

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

In the Matters of:

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent,

OAH CASE NO. N2007050302

STUDENT,

Petitioner,

v.

TEMECULA VALLEY UNIFIED SCHOOL
DISTRICT,

Respondent,

OAH CASE NO. N2007050762

DECISION

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings, Special Education Division (OAH), heard the above-captioned matter in Temecula, California on July 18, 19, 20, 24 and 25, 2007.

Temecula Valley Unified School (District) was represented by Peter A. Sansom,

Attorney at Law, of Lozano Smith. Terrence Davis, Director of Special Education, was present on behalf of the District on July 18, 19 and 20, 2007. Leah Alviso, Assistant Director of Special Education, was also present on behalf of the District on July 24, 2007, and portions of July 25, 2007.

Student was represented by Heather McGunigle and Maronel Barajas, Attorneys at Law, of the Disability Rights Legal Center (DRC) and Valerie Roddy and Tigran Guledjian, Attorneys at Law, of Quinn Emanuel Urquhart Oliver & Hedges. Student was present for a portion of the day on July 25, 2007. Student's mother was present each day of the hearing. Liza Brereton, summer associate, with the law firm of Quinn Emanuel Urquhart Oliver & Hedges was present. Shawn Rech, DRC intern, was present on July 18, 2007. Shawn Cassiss, DRC intern, was present on July 19 and 20, 2007 and Sarah Young, DRC intern, was present on July 25, 2007.

The District's Due Process Hearing and Mediation Request was filed on May 9, 2007. The Student's Due Process Hearing and Mediation Request was filed on May 21, 2007. Resolution session was waived by both parties in Student's case, and mediation was waived by both parties in both cases. The cases were consolidated on May 31, 2007, and the hearing dates in both cases were continued until July 18, 2007. Testimony and documentary evidence were received. The record remained open until August 2, 2007, for the submission of closing briefs by August 1, 2007, and evidentiary objections to the closing briefs by August 2, 2007. On August 1, 2007, the parties filed their respective closing briefs. The record was closed on August 2, 2007.

ISSUES

1. Did the District offer Student a Free and Appropriate Public Education (FAPE) in the least restrictive environment (LRE) in the Individual Education Program (IEP) dated October 22, 2006, as amended March 23, 2007, for the 2007-2008 school year?
2. Did District deny Student a FAPE when it failed to offer Student a placement

at Winston School in Del Mar, a non-public school (NPS), and transportation at public expense for the 2007-2008 school year?

CONTENTIONS

District contends that placement in a Special Day Class (SDC) for the Emotionally Disturbed (ED) offers Student a FAPE in the least restrictive environment. District further contends that Student's behavior is such that he derives no educational or social benefit from the general education class and needs a more restrictive environment.

Student contends that District cannot offer him a FAPE because he has an extreme form of Attention Deficit Hyperactivity Disorder (ADHD) and autistic-like behaviors which require placement at an NPS.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 12-year-old boy born on November 28, 1994. Student is a special education student residing within the boundaries of the District. He is eligible for special education and related services under the eligibility categories of severe emotional distress (SED) and other health impairment (OHI). He will be in the seventh grade for the 20072008 school year. Student has been diagnosed with ADHD and Disruptive Conduct Disorder.

BACKGROUND

2. Student attended first grade in Chicago, Illinois during the 2001-2002 academic year. There, he was diagnosed with ADHD and placed in a SDC pursuant to a

504¹ plan. During the 2002-2003 school year, while in second grade, Student moved to San Diego, California and attended Angier Elementary School. Student had serious behavior problems at Angier. He was eligible for services under the 504 Plan and placed in a general education classroom. At the time of Student's move from San Diego, a one-to-one aide, and social skills group were being considered.

3. Early in third grade, academic year 2003-2004, Student moved to Temecula and enrolled in third grade at Vail Elementary School where he remained on a 504 plan in a general education classroom. Student's 504 plan provided for preferential seating and extra time when needed. Student's behavior problems continued, but he was able to perform academically and completed his homework.

4. During the 2004-2005 academic years, while Student was in the fourth grade, his mother requested an assessment to rule out behavioral causes other than ADHD. Student was assessed by school psychologist Dolores Diaz on October 28, 2004. Diaz concluded that although Student had some behavioral problems characteristic of emotional disturbance, his academic performance was not affected. Based on Diaz's assessment, Student was found ineligible for special education services, but was given a 504 plan and placed in a general education classroom.

2005-2006 School Year

5. Student attended fifth grade during the 2005-2006 school year at Crowne

¹ Section 504 of the Rehabilitation Act of 1973, as amended in title 29 of the United States Code section 794; 34 Code of Federal Regulations part 104. Section 504 provides that no qualified individual with a disability shall be subject to discrimination. OAH does not have jurisdiction over complaints brought under this act. There is no dispute in this case about the 504 plan.

Hill Elementary within the District. He was a Student in Shana Reed's fifth grade class. Student had behavioral problems in class and was not attentive in class. For several weeks, Student's mother was in the class on a daily basis sitting next to him at his desk to assist him in controlling his behaviors and remaining on task.

6. Dr. David Helms, the school psychologist, assessed Student in October of 2005 during his fifth grade year (2005-2006 school year.) Helms reviewed Diaz's report and incorporated some of the results from that assessment into his report. Helms conducted three interviews with Student, an interview with Student's mother, administered the Behavior Assessment System for Children, Second Edition (BASC-2)², a sentence completion exercise and the Conners Teacher Rating Scale-Revised-Long Form and Conners Parent Rating Scale-Revised-Long Form (Conners rating scales.)³ On analysis of

² The BASC-2 is an integrated system designed to facilitate the differential diagnosis and classification of a variety of emotional and behavioral disorders of children and to aid the design of treatment plans. Student's teacher Shana Reed prepared the school portion of the report, Student's mother prepared the home portion, and Student completed a self-report portion of the BASC-2.

³ The Conners Teacher Rating Scale-Revised Long Form and Conners Parent Rating Scale-Revised: Long Form were completed by Ms. Reed and Student's mother. The data showed Student to be in the extreme end of the clinically significant range for hyperactivity, in the at-risk to significant range for attention problems, at-risk for depression at-risk to clinically significant for withdrawal. Student's self-ratings on negativity toward school, teachers and parents were all in the clinically significant range. His ratings for aggression and conduct problems were in the at-risk range. The anger control and bullying categories were at-risk to clinically significant.

the Conners rating scales, Helms found all nine signs and symptoms of attention deficit disorder (ADD) and eight of the nine signs and symptoms of ADHD. Extremely high ratings were also found on scales relating to restless impulsivity and to emotional lability. Social problems were also rated at the extreme end of the clinically significant range.

7. Helms opined that in addition to extreme ADHD, Student had not made normal social emotional growth. According to Helms, Student was "caught in a downward spiral." He noted that Student's behavior was hostile, aggressive, and blatantly inappropriate. Helms noted that Student had an extraordinary self-centeredness, a lack of empathy, a lack of concern about what others may think of him or what he does, but still expected acceptance. Helms opined that Student suffered from a kind of retarded social-emotional development and concluded Student displayed the characteristics of serious emotional disturbance. Specifically, he found that Student displayed an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, inappropriate types of behavior or feelings under normal circumstances and a general pervasive mood of unhappiness or depression over a long period of time. He also noted that Student's educational ability was adversely affected by his ADHD and recommended that Student be examined by a neurologist.

8. On October 31, 2005, an IEP meeting was held to make a determination of eligibility for special education services. The District members of the IEP team agreed that Student was eligible for special education services under the disability category of severe emotional disturbance (SED.) Student's mother disagreed with the eligibility category proposed by the District team members. Student's mother asserted that ADHD and related behaviors were Student's primary disability. Accordingly, the IEP team reached consensus that Student's primary category for eligibility was Other Health Impairment (OHI) although Student also met eligibility criterion under SED.

9. At the October 31, 2005 IEP meeting, the offer of FAPE was a general

education placement in a regular sixth grade class with a one-to-one aide, resource specialist program (RSP) support one session per week, 30 minutes per session, and counseling one session per week, 30 minutes per session. Goals were developed in the areas of managing frustration, eliminating aggressive behaviors, personal hygiene, responsibility for actions, assignment completion and seeking assistance when appropriate. Student's mother consented to implementation of the IEP on October 31, 2005. The IEP team also agreed that Student would benefit from a behavior support plan (BSP) and that his mother should not be in the classroom on a daily basis.

10. The IEP team reconvened on November 3, 2005, at which time, a BSP was developed for Student.⁴ Student's mother consented to the BSP on November 3, 2005.

11. Additional IEP meetings were held on November 28, 2005, and December 16, 2005, wherein the team reviewed Student's progress since the November 3, 2005 IEP.⁵ It was noted that Student had completed more work with the assistance of a one-to-one aide, but that he continued to touch others and to display impulsive behaviors. Student's mother requested an occupational therapy (OT) evaluation. District agreed to undertake an

⁴ Pursuant to the BSP, Student was provided a one-to-one aide to assist him with taking breaks, leaving the classroom, support and on the spot counseling to help him with self-control, removing himself from a situation and learning more appropriate ways to deal with frustration. This was to address the following behaviors: (1) becoming upset when frustrated; and (2) aggressive and annoying behaviors including spitting, poking, spraying saliva, loud coughing and loud sneezing. The plan was developed at Crowne Hill Elementary and overseen by the RSP teacher.

⁵ Student had received eight disciplinary referrals by the time of the November 28, 2005 IEP meeting.

OT screening of Student.⁶ After a screening, it was determined that an OT assessment was appropriate for Student.⁷

12. As the school year continued, Student's behavior deteriorated, as did his grades. Among the disruptive and inappropriate behaviors displayed by Student were: spitting, poking others, playing with mucous and saliva, touching others, running at inappropriate times, hitting others, throwing things, picking at his skin, growling, inattention in class and refusal to follow teacher and administrator instructions. Reed was forced to stop the class instruction multiple times on a daily basis to address Student's behaviors. Although teaching a general education class, Reed has a special education credential and experience teaching special education classes in the past. Reed utilized her special education experience and skills, but was unable to control Student's behavior.

13. On February 1, 2006, an IEP meeting was held. At the meeting, District team members advised Student's mother that Student was not receiving an academic benefit from the general education classroom and had become more disruptive and aggressive in the classroom. District team members opined that Student required a more restrictive placement in the SDC-ED classroom to work on his behavioral issues. Student's mother rejected the placement. She believed that Student was receiving only negative input in the classroom and that all provisions of the IEP had not been implemented. Student's mother did not believe that sufficient time had passed to determine how Student would respond to implementation of all provisions of the IEP. She also asserted that Student's ADHD was being ignored by District personnel. Student remained in the general education classroom

⁶ A screening is a tool utilized to determine whether or not an assessment is needed. The screening is usually prepared by the classroom teacher.

⁷ The occupational therapy assessment was conducted on June 21, 2006.

pursuant to the October 31, 2005 IEP. Student's behaviors became worse and more frequent. Reed took a stress leave of absence because of Student's behaviors and her frustration with the turmoil over his placement.

14. On March 3, 2006, another IEP team meeting was held. At the meeting Student's mother requested an Independent Educational Evaluation (IEE) and Functional Analysis Assessment (FAA).⁸ At some point, not disclosed in the evidence presented, District agreed to pay for an IEE.

15. Jose L. Fuentes, PhD, conducted the IEE of Student.⁹ Fuentes is a

⁸ An FAA, prepared by special education teacher Betty Boudreaux, dated June 14, 2006, was signed by Student's mother on July 10, 2006, and was the subject of a June 15, 2006 IEP meeting.

⁹ Fuentes administered the Beck Anxiety Inventory (BAI), Behavioral Rating Inventory of Executive Functions (Brief), California Verbal Learning Test, Children's version (CVLT-C), Children's depression Inventory (CDI), Children's Memory Scale (CMS), Continuous Performance Test-II (CPT-II), Rey-Osterriety Complex Figure Test (Rey-O)(ROCF), Scales of Independent Behavior-Revised (SIB-R), Woodcock Johnson Tests of Achievement, Third Edition (WJ-III) and Woodcock-Johnson Test of Cognition, Third Edition (WJ-Cog). Student performed at the average level in cognitive efficiency, fluid reasoning, short-term memory, working memory, broad attention, cognitive fluency and executive processes. Student scored in the high average range for verbal ability, comprehensive knowledge, visual-spatial thinking and processing speed. Student scored above average in comprehension-knowledge and long-term retrieval. Student scored in the Superior range in thinking ability and visual-auditory learning. Student scored in the very superior range in sound blending.

neuropsychologist. The assessment was conducted on May 11 and 18, 2006. Fuentes observed Student before and after administration of medication to control Student's ADHD. Fuentes noted that the difference in Student's behavior while off of medication was significant. Fuentes described Student as more rude, sarcastic and oppositional before taking the medication. Within an hour of taking his medication, Student's demeanor and attention changed dramatically.¹⁰

16. Fuentes determined that Student possessed high average to above average cognitive ability.¹¹ Fuentes did not find any significant discrepancies between Student's overall cognitive ability and his measured achievement. Fuentes opined that Student would benefit from an advanced curriculum with an accommodation of reduced homework. Fuentes opined that homework should be gradually increased as Student shows some improvement in self-regulatory skills. Student's overall adaptive functioning

¹⁰ Student has tried Concerta, Ritalin, Statterra and Dexadrine for ADHD. According to Fuentes, negative behaviors were more pronounced when off the medication. Student's medication has not been consistent. Student did not want to take the medication and had little tolerance for the headaches and side effects. At that time, Student's medication, if any, was monitored by a psychiatrist with the County Department of Mental Health.

¹¹ On the WJ-III, Student received a superior classification in broad reading, average in oral language, average in broad math, high average in math calculation skills, superior in broad written language, average in written expression, very superior in academic skills, high average in academic fluency and high average in academic applications. This was consistent with the testing conducted by Helms, Diaz and RSP specialist Georgia Wilson, all of which concluded that Student had high average to above average cognitive ability.

level was within normal limits.¹²

17. At that time, Fuentes indicated that Student was eligible for special education services under either the category of OHI or SED. Fuentes opined that the underlying impetus of Student's behaviors were a result of severe ADHD and not of a mood or conduct disorder.¹³ Fuentes credibly ruled out autistic-like behaviors as untenable.¹⁴ Fuentes reasoned that although Student was quite immature, he clearly

¹² On the Scales of Independent Behavior-Revised (SIB), a comprehensive measure of adaptive and problem behaviors designed to measure function independence and adaptive functioning in school, home, employment and community settings, motor-social Interaction and communication and community skills were all within age appropriate limits. Personal living skills were significantly below expectation because of delayed toileting and dressing skills, resulting in a borderline rating in personal self-care and a below average rating in domestic skills. The delays were due to social-emotional development and self-regulation, not neurodevelopment or medical deficiencies.

¹³ Russell Sprague, a clinical therapist with the Riverside County Department of Mental Health now treats Student in conjunction with a county psychiatrist under the dual diagnosis of ADHD and Disruptive Conduct Disorder.

¹⁴ Libert, the neuropsychologist that facilitates Student's outside social skills group disagreed with Fuentes's conclusion. Liebert believes that Student should have a dual diagnosis of ADHD and Pervasive Developmental Disorder not otherwise specified (PDD-NOS), and autistic-like behavior. Liebert sees Student as part of a privately funded social skills group for children on the autism spectrum. Although Liebert had seen Student for 30 hours in the social skills group setting, he had not observed Student function in a classroom and had not conducted any formal assessments of Student.

understood the pragmatics of communication, sought out social interactions, understood abstractions of language, and displayed an excellent, but immature sense of humor. According to Fuentes, these attributes were inconsistent with a diagnosis of autistic-like behaviors or Pervasive Developmental Disorder-Not otherwise specified (PDD-NOS).

18. Pursuant to a settlement agreement,¹⁵ Student was placed in the SDC for the Emotionally Disturbed SDC-ED at Vintage Hills Elementary School for a portion of the day during the last two months of the fifth grade 2005-2006 school year.

2006-2007 SCHOOL YEAR

19. In preparation for the 2006-2007 school year and transition to sixth grade middle school, an IEP meeting was held on June 15, 2006. According to the IEP notes, Dr. Fuentes discussed his IEE report at the meeting. Fuentes felt Student's behaviors emanated more from his ADHD than from his emotional problems. At that time, Fuentes felt that Student could function in a general education setting with appropriate supports including a one-to-one aide. The notes indicated that the SDC-ED teacher, Betty Boudreaux, did not believe that Student needed to be in her class. For the sixth grade, Student was placed in a general education classroom at Vail Ranch Middle School (VRMS), with 53 minute RSP sessions five times per week, small group social skills/pragmatic language group once a week for 53 minutes, and a one-to-one aide to support task initiation, task completion, behavioral intervention and social skills for six hours per day. The June 14, 2006 FAA which targeted impulsive behavior and lack of self-control was reviewed at the meeting. The FAA was prepared by Betty Boudreaux, the SDC-ED teacher at Vintage Hills elementary school.¹⁶

¹⁵ The settlement agreement related to a previous due process complaint.

¹⁶ According to the FAA, the behaviors occurred most often during unstructured

20. On July 10, 2006, an IEP meeting was held to review an OT assessment prepared by occupational therapist Diana Rash.¹⁷ Rash noted that Student had above average visual-motor abilities and legible accurate handwriting speed. She noted that Student displayed some sensory-based behaviors that impacted his educational performance and some body/space awareness issues related to the vestibular system.¹⁸

time or unstructured activities and the lunch line. The behaviors are impulsive and occur throughout the day, but are most noticeable in the general education class. Sometimes the behaviors occur in reaction to peers and tend to continue when he receives attention from others. The FAA called for teaching new behaviors, practicing new behaviors, environmental/ecological changes and managing agitated behaviors and documentation through weekly charts to monitor behaviors. A reward system, organizational assistance and breaks were among the strategies set forth in the FAA.

¹⁷ On June 21, 2006, a school based occupational therapy assessment was conducted by licensed Occupational Therapist Diane Rash. She utilized a records review, parent interview, the wide range assessment of visual-motor abilities (WRAVMA), Evaluation Tool of Children's handwriting-manuscript (ETCH-M), the Sensory Profile Adolescent/Adult Self Questionnaire, Clinical Observations based on sensory integration theory. Student was uncooperative and reluctant to participate in the assessment.

¹⁸ The vestibular system is located in the inner ear. It is responsive to motion or change of head position. It influences functions such as balance, muscle tone, posture, coordination of eye and hand movements, the ability to use both sides of the body together and arousal levels. Difficulties with the vestibular system would result in problems such as standing up when eating, fear of heights, jumping into things, and having difficulty sitting still for long periods of time.

She also noted auditory defensiveness, trouble with loud noises and distraction by noises and clutter. According to Rash, Student was not able to maintain certain postures, which may indicate some vestibular processing problems. Rash suggested the implementation of some strategies for use in the classroom.¹⁹ She also recommended institution of training and consultation services to implement a sensory diet. Student's mother did not consent to implementation of the services until December 8, 2006, although there is some confusion and ambiguity about the reason for the delay.

DISTRICT PLACEMENT OFFER FOR THE 2007-2008 SCHOOL YEAR

21. When a school district's program is designed to address a Student's unique educational needs, is reasonably calculated to provide some educational benefit, and comports with the IEP, a FAPE has been offered.

22. For the 2007-2008 school year, pursuant to the October 23, 2006 IEP as amended on March 22, 2007, the District's offer of FAPE was full-time placement in a SDC for the emotionally disturbed at VRMS. VRMS is Student's school of residence. Related and supplementary services provided were small group social skills once a week for 52

¹⁹ The following strategies were suggested by Rash: (1) take one minute rest breaks from writing assignments when hand fatigue is noticed; (2) alternately use squeeze or stress ball or hand exercises; (3) place aquarium tubing over pencils with one inch of tubing over erase end of pencil for chewing; (4) soft pencil grips or mechanical pencil with built in cushion grips; (4) allow movement breaks at appropriate times; (5) monitor noise level around workspace and give preferential seating away from louder students or noise sources; and (6) allow time for organization of class materials at his desk to avoid visual clutter. Rash opined that direct OT services were not needed, but that Student might benefit from some classroom strategies.

minutes, collaborative OT twice a year for 60 minutes, and once a year OT training for staff for 60 minutes. Riverside County Mental Health was to provide outpatient individual counseling once a week for 54 minutes per session, and medication monitoring for 30 minutes every two months. Student was also eligible for extended school year (ESY).

IDENTIFICATION OF UNIQUE NEEDS

23. Student was assessed by school psychologists Dorothy Diaz and Dr. David Helms, and an IEE was performed by Dr. Jose Fuentes. Dr. Jeffery Owen²⁰ conducted a records review and a one and one-half hour observation of Student during summer session at the Winston School. All assessments and observations indicated that Student had average to above average cognitive abilities.²¹

24. Student does not consistently complete class work or homework. When Student does complete his work, it is of "A" quality according to his teachers.

²⁰ Dr. Owen is a licensed clinical psychologist, holds a pupil personnel/school psychologist credential and is nationally certified as a school psychologist. He received a bachelor's degree from the University of California at Los Angeles in Psychology, a master's and doctorate degree in clinical psychology with a minor in educational psychology from the University of Southern California. Owen has worked as a special education consultant for many school districts over the last seventeen years and served as a school psychologist and coordinator of special education for the Del Mar Union School District for six years.

²¹ On October 3, 2005, Resource Specialist Georgia Wilson of Crowne Hill Elementary administered the WJ-III. Student's broad math scores were in the high average range, his written language score was in the superior range and his broad reading scores were in the high average range.

25. All experts and the parties agree that Student is socially immature and that his behaviors include growling, running, aggression, frustration and thumb sucking. Importantly, although the testifying psychologists did not agree on some things, they all agreed that Student needed a small structured environment with attention to his behavior and grade level or higher curriculum.

26. A review of Student's present levels of performance (PLOPS) as set forth in the October 23, 2006 IEP, and March 22, 2007 IEP, and available assessment data was conducted to determine his unique needs. It was noted in the PLOPS portion of the October 23, 2006 IEP that Student had been performing at grade level. The PLOPS from the October 23, 2006 IEP, noted that Student's communication skills were overall within normal limits, but at times, Student did shut down and become non-communicative. It was further noted that his behavior during class was affecting his classroom performance and distracting those around him. Student demonstrated behaviors that were not age appropriate such as thumb sucking, wiping nasal mucus on surfaces around him, and making noises. In the classroom, Student was easily distracted and unorganized. He often lied or left out information when asked to accept responsibility for his actions. Student was very immature and would pout or throw a tantrum if not given his way. Student was very impulsive and fidgety. He had difficulty with peer social interactions and seemed unaware of others' feelings and personal space. He had difficulty keeping his hands to himself. It was also noted that there were significant behavioral manifestations of ADHD, which impaired Student's ability to function successfully in mainstream classes without behavioral support. By the March 22, 2007 IEP, his grades had fallen dramatically and he was in danger of failing classes because of his failure to complete work. The District team members noted in the March 22, 2007 IEP that Student was successful in the curriculum when he chose to work. However, Student's behaviors had escalated since the October 23, 2006 IEP, and interrupted class instruction on a frequent basis.

27. Student received numerous disciplinary referrals throughout the 2006-2007 school year for defiant, aggressive and inappropriate behavior.²² Student's grades fell and

²² Student received the following disciplinary referrals:

September 8, 2006: refusal to follow instructions from an adult;

September 12, 2006: pushed another student to the ground;

September 15, 2006: pushed another student;

September 18, 2006: refused to follow adult request;

September 22, 2006: swung another student to the ground and used profanity;

October 2, 2006: refusal to follow adult directions;

October 10, 2006: bothering other students and refusing to stop;

October 27, 2006: spit in the face of another student;

January 17, 2007: refusal to follow adult directions and disrupted class;

January 24, 2007: took another student's pen;

February 5, 2007: refused to follow adult directions and disrupted class;

February 13, 2007: flicked pencil lead into the eye of another student;

March 6, 2007: pushed another student, kicked a trashcan and refused to follow adult directions;

March 12, 2007: repeatedly refused to follow adult directions and disrupted class

he became increasingly dysfunctional and isolated. On two occasions, the police were called about Student's behavior.²³

instruction;

April 19, 2007: kicked another student;

April 24, 2007: refusing to follow adult directions and kicked items;

May 1, 2007: damaged another student's backpack and spit on another student;

May 2, 2007: slapped a student, spit erasers at another student, and raised a chair above his head in defiance;

May 8, 2007: defiant in classroom;

May 15, 2007: chased students and punched a female student in the chest;

May 22, 2007: repeated defiance and disruption in the classroom;

May 23, 2007: struck aide in the head with a plastic yogurt lid resulting in medical treatment; and

May 25, 2007: hit another student in the back with a water bottle, grabbed aide's clothes, and spit on the aide's arm and face.

²³ On October 26, 2006, the Temecula Police school resource officer was called for an off campus incident wherein Student attempted to throw some other students' backpacks into bushes, hit a girl in the face with a tree branch, hit another in the nose with a plastic soda bottle and destroyed some snacks belonging to others. Student was scheduled to be in after school tutoring at the time. He was released to his mother and given diversion for the incident. The police were also called on May 23, 2007, when an aide

28. Kim Wall, an instructional aide, was assigned to Student for the 2006-2007 school year. Wall has an Associate of Arts degree and has received crisis communication and Applied Behavioral Analysis training from the District. Wall had experience serving as an aide for students on the autistic spectrum. Student was the first child diagnosed with ADHD that she had been assigned to work with one-on-one. Initially, she had some success with Student and was able to build some trust. The relationship deteriorated over time and Student's behaviors became more disruptive, difficult and defiant. Student's mother and Wall each asked that Wall be replaced, but District personnel refused the request.²⁴ Though very capable, Wall became afraid of Student. This was consistent with

was hit in the eye with a yogurt lid that was meant for the trash. Student had refused to stop throwing trash by passing students at a distant trash can when the incident occurred.

²⁴ Student's mother had no faith in Wall and made that clear to Student. Student, in turn, showed no respect to Wall or any of her instructions. The deterioration of communication between District and Student's mother took its toll on Student and his behaviors escalated. The struggle and conflict had an adverse affect on Student. In frustration, Student's mother removed him from School at the end of the school year. Dr. Liebert, a nueropsychologist that facilitated a private social skills group in which Student participated, noticed the deterioration in Student and wrote to the Director of Special Education about his concerns that there appeared to be a developing adversarial relationship between Student and the education staff with whom he interacts. The level of communication and cooperation between the school and the Student's family also suffered. Student's mother became distrustful of school personnel. Her distrust became so great that she refused to discuss any aspects of Student's behavior by telephone and insisted that all communication be made in writing or by email. On several occasions, she

Fuentes's observation that the longer someone worked with Student, the less effective the person became.

29. Wall was visibly agitated and shaken as she testified about her interactions with Student. By spring 2007, Wall had lost Student's trust and was no longer effective in managing his behaviors. Instead, her role shifted to documenting behaviors and disciplinary referrals.

GOALS

30. From the present levels of performance and assessment data, it was determined that Student had unique needs in the areas of behavior, communication, daily living/community participation, and social emotional development. Goals were written to address Student's unique needs. The appropriateness of the goals and services are not at issue.

31. The following goals were established:

- (1) When faced with a situation that he perceives as stressful, Student will be able to manage his frustration by choosing an appropriate response 70% of the time on three out of five days.
- (2) Student will have no reported incidents of inappropriate behaviors with other on three out of five days.
- (3) When disciplinary action is appropriate, Student will verbally state that he has done something wrong, 70% of the time in three out of five days.
- (4) Student will initiate and complete given class assignments with no more than two verbal prompts in four out of five days.
- (5) When Student realizes he is having difficulty on an assignment, Student will seek

terminated calls made by District personnel.

- help appropriately or ask for assistance on four out of five days.
- (6) When traveling or negotiating campus, Student will demonstrate appropriate movement-walking verses running-and will go from point A to point B with no more than one verbal reminder on four out of five school days.
 - (7) Student will demonstrate appropriate organizational skills to ensure that he has all required materials to successfully complete assignments and participate in class with 90% on four out of five days.
 - (8) Upon recognition of need for sensory input by an adult, assist in identifying his level of arousal and choose an activity from a choice of three activities with no more than two verbal prompts within two minutes on four out of five trials.

PLACEMENT AND SERVICES

32. In determining the adequacy of a special education placement, the focus is on the adequacy of the placement offered and not on the placement preferred by the parent. A placement that is designed to meet the unique needs of the student, provides some educational benefit, comports with the Student's IEP, and is provided in the least restrictive environment is adequate.

33. District's offer of FAPE for the 2007-2008 school year as set forth in the October 23, 2006 IEP, as amended by the March 22, 2007 IEP, was placement in a SDC for the emotionally disturbed at VRMS. VRMS is Student's school of residence. Related and supplementary services provided were small group social skills once a week for 52 minutes, collaborative OT twice a year for 60 minutes and once a year occupational therapy training for staff for 60 minutes. Riverside County Mental Health is to provide outpatient individual counseling once a week for 54 minutes per session and medication monitoring for 30 minutes every two months. Student is also eligible for ESY.

34. The SDC-ED class at VRMS is taught by Todd Barrowcliff with the assistance of two aides. VRMS is Student's home school. The class is a self-contained class of 8 to 12

students. Instruction is individualized. All students in the class are on IEPs with behavioral goals. The class is highly structured and focuses on behavior modification and eradication. Student schedules are taped to their desks. Aides and the teacher circulate throughout the class and remind students of the classroom rules while assisting with class work. Most students in the class have been working at grade level. Student would receive grade level curriculum in the classroom. The class could accommodate above grade level curriculum for Student, if needed. The class takes lunch between first and second periods when other Students are not at lunch, the restroom is in the classroom and, unless dictated by an IEP, there is no opportunity to mix with the general education population for children who spend their entire day in the SDC-ED except an occasional all school assembly. When appropriate, and pursuant to IEPs, students are given the opportunity to participate in the general education environment for portions of the day. Student's IEP provides for full-time placement in the SDC-ED at this time.

35. Some of the students are on juvenile probation and/or live in group homes. Some have ADHD or other disabilities. The physical classroom is comprised of two rooms. One room has the academic classroom and the other room has activities that Students can engage in for fun.

36. Barrowcliff has a master's degree in special education and a special education teaching credential. He has taught the SDC-ED class at VRMS for five years. For four years, the class was under the auspices of Riverside County. Beginning last school year, the class came under the umbrella of the Temecula Unified School District. Barrowcliff sees himself as a partner with parents and uses positive measures for behavioral modification. Barrowcliff reviewed the October 23, 2006 IEP, and the amendments contained in the March 22, 2007 IEP, and opined that the provisions could be fully implemented in his classroom. The SDC-ED placement as set forth in the October 23, 2006 IEP, as amended by the March 22, 2007 IEP, provides an educational benefit to Student.

37. At the time of the hearing, Student was in a summer school program at Winston School in Del Mar, California, a non-public school. Student prefers a placement at the Winston school to a placement at VRMS. Student contends that the District's placement is not a FAPE and that Student requires the Winston School, a specialized school, due to his ADHD. The Winston school educates students with learning disabilities and ADD/ADHD with average to superior cognitive ability in a small structured environment. It offers OT and counseling to students, if needed. Seventh grade students utilize grade level curriculum. Advanced curriculum is available in some subject areas for eighth grade and older students, but not for seventh graders such as Student. Student's IEP consists primarily of social emotional and behavioral goals. The Winston School is not set up for the types of behaviors displayed by Student and does not have the capabilities to address the goals of Student's IEP. The school is not set up to accommodate serious behavioral problems or dangerous behavior. Mary Sterling, the School Director, acknowledged that some of the behaviors in which Student engaged at the public school would have resulted in suspension and possible expulsion from the Winston School.

LEAST RESTRICTIVE ENVIRONMENT

38. School districts must provide special education students with a FAPE in the least restrictive environment (LRE). The least restrictive environment for a particular child involves the analysis of the educational benefits of placement full time in a regular education classroom, the non-academic benefits, the effect the disabled child will have on the teachers and children in the class and the costs associated with the placement.

EDUCATIONAL AND NON ACADEMIC BENEFITS OF PLACEMENT

39. Student is not obtaining educational benefit from his current placement in a general education class with a one-to-one aide. Despite better performance early in the 2006-2007 year, his academic performance has consistently fallen. Student was required to

attend summer school during the summer of 2007. Student has not completed his homework or class work on a consistent basis and misses much of class because of suspensions, shutting down, disorganization, behavioral problems and inability to participate in the class. Although Student has average to superior cognitive abilities, he has been unable to complete his grade level curriculum in his current setting.

40. According to his teachers Mindy Martin, and Susan Petch, and Kim Wall, his aide, Student has become socially isolated as a result of his aggressive and bizarre behavior. He does not have any friends or social interaction with other students in the classroom or during unstructured time. Student has been disciplined for various offenses in passing periods, recess, lunch time and after school. At this time, he is not obtaining measurable social or academic benefit from being in a general education classroom.

AFFECT ON TEACHERS AND OTHER STUDENTS

41. Student's behavior is regularly disruptive. Classes have been halted repeatedly on a daily basis to deal with his behavior. The presence of a one-to-one aide has assisted in controlling some, but not all behaviors. Student has received numerous behavioral referrals and has received suspensions. Cumulatively, Student received nine days of suspension. Manifest determination meetings were held on May 11, 2007, May 30, 2007 and June 4, 2007. At each, it was determined that Student's behaviors were the direct result of his disabilities and traditional discipline was not imposed. District has utilized all available resources including a one-to-one aide, relief aides, sensory breaks, an FAA and BSP to assist Student in the general education classroom. While Student is able to articulate appropriate social skills and behaviors in the social skills group conducted by Michelle Cooper, he is unable to effectuate those skills when faced with a situation requiring the implementation of the skills. Student's aide and teachers indicated that his behaviors escalated as the academic year continued. At the beginning of the year, sensory breaks as designed by his OT therapist Diana Rash, were useful to Student as was the

reward system of his BSP and FAA. As time went on the rewards system was ineffective and Student's behaviors escalated after receiving rewards. One teacher took a stress leave as a result of dealing with Student's behaviors. Some other students have suffered injuries as a result of his actions and most other students attempt to avoid him.

42. Student's behavior at the Winston School has been similar to that demonstrated at VRMS. Student had altercations with two classmates during the first two weeks of summer school at the Winston School and engaged in inappropriate classroom behavior. When Dr. Owen observed Student in the computer classroom at the Winston School, Student had been isolated for disturbing other students. Owen observed Student attempt to trip several students during the one and one-half hours he was on campus observing Student at the school. He was placed on a behavioral contract the second week of the program. According to the contract, Student receives tokens for good behavior and may exchange them for rewards

43. The VRMS SDC-ED class offers student a FAPE in the least restrictive environment.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. District has the burden of persuasion that its offer of placement is appropriate and in the least restrictive environment. Student has the burden of persuasion that his preferred placement is necessary to receive a free appropriate education in the least restrictive environment. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al, Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed.2d 387].)

2. Under the federal Individuals with Disabilities Act (IDEA) and companion state law, students with disabilities have the right to a free and appropriate public education (FAPE). (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special

education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's individualized education plan (IEP). (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

3. IDEA and state law require that, in order to provide FAPE, a school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 203 [102 S.Ct. 3034, 3049].) The IEP must contain specified information including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals. (20 U.S.C. § 1414((d)(1)(A)(i)(I), (II); Ed. Code, § 56345, subds. (a)(1) & (2).) The district must review the child's IEP at least once a year in order to determine whether or not the annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4)(B)(i); Ed. Code, § 56341.1, subd. (d).)

4. A disabled child's IEP must be tailored to the unique education needs of that particular child who, by reason of disability, needs special education and related services. (*Heather v. State of Wisconsin* (1997) 125 F.3d 1045.) The term "unique educational needs" is to be broadly construed to include 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.)

5. The Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the IDEA's requirements. The Court determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley v.*

Board of Hendrick Hudson (1982), 458 U.S. 176, 198 [102 S.Ct. 3034, 73 L.Ed.2d 690].) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.)

6. Under *Rowley, supra* at 179, a challenge to an IEP requires resolution of two issues: (1) whether the school district complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was reasonably calculated to enable the child to receive educational benefits. If the school district’s program was designed to address student’s unique educational needs, was reasonably calculated to provide some educational benefit, and comported with the IEP, then the district provided a FAPE, even if student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit.

7. To determine whether a District offered a student a FAPE, the focus is on the adequacy of the placement the District actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) In addition, federal and state law requires school districts to provide a program in the least restrictive environment (LRE) to each special education student. (See 34 C.F.R. § 300.114, et. seq. (2006).) A special education student must be educated with non-disabled peers “to the maximum extent appropriate,” and may be removed from the regular education environment only when the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)(ii).) 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.)

8. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F. 3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular

placement is the "least restrictive environment" for a particular child involves an analysis of four factors, including (1) the education benefits to the child of placement in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting. (34 C.F.R. §§ 300.114, 300.115, 300.116.) However, the Supreme Court has noted 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 p. 197.)

DETERMINATION OF ISSUES

1. THE EDUCATIONAL PROGRAM OFFERED IN STUDENT'S IEP DATED OCTOBER 23, 2006, AS AMENDED MARCH 22, 2007, OFFERED A FAPE TO STUDENT FOR THE 2007-2008 SCHOOL YEAR.

Based upon Factual Findings 1 through 43 and Legal Conclusions 1 through 8, District did offer Student a FAPE for the 2007-2008 school year in the IEP dated October 23, 2006, as amended March 22, 2007.

District's IEP dated October 23, 2006, as amended on March 22, 2007, offers Student a FAPE. Student is of high average to above average cognitive ability, but is having difficulty completing his class work and homework and functioning in a general education classroom due to his aggressive, disruptive and inappropriate behavior. Student's behavior has been an obstacle to academic achievement. When Student does complete work it is of high quality. Student's IEP goals are tailored to his unique needs and focus on his social/emotional, behavioral and adaptive behavioral issues. The goals and objectives of Student's IEP can be implemented in the SDC-ED class at Vail Ranch Middle School. The classroom is small and structured with individualized instruction which can be tailored to

provide Student with above grade level curriculum, if appropriate. The prime focus of the class is to rehabilitate behavioral problems. When appropriate, students are mainstreamed in to a general education classroom for varying portions of the day. District has exhausted all resources and supports including a one to one aide, BSP and FAA to attempt education of Student in a general education classroom and homework modifications without success.

2. STUDENT DOES NOT REQUIRE A PLACEMENT AT A NON-PUBLIC SCHOOL LIKE THE WINSTON SCHOOL OR TRANSPORTATION TO RECEIVE A FAPE, AS CONTENDED BY STUDENT.

Based upon Factual Findings 1 through 43 and Legal Conclusions 1 through 8, District is not required to place Student at the Winston school or a similar non-public school.

The District has offered Student a FAPE in the least restrictive environment pursuant to the October 23, 2006 IEP as amended March 22, 2007. Placement at the Winston School or a similar school, though preferred by Student, is not required for Student to receive a FAPE. Additionally, the Winston School cannot provide Student with a FAPE. The Winston School is not equipped to deal with the level of behavioral problems evidenced by Student. The school consists entirely of disabled students with no potential for mainstreaming on a general education campus and is not the least restrictive environment for Student.

Transportation is not required because the District's placement constitutes a FAPE and is located at student's neighborhood school.

ORDER

1. District's IEP of October 23, 2006, as amended March 22, 2007, offered Student a FAPE for the 2007-2008 school year.
2. Student is not entitled to placement at a Non-Public school at public

expense.

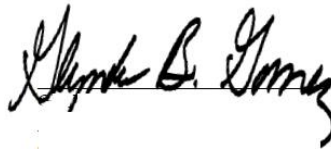
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District has 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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: August 23, 2007

A handwritten signature in black ink that reads "Glynda B. Gomez". The signature is written in a cursive style with a horizontal line through the middle of the letters.

GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings
Special Education Division