not establish that Respondents were obligated to follow the terms of an expired agreement when they developed Student's interim placement.

SEPTEMBER 15, 2005 THROUGH NOVEMBER 16, 2005:

Respondents' alleged failure to include Parents in the IEP process (Issue 2.A.)

10. On September 15, 2005, a 14-member IEP team, including legal counsel for Parents and Respondents, held a two and one-half hour IEP meeting. The team discussed Student's educational needs, appropriate services, and placement. Although she was eleven years old, her then present level of performance was at the level of a toddler's.

[3] A component of the Oklahoma IEP called for using aversive behavioral interventions (such as placing Student in isolation in a 3-4 square room). Aversive behavioral interventions may only be used in California in limited circumstances (Legal Conclusions Nos. 11-14).

Based on the goals discussed at the meeting, the educational members of the team recommended a placement in the special day class (SDC) on the Kimball Elementary School campus (Kimball). Student's goals, objectives, and placement were thoroughly discussed at the IEP meeting.

11. The proposed IEP, and the documents memorializing what occurred at the September 15, 2005, IEP meeting, total 31 pages. The IEP contains 2 goals and 7 objectives in speech and language; 2 goals and 6 objectives in reading and writing; 3 goals and 7 objectives in mathematics; 7 goals and 21 objectives as part of a behavioral support plan; 1 goal and 3 objectives for visual motor control, a transitional plan, and an assessment plan that included (per Mother's request) an assessment of Student in the area of assistive technology (for which Mother later revoked her consent). The narrative account of the meeting established full participation in the IEP process by Mother (Father did not attend) and Student's attorney. In sum, the goals, objectives, and placement options contained in the proposed IEP of September 15, 2005, reflected a conscientious and concerned effort by the educational members of the IEP team to identify Student's unique needs, develop goals and objectives to meet those needs, and to place Student in the least restrictive environment. Fellow IEP team members duly considered the concerns expressed by Mother and her attorney. Parents did not accept this offer. Subsequent IEP meetings were scheduled pending the completion of certain assessments. Parents and their counsel were given time to review the comprehensive goals, objectives, services, and placement that were offered by Respondents.

12, Parents contended that Respondents' failure to offer additional placements, including a program at Bristow Middle School, seriously infringed upon their opportunity to meaningfully participate in the IEP process. Although Parents disagreed with the placement recommended by the educational members of the IEP, and would have preferred another, Respondents' failure to make additional offers of a FAPE on the campus

preferred by Parents did not establish a serious infringement of Parent's right to participate in the IEP process.

Respondents' alleged failure to offer an appropriate special day class (Issue 2.B.)

13. Respondents' offer to place Student at Kimball provided Student with a placement among students with instructional levels that ranged from the high first to the fourth grades. The class had one adult for every two students. Pursuant to this offer, Student was to be provided her own one-to-one, aide for the entire school day, as well as an additional aide during Student's first week of attendance to help Student transition to the new campus, as transitioning to different environments increased the frequency and intensity of Student's behavioral problems. The curriculum at the SDC class focused on its students' individualized goals and objectives, and incorporated the teaching of functional/life skills (for example, cooking exercises) and community based instruction (such as, field trips to restaurants and veterinarians' offices). The SDC classroom was located on a comprehensive elementary school campus. Student was to be mainstreamed ten percent of the day, receive language therapy, occupational therapy and consultation, and home-to-school transportation. Behavioral consultation for 8-10 hours per month was also offered. Respondent's offer to place Student in the SDC class at Kimball was reasonably calculated to provide Student with some educational benefit, based on Student's then identified needs.

14. Parent's principal objection to the offer was that the SDC teacher, Ms. Herrington, was unqualified. Ms. Herrington was teaching under an "emergency" credential and was in her first year of teaching special education Students. These facts, however, did not render her an unqualified special education teacher.

15. Student did not establish that Ms. Herrington was not lawfully licensed to teach special education students while holding an "emergency" credential. Ms. Herrington was in her fifth year of teaching, had worked as a general education teacher and reading

specialist, held a multiple subject credential, and master's degree in curriculum and education. Her experience included a year of teaching kindergarten students (students who performed at a functional level nearest that of Student). As a reading specialist, she also worked with kindergarten-aged students. She taught a student with Down's syndrome, as well as other special education students with needs similar to those of Student's. Ms. Herrington presented at hearing as a competent professional, concerned about the well-being and appropriate education of her students. There was no legal or evidentiary basis for one to conclude that she was incapable of providing Student with appropriate instruction, particularly in light of the ample support provided to her by the instructional aides.

16. Respondents' recommendation to place Student at Kimball was a proper exercise of the collective expertise of the educational members of the IEP team. Student did not establish that Respondents' offer to place Student in the SDC at Kimball was inappropriate.

17. Respondents' offer to place Student at Kimball was also a reasonable and appropriate extension of Student's interim placement pending their completion of Student's assessments. (Legal Conclusions Nos. 8-10).

Respondents' alleged failure to offer appropriate behavior goals and objectives (Issue 2.C.)

18. The proposed IEP included 7 goals and 21 objectives as part of a behavioral support plan (Factual Finding No. 11). As set forth at Legal Conclusions Nos. 11-14, the proposed behavioral support plan was appropriate.

Respondents' alleged failure to implement behavior consultant services (Issue 2.D.)

19. Ms. Ramage, a behavioral analyst employed by Byron, established she provided 8 to 10 hours of behavior consultation services during the time at issue. Student failed to establish Ms. Ramage failed to perform the services.

Respondents' alleged failure to implement functional academic goals and objectives at Discovery Bay Elementary School (Issue 2.E)

20. Ms. Zoravich (Student's teacher at DBES) and Dale Curry (Student's one-to one aide) established that Student was provided instruction in functional academics as part of the interim placement. Parents refused Byron's offer made on September 15, 2005. Accordingly, the interim placement remained in effect, as did the teaching of functional academics. Student failed to establish that Student did not receive such instruction.

Respondents' alleged failure to offer a mainstreaming component (Issue 2.F.)

21. As set forth at Factual Finding No.7, Student was provided with mainstreaming opportunities during the time in question.

NOVEMBER 16, 2005 THROUGH NOVEMBER 16, 2006:

Did Respondents' written offer of placement made on November 16, 2005 offer Student a FAPE in the Least Restrictive Environment? (Issue 3)[4]

22. As set forth at Legal Conclusion Nos. 1-7, a two part analyses is required to determine if a district offered a FAPE. First, a determination must be made as to whether a district followed the appropriate procedural requirements and, secondly, whether the IEP offered by a district was reasonably calculated to provide a child with some educational benefit in the least restrictive environment.

PROCEDURAL ANALYSIS

23. Student alleged that Respondents committed two procedural violations in developing the offer of an IEP made on November 16, 2005. First, Student alleged that Parents were not allowed to meaningful participate in the IEP process. Second, Student

[4] Both Byron and Student raised this issue. Student's specific contentions as to why the offer did not constitute a FAPE will be addressed under this heading since the contentions are subsumed by the larger issue as stated herein.

alleged that Respondents failed to provide appropriate prior written notice regarding its refusal to offer placement at Bristow. The evidence established that neither contention was meritorious.

PARTICIPATION IN THE IEP PROCESS

24. As set forth in Factual Findings 10-12, Parents participated in the September 15, 2005 IEP meeting. They also fully participated in the IEP meeting of November 9, 2005, and were given the opportunity to participate in meetings scheduled thereafter.

25. Respondents established that they routinely, and on short notice, adjusted IEP members' busy schedules to accommodate Parents' preferred meeting dates, thus ensuring that Parents were given an opportunity to participate.

26. On November 9, 2005, the IEP team met to discuss Ms. Ramage's behavioral assessment report, as well as, a recently completed language report. At that time, Respondents recommended the Spectrum program (Spectrum) as the appropriate placement for Student. Spectrum is a segregated campus. Byron changed its offer of placement from Kimball to Spectrum based on the behavioral assessment report. In order to provide Parents with an understanding of Spectrum, Dr. Trish Gibson, Spectrum's director, attended the November 9, 2006, IEP meeting. She provided a detailed explanation of the program to the team. Dr. Gibson explained at that meeting, and again at the hearing, how Spectrum intended to address the unique needs of Student's behavioral challenges. Dr. Gibson explained Spectrum's staff/student ratios, administrative oversight procedures, and how the campus is physically designed to mitigate the risk of injury posed by Student's behaviors to herself and to those around her (the dangerous nature of Student's behaviors are discussed later). Dr. Gibson explained that Student (like all others at Spectrum) would have an IEP meeting 30-days after her enrollment, and the existing IEP could be modified to better meet Student's unique needs. Dr. Gibson testified that it was the goal of Spectrum to prepare Student for re-entry to a comprehensive campus, and that Spectrum was successful in accomplishing this goal with numerous

other students. Dr. Gibson was a well-credentialed, experienced educator who testified in a credible and a persuasive manner.

27. At the November 9, 2005 IEP meeting, Respondents specifically scheduled occasions for Parents to visit the Spectrum campus, classrooms, and students, as well as, to meet with the Spectrum staff. The evidence established that these visits were specifically arranged so Parents could become more knowledgeable about Spectrum before further participating in future IEP meetings.

28. Byron arranged for Parents to make two visits to the Spectrum campus. The first visit was scheduled to occur on November 21, 2005, between 10:00 a.m. and 12:00 p.m. (where Parents and their advising "educator" were scheduled to meet with Dr. Gibson). The second visit was scheduled for November 28, 2005, between 10:00 a.m. and 12:00 p.m. (for which Mother agreed to bring Student with her).

29. The IEP team was scheduled to reconvene on November 29, 2005, December 2, 2005, December 5, 2005, or December 6, 2005, at Parents' choosing. The purpose of the further IEP meeting was to solicit Parents' input regarding the Spectrum placement after Parents and Student completed their scheduled visits.

30. Parents and Student failed to attend either of the arranged visits to Spectrum. Rather, on November 10, 2005 (the day after the IEP meeting where Spectrum was offered), attorney for Parents' notified Byron that Parents were withdrawing Student from Byron.

31. Parents chose not to visit Spectrum as agreed upon, chose to withdraw Student from Byron, and chose not to attend any of the proposed IEP meetings referenced above.

32. Parents' assertion that Respondents denied them an opportunity to participate in the IEP process is contrary to the evidence established at hearing, as set forth above.

Written refusal

33. As set at Factual Finding No.12, Respondents were not required to offer Student a placement at Bristow. It follows, that Respondents were not obligated to provide a written explanation detailing why they did not make such an offer when they were not obligated to do so in the first instance. Respondents committed no procedural violation in this regard.[5]

34. On November 16, 2005, Byron, through its counsel, sent a letter to Parents' counsel detailing Respondent's offer of goals and objectives, services, and placement for Student, covering the time at issue. As set forth at Legal Conclusion No.18, this constituted a proper prior written notice on behalf of Respondents.

Educational benefit

35. Ms. Ramage completed her report on October 27, 2005. Her report totaled 20 single-spaced pages, and was a thorough, well-written, professional analysis of Student's behavioral problems. Ms. Ramage's report established that Student's behavioral problems prevented her from gaining access to the academic content of her education. Further, Ms. Ramage made clear in her report, and at hearing, that Student's behavioral problems were the most important of her unique needs to be addressed by the IEP team. Evidence established that the educational members of the team concurred with Ms. Ramage's opinion in this regard. The report provided a detailed recitation of Student's

[5] The evidence established Bristow Middle School would have been an inappropriate placement for Student, a fifth grade elementary school student with an overall I.Q. of 41,. Respondents established that none of the other student's attending the SDC at Bristow had behavioral intervention plans in place, as did Student here. As discussed later, Students behavioral issues would have almost certainly proved to be a disruption to the SDC at Bristow, just as they were to the ISP class at DBES.

inappropriate behaviors and how the behaviors escalated. Ms. Ramage opined that unless steps were taken to mitigate Student's behaviors, Student would be unable to access her curriculum.

36. Student contended generally that the cause of Student's inappropriate behaviors was Respondents' failure to provide Student with an appropriate curriculum and trained staff. The evidence established, however, that Student had long-standing behavioral issues, irrespective of her curriculum or teachers. Student was the subject of at least three functional behavioral assessments completed February 13, 2003, January 28, 2005, and March 7, 2005. Behavioral intervention plans followed each of these assessments, and an additional emergency assessment plan was drafted in September 2004. The evidence established that the following types of behaviors existed before and during the period of Ms. Ramage's observations:

> Throwing temper tantrums that disrupted the entire class.
>
> Running away from staff and escorts ("bolting")
>
> Spitting on staff and peers.
>
> Kicking staff, peers, and inanimate objects.
>
> Hitting staff, peers, and inanimate objects.
>
> Throwing rocks, chairs, books, and other objects at staff.
>
> Taking objects from other students, such as pencils, papers, scissors, and eyeglasses.
>
> Locking herself in the bathroom.
>
> Hiding under desks and between buildings.

Climbing walls.

Pushing staff and peers.

Blocking her peers' access to playground apparatus.

Removing her shoes and licking her feet.

Blowing mucous and partially chewed food on others.

Making loud noises that disrupted the class.

Grabbing the body parts of staff.

Undressing, including removing her pants and undergarments.

Non-compliance with staff's instructions.

Verbal protesting. Pulling the hair of others.

Swinging objects in the direction of others.

Slapping others.

Breaking items.

Inappropriate sexual conduct/masturbation.

37. Evidence established these behaviors placed Student and others at risk of injury. For example, in one incident, Student "bolted" from her aide, grabbed an axe from a maintenance cart and swung it in the direction of others. On another occasion, Student hid between a narrow space that existed between two buildings. Student also threw a book that struck Ms. Morales, the aide who worked with Student for 3 years, and with whom Student formed a close bond, with sufficient force to draw blood. Student's

behaviors were so disruptive to the classroom environment that all other students were routinely removed from the class on a daily basis while staff addressed her behaviors. This sometimes occurred several times throughout the day.

38. Ms. Ramage observed Student on September 29, October 18, 19, 20, 21, and 25, 2005. During this period, the frequency and intensity of Student's behaviors were at increased levels, as was detailed in her report. For example, Ms. Ramage personally observed Student engage in aggressive behavior on over 30 instances within her 12-hours of observations. This included an incident in which Student swung a pipe at an aid. Student was also away without leave (AWOL) on nine occasions. On 10 occasions, Student attempted to place her fingers through Ms. Curry's or Ms. Ramage's clothing and into either their vagina or rectum.

39. Ms. Ramage observed inappropriate sexual behavior on fifteen occasions during her assessment. One event involved Student entering the classroom of a pre-school operated by the YMCA, but located the DBES campus. Upon entering the pre-school, Student started to engage in inappropriate sexual conduct in view of the pre-school students. Student typically made a guttural/noise laugh prior to engaging in inappropriate sexual behavior (generally described as masturbation or the mimicking of masturbation). This noise was also a distraction to other students. Student also exposed herself to fellow students on more than one occasion.

40. Ms. Ramage testified in a credible manner and was a persuasive witness. The observations she made were consistent with the observations made by others who either contemporaneously observed the occurrence of the acts described in her report, or described them in the documentary evidence.

41. Respondents established that before Student will be able to gain any meaningful educational benefit, her behaviors must be successfully addressed. Given the escalation in the frequency and intensity of Student's behaviors, the offer of placement at Spectrum was appropriate.

Least restrictive environment

42. As set forth at Legal Conclusions Nos. 15-17, there is a preference for special education students to be placed on a comprehensive campus. This preference, however, must be viewed in the light of a student's unique needs. Whether the offered placement of Student on a segregated campus such as Spectrum is appropriate requires an analysis of four elements, known as the *Holland* factors. Those factors will be discussed, in turn.

EDUCATIONAL BENEFITS OF PLACEMENT IN A REGULAR EDUCATIONAL ENVIRONMENT

43. Student asserted that a placement on a segregated campus was too restrictive. The evidence established the contrary. (Factual Findings 35-41). Student requires an educational environment where her behaviors can be better managed. Respondents' offer to place Student at Spectrum is an offer for placement that meets the most important of Student's unique needs. Respondent's established that a placement on less than a segregated campus, at this point in time, could not meet Student's behavioral need, most critical of her unique needs.

NON-ACADEMIC BENEFIT OF A REGULAR EDUCATION PLACEMENT

44. Evidence established that Student did not meaningfully interact with regular education students. The testimony of Student's aide (Ms. Morales), her principal (Mr. Petersdorf), and her teacher (Ms. Zoravich), all of whom observed the quality of Student's interactions with others on a daily basis, provided persuasive testimony on this point.

EFFECT STUDENT HAD ON STAFF AND CLASSMATES

45. Student's behaviors posed a risk of injury to herself and to those around her, as well as, disrupted the educational environment of her fellow students, thus depriving them of full access to their educational content.

COSTS OF MAINSTREAMING

46. Costs of mainstreaming were not an issue.

47. As set forth at Legal Conclusion No. 15, a student's placement should be located as close as possible to the student's home. Ms. Smith, Student's teacher in Oklahoma, established that Student tolerated her bus trips to and from school in Oklahoma well. It was established that Student's bus rides to Spectrum was analogous to her commute in Oklahoma. Respondents' established that Spectrum was the nearest campus to Student's home, capable of meeting Student's needs. (Factual Findings 35-41).

48. Respondents offered educational and related services that were calculated to provide Student some educational benefit, in the least restrictive environment--here a segregated campus. Respondents met their burden of proof on this issue.

LEGAL CONCLUSIONS

GENERAL PRINCIPLES GOVERNING SPECIAL EDUCATION

1. The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (Bd. of Education of the *Hendrick Hudson Central School Dist. v. Rowley,* 458 U.S. 176 at pp. 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as the school district's offer was reasonably calculated to provide educational benefits, it constitutes an offer of a FAPE. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley, supra,* 458 U.S. at p. 200.) Nevertheless, the district must offer a program that is reasonably calculated to provide more than a trivial level of progress. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Education* (4th Cir. 1985) 774 F.2d 629, 636.)

2. 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.)[6] "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmannv.*

[6] Although Adams involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in Adams to other issues concerning an

East Hanover Bd. of Education (3rd Cir. 1993) 993 F.2d 1031, 1041.) Although a child's progress toward the IEP's goals may be considered, whether an IEP offers a FAPE must beevaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*; *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.*, *supra*, 811 F.2d at p. 1314.) Even if the parents' preferred placement would be better for the child, this does not necessarily mean that the district's offer did not constitute a FAPE. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at p. 200; *Gregory K. v. Longview School Dist.*, *supra*, 811 F.2d at p. 1314.)

3. In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. Thus, the analysis of whether a student has been provided a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the IDEA, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Bd. of Education of the Hendrick Hudson Central School Dist. v. Rowley*, *supra*, 458 U.S. at pp. 206-207.)

4. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.) To constitute a denial of a FAPE, a procedural violation must result in either the loss of educational opportunity, or

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IEP (Christopher S. v. Stanislaus County Off. of Education (9th Cir. 2004) 384 F.3d 1205, 1212). District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (Pitchford v. Salem-Keizer School Dist. No. 24J (D. Or. 2001) 155 F. Supp. 2d 1213, 1236).

a serious infringement of the parents' opportunity to participate in the IEP process. (*Ibid.*; 20 U.S.C. § 1415(f)(3)(E)(ii), effective July 1, 2005; Ed. Code, § 56505, subd. (j).)

PARENTAL PARTICIPATION IN IEP PROCESS

5. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. §§ 300.344(a)(1) [parents are members of IEP team], 300.345 [district must ensure opportunity for parents to participate in IEP meeting]; Ed. Code, §§56341, subd. (b)(1) [parents are members of IEP team], 56341.5 [district must ensure opportunity for parents to participate in IEP meeting], 56342.5 [parent must be member of any group making decision on educational placement].) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B) [during evaluations], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(c)(2)(iii) [during IEP meetings], 300.346(a)(1)(i) [during development of IEP], (b) [during review and revision of IEP], 300.533 (a)(1)(i) [during evaluations]; Ed. Code, §§ 56341.1, subd. (a)(1) [during development of IEP], subd. (d)(3) [during revision of IEP], and subd. (e) [right to participate in IEP].)

6. The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 891.) The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (*Ibid.*)

7. A parent has meaningfully participated in the development of an IEP when the parent is informed of her child's problems, attends the IEP meeting, expresses her 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.) A 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. (*Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

INTERIM PLACEMENTS

California Law

8. Prior to October 1, 2005[7] Education Code 56325, subdivision (a) provided that "whenever a pupil transfers into a school district from a school district not operating programs under the same local plan in which he or she was last enrolled in a special education program, the administrator of a local program under this part shall ensure that the pupil is immediately provided an interim placement for a period not to exceed 30 days. The interim placement must be in conformity with an individualized education program, unless the parent or guardian agrees otherwise. The individualized education program implemented during the interim placement may be either the pupil's existing individualized education program, implemented to the extent possible within existing resources, which may be implemented without complying with subdivision (a) of Section 56321, or a new individualized education program, developed pursuant to Section 56321." (see also, Ed. Code § 56043, subd. (k).) Prior to the end of this 30- day interim period, the IEP team must review the interim placement and make a final recommendation on the appropriate placement. (Ed. Code § 56325, subd. (b).)

[7] On October 7, 2005 this statute was amended. The version of the statute cited above was in effect at the time of Student's transfer to Byron, and accordingly, establishes the appropriate legal standard to be applied in deciding this matter.

FEDERAL LAW

9. Transfers from outside the state: In the case of a child with a disability who transfers to a school district within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another state, the district must provide such child with FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation, if determined to be necessary, and develops a new IEP, if appropriate, that is consistent with Federal and State law. (20 U.S.C. § 1414(d)(2)(C)(i)(II).)

10. To facilitate this transition, the new school at which the child has enrolled must take reasonable steps to promptly obtain his records, including the IEP and supporting documentation, along with any other records relating to the provision of special education and related services. The prior school must take reasonable steps to promptly respond to any such request from the new school. (20 U.S.C. § 1414(d)(2)(C)(ii).)

BEHAVIOR INTERVENTION PLAN AND FUNCTIONAL ANALYSIS ASSESSMENT

11. There are two situations in which federal and state law require that a child's behavior be addressed. First, when a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a) (2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Second, when a school district subjects a child to certain types of discipline, it must conduct a functional behavior assessment and implement a behavior intervention plan, or review and modify the behavior intervention plan if one is already in place. (20 U.S.C. § 1415(k)(1)(B); 20 U.S.C. § 1415(k)(1)(D), (F), effective July 1, 2005; 34 C.F.R. § 300.520(b); Ed. Code, § 48915.5 [a student receiving special education services may be suspended or expelled as provided by 20 U.S.C. 1415(k) and 34 C.F.R. §§ 300.519 – 300.529]; *Alex R. v. Forrestville Valley Community Unit School Dist. #221* (7th Cir. 2004) 375 F.3d 603, 614.)

12. Federal law does not impose any specific requirements for a functional behavior assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Community Unit School Dist. #221*, *supra*, 375 F.3d at p. 615.) Although the comments to the 1999 federal regulations offer guidance about what may be included, further requirements were not imposed in order to give the school discretion to determine what is appropriate depending upon the needs of the child. (64 Fed. Reg. 12588 (Mar. 12, 1999).) The comments indicate that it may be appropriate for the IEP team to identify the circumstances or behaviors of others that may result in inappropriate behaviors by the child. (*Ibid.*) It may also be appropriate to include specific regular or alternative disciplinary measures that may result from infractions of school rules. (*Id.* at p. 12589.) A functional behavior assessment that meets the definition of an evaluation must meet the requirements of an evaluation. (*Id.* at p. 12620.)

13. While California law does not define a functional behavior assessment, a behavior intervention plan[8] is required when a student "exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP." (Cal. Code Regs., tit., 5, § 3001, subd. (f).) Behaviors that are "self-injurious, assaultive, or cause serious property damage, and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective," constitute a serious behavior problem that may require a behavior intervention plan. (*Id.*, § 3001, subd. (aa).) An FAA must be conducted and considered in the development of a behavior intervention plan. (*Id.*, §§ 3001, subd. (f)(1), 3052, subd. (c).) The requirements for a behavior intervention plan and an FAA are specific and extensive. (*Id.*, tit. 5, §§ 3001, subd. (f), 3052.)

[8] The development of a behavior intervention plan under California law is commonly referred to as a "Hughes Bill assessment." (Ed. Code, § 56520; Cal. Code. Regs., tit. 5, § 3052.)

14. There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit., 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.*, *supra*; *Neosho R-V School Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Education* (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

LEAST RESTRICTIVE ENVIRONMENT

15. A child with a disability must be educated, to the maximum extent appropriate, with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.550(b).) In addition, 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. (*Ibid.*) Each child with a disability must participate with children who are not disabled in nonacademic and extracurricular services and activities, such as

meals, recess and clubs, to the maximum extent appropriate to the needs of the child. (34 C.F.R. § 300.553.) The child's placement must be in the least restrictive environment (LRE), based on the child's IEP, and as close as possible to the child's home. (34 C.F.R. § 300.552(a)(2), (b)(2), (3).) A student's placement decision must be made in conformity with the requirements concerning the LRE for the child. (34 C.F.R. § 300.552(a)(2).) California law incorporates these requirements. (Ed. Code, §§ 56031, 56342.)

16. A student may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code § 56031.) The Supreme Court has noted, however, that IDEA's use of the word "appropriate" reflects Congressional recognition "that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at 197.)

17. The IDEA establishes a strong preference in favor of the placement of a special education student in the LRE. (20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) In light of this preference, in order to measure whether a placement is in the LRE the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four factors:

> (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class, and (4) the costs of mainstreaming [the student].

PRIOR WRITTEN NOTICE

18. The district is required to provide written notice to the parents of the child whenever the local educational agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.[9] (20 U.S.C. §1415(b)(3).) The notice given to the parent's of the child must meet the requirements specified in Title 20 United States Code section 1415(c)(1).[10]

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[9] Education Code section 56500.4 states:

> Pursuant to paragraphs (3) and (4) of subsection (b) and paragraph (1) of subsection (c) of Section 1415 of Title 20 of the United States Code, and in accordance with Section 300.503 of Title 34 of the Code of Federal Regulations, prior written notice shall be given by the public education agency to the parents or guardians of an individual with exceptional needs, or to the parents or guardians of a child upon initial referral for assessment, and when the public education agency proposes to initiate or change, or refuses to initiate or change, the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education to the child.

[10] Title 20 United States Code section 1415(c)(1) states:

> (1) CONTENT OF PRIOR WRITTEN NOTICE- The notice required by subsection (b)(3) shall include--(A) a description of the action proposed or refused by the agency;(B) an explanation of why the agency proposes or refuses to take the action and a

COMPENSATORY EDUCATION

19. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Parents of Student W v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, citing *School Com. of the Town of Burlington, Mass. v. Dept. of Education of Mass.* (1985) 471 U.S. 359, 374.) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Parents of Student W v. Puyallup School Dist., No. 3*, *supra*, 31 F.3d at p. 1497.) The law does not require that day- for-day compensation be awarded for time missed. (*Ibid.*). Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

REIMBURSEMENT

20. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a

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description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;(D) sources for parents to contact to obtain assistance in understanding the provisions of this part;(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal.

FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14.)

BURDEN OF PROOF

21. Student had the burden of proof on Issues 1-2. Byron had the burden of proof on Issue 3. The burden was of proof was by a preponderance of the evidence. (*Schaeffer v. Weast* (2005) 546 U.S._____ ; 126 S.Ct.528).

DETERMINATION OF ISSUES

AUGUST 9, 2005 THROUGH SEPTEMBER 15, 2005

Because of Factual Findings Nos. 2-9, and Legal Conclusions Nos. 8-10, Respondents interim placement was appropriate.

SEPTEMBER 15, 2005 THROUGH NOVEMBER 16, 2005

Because of Factual Findings Nos. 10-12, and Legal Conclusions Nos. 5-7, Parents participated in the IEP process. There were no procedural violations committed by Respondent that significantly impaired their participation in the IEP process ordeprived Student of educational benefit.

Because of Factual Findings Nos. 13-17, and Legal Conclusions 1-4, 11-14, and 15-17, Respondent's IEP offer made on September 15, 2005 was an offer of a FAPE.

Because of Factual Findings Nos. 18-19, and Legal Conclusions 11-14, Respondents provided appropriate behavioral support services.

Because of Factual Finding No. 20, and Legal Conclusions Nos. 1-4 and 8-10, Respondents provided appropriate functional goals and objectives.

Because of Factual Findings Nos. 7 and 10-11, and Legal Conclusions 15-17, Respondents provided appropriate mainstreaming opportunities.

NOVEMBER 16, 2005 THROUGH NOVEMBER 16, 2006

Because of Findings of Fact Nos. 22-46, and Legal Conclusions Nos. 1-7 and 11-18, Respondents offered a FAPE. There were no procedural violations committed by Respondent that significantly impaired their participation in the IEP process or deprived Student of educational benefit.

COMPENSATORY EDUCATION

Because of Factual Findings Nos. 2-9, 13-17, and 22-46, and Legal Conclusion No. 19, Student is not entitled to receive compensatory education.

REIMBURSEMENT

Because of Factual Findings Nos. 2-9, 13-17, and 22-46, and Legal Conclusion No. 20, Parents are not entitled to receive reimbursement for the costs of services provided to Student.

ORDER

For the foregoing reasons, Student's requests for relief are denied.

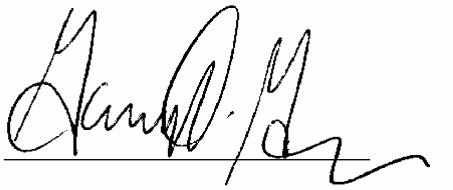
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. Respondents 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: June 30, 2006



GARY A. GEREN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division