

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FATHER on behalf of STUDENT ,

v.

ORANGE COUNTY HEALTH CARE
AGENCY.

OAH CASE NO. 2008080612

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 14 and 24, 2008, and December 1 through 4, 2008.

Attorney Tania L. Whiteleather, represented Student and her Father. Father attended the hearing every day. On the first day of the hearing, Ms. Whiteleather was accompanied by advocate Vikki Rice and paralegal Courtney Ford. Ms. Rice was also present for part of the second day of hearing. Student, who is currently living and receiving educational and mental health services at a residential treatment center in the state of Utah, did not attend the hearing.

Michelle L. Palmer, Senior Deputy County Counsel, represented the Orange County Health Care Agency (hereafter HCA or Agency). She was accompanied each day of the

hearing by Manuel Robles, the AB 3632 coordinator for the HCA.¹

At hearing, the parties were granted permission to file consecutive written closing arguments. Student timely filed her closing argument on December 15, 2008. The HCA timely filed its closing argument on December 18, 2008. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

PROCEDURAL HISTORY

Student filed her Request for Due Process Hearing (complaint) on August 19, 2008. On October 2, 2008, OAH granted a joint request for continuance. On November 4, 2008, OAH issued an Order Following Pre-hearing Conference which identified the sole issue for hearing as "Did the Agency deny Student a FAPE by failing to offer a placement to Student that met her unique educational needs?" On November 5, 2008, Student filed a Notice of Error in which she asserted that the issue identified in the November 4, 2008 Order Following Pre-hearing Conference failed to identify all issues she raised in her complaint and in her Pre-hearing Conference Statement. At a telephonic status conference held before the undersigned ALJ on November 13, 2008, and again on the first day of hearing on November 14, 2008, Student asserted that her complaint raised three issues, to wit:

1. Beginning July 22, 2008, and continuing to the present, did the HCA fail to offer Student a residential placement that would meet her unique needs?
2. Did the HCA predetermine Student's residential placement when it refused

¹ Assembly Bill No. 3632 (hereafter AB 3632) enacted by Chapter 1747 of the Statutes of 1984, operative July 1, 1986, established interagency responsibilities for providing and funding mental health services to students with disabilities. This enactment is codified as Chapter 26.5 of Division 7 of title 1 of the Government Code.

to consider placing her at the Provo Canyon School in Orem, Utah (hereafter Provo)?

3. Did the HCA fail to make a specific offer of placement to Student at the individual educational program (IEP) meetings held July 22, 2008, and August 20, 2008, in violation of state and federal statutes, and in violation of the required criteria for specificity of an offer of placement as determined by the Ninth Circuit Court of Appeals in the case of *Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519 (hereafter *Union*)?

After carefully reviewing Student's complaint, the ALJ agreed that Student's complaint, in both its narrative section and in the section identified under Issue 1, raised as issues whether the HCA's offer of placement met Student's unique needs and whether the HCA predetermined Student's placement by refusing to consider Provo Canyon as a possible placement for her. The ALJ therefore orally amended the issues for hearing to include the predetermination issue. However, the ALJ found that Student did not raise the issue of whether the HCA's offer of placement met the standards of the *Union* case, either in the narrative portion of the complaint or in the specific delineations of issues. The ALJ found that the specificity issue was not subsumed in the issue of whether the HCA's offer met Student's unique needs, and that the HCA was therefore not on notice that Student intended to raise the issue. Since HCA did not agree to include the specificity issue as an issue to be heard by the ALJ in the instant proceedings, the ALJ denied Student's motion to expand the issues for hearing to include that issue.

Thereafter, Student filed another complaint (Second Complaint) with OAH on November 24, 2008, which OAH designated as case number 2008120018. Therein, Student, *inter alia*, raised two new issues. First, Student alleged that the HCA failed to make an offer of residential placement that identified the special education and related services to be provided to Student by that placement. Additionally, Student alleged that the HCA had predetermined its offer of placement at Cathedral Home, a residential treatment center (RTC) that it offered to Student by letter to Father dated August 5, 2008.

Initially, the HCA opposed consolidation of the new issues raised by Student with the instant proceedings. However, at the conclusion of testimony on December 4, 2008, the HCA noted that testimony at hearing had encompassed the new issues raised in Student's Second Complaint. After the parties and the ALJ had an opportunity to review the issues in both Complaints, and after discussion with the parties, the HCA stipulated to including the newly-raised issues of Student's Second Complaint in the instant proceedings. Student thereupon agreed to withdraw her Second Complaint. The issues which the ALJ shall therefore address in this Decision encompass the issues of both of Student's Complaints, as delineated below. Student subsequently filed a notice of withdrawal as to her Complaint in case number 2008120018.

ISSUES²

1. Did the HCA predetermine Student's residential placement, and thereby deny Student's Father meaningful participation in the IEP process, by:
 - a) Refusing to consider placing Student at Provo Canyon?
 - b) Predetermining that Cathedral Home was the only appropriate placement for Student?
2. Did the HCA fail to make a specific offer of placement to Student at the

² Student's Complaints in case number 2008080612 and 2008120018 raise the issue of whether the HCA's alleged violations of Student's rights under the Individuals with Disabilities Education Act and state law also violated her rights under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. Since OAH does not have jurisdiction to hear matters concerning the ADA or the Rehabilitation Act, the ALJ dismissed those issues and will not address them in this Decision.

individual educational program (IEP) meetings held July 22, 2008, and August 20, 2008, in violation of state and federal statutes, and in violation of the required criteria for specificity of an offer of placement as determined by the Ninth Circuit Court of Appeals in Union?

3. Beginning July 22, 2008, and continuing to the present, did the HCA fail to offer Student a residential placement that would meet her unique needs?

WITNESSES

Both parties jointly called the following witnesses: Dr. Phyllis Crane, Jim Hemsley, Penelope Bergeron, Father, and Manuel Robles. Student also called Vikki Rice, Debbie Curtis, and Gerald Elmore on her behalf. The HCA additionally called Dr. Huma Athar and Teri Williams as witnesses.

CONTENTIONS

Student contends that the HCA committed both procedural and substantive violations of her rights during the IEP process which led to an offer of placement for Student at a residential treatment center (RTC) located out of the state of California. Student contends that the HCA predetermined its offer of placement, thereby denying Father an opportunity for meaningful participation in the IEP process, when it refused to consider and/or discuss placing Student at Provo Canyon, where Father had initially privately placed her. Student further contends that the HCA predetermined its offer of placement for Student at Cathedral Home, another RTC, which also denied Father his right to meaningful participation in the IEP process. Student also contends that the HCA failed to make a specific offer of one placement for her at the IEP meetings held July 22, 2008, and August 20, 2008, which included the specific types of special education and related services it had determined Student required, and that it was therefore offering to her at the RTC. Student alleges that this failure to make a specific offer of placement also deprived Father of his ability to meaningfully participate in the IEP process. Finally, Student

contends that her mental health needs could not be met by the HCA's offer of placement at Cathedral Home because that would result in her removal from her program at Provo Canyon, where she was making good progress, and against the recommendations of her therapist there. Student contends that her Father is entitled to reimbursement for expenses he has incurred placing Student at Provo, to the extent not otherwise covered, and that Student is entitled to prospective placement at Provo, as a result of HCA's alleged violations of Student's and Father's rights.

The HCA responds that it did not predetermine its offer of placement to Student. First, the HCA asserts that Provo Canyon is a for-profit institution and that the HCA is prohibited by state statute from placing students at for-profit institutions. Additionally, the HCA contends that it did not predetermine its offer of placement at Cathedral Home, and that it considered other RTCS and was open to discussion about other placements with Student's Father. The HCA further contends that it did make a specific offer of placement that met Union standards, to the extent that it was able to do so, and that more specific designations of related mental health services for Student would have been made in conjunction with the staff at Cathedral Home at an IEP meeting held within 30 days after Student's placement at Cathedral Home, had she accepted the placement. In addition, the HCA responds that its placement offer to Student at Cathedral Home met all her unique needs and that, specifically, there was no reason that Student could not have successfully transferred from Provo Canyon to Cathedral Home at the time of the offer. Finally, the HCA contends that even if the ALJ finds that Student's Father should be reimbursed for expenses at Provo, that order should not include reimbursement for anything other than the costs directly associated with the provision to Student of mental health services by Provo Canyon, exclusive of room and board costs or costs associated with parent visits to Student.

FACTUAL FINDINGS

1. Student is currently 17 years old, and is eligible for special education and related services under the classification of emotional disturbance (ED). She was first found eligible in May 2008. Student is presently residing at Provo, a residential treatment center located in Orem, Utah, where Father privately placed Student. Student's permanent address is in Orange County, California, the county for which the HCA provides various mental health services to residents of the county.³ The parties do not dispute that Student presently requires a residential placement to benefit from her educational program.

2. Student's parents divorced when she was two years old. Due to her mother's substance abuse, Father eventually obtained sole custody of Student although she continued to have visitations with her mother. In approximately November 2006, Student informed either her aunt and/or a friend that her mother's boyfriends and husbands had sexually abused Student from the time she was four until she was 15 years old. The sexual

³ An issue arose at hearing concerning Father's residency and, by implication, Student's residency. The evidence indicated that Father was in the process of obtaining a divorce from his wife, Student's stepmother, and had moved out of his wife's home in Huntington Beach, which is in Orange County, California. However, the evidence also indicated that Father continued to maintain his mailing address at that home and was staying temporarily at times with friends in another city in Orange County. There was no concrete evidence that Father had moved out of Orange County. Since the HCA is responsible for the provision of mental health services to residents of the entire county, irrespective of the city in which they live, as long as the city is within Orange County, the fact that Father may no longer be a legal resident of the city of Huntington Beach is not relevant to the HCA's obligations to provide Student with mental health services in this case.

abuse and family conflicts are the core issues affecting Student's mental health.

3. Student also suffers from grand mal seizures. Her first seizure occurred in November 2006, a few weeks before Student reported the sexual abuse. Student has had a few more seizures since that time although they do not occur on a regular basis. Medical tests conducted on Student have failed to determine the cause of the seizures.

4. Although Student did well academically during elementary school, she began to struggle academically in middle school and began having difficulties with social interactions. Student began private individual therapy sessions in 2003 to address her behavioral problems, social withdrawal, and depressed mood. Student began participating in family therapy beginning in 2005. She was eventually diagnosed with recurrent major depression and oppositional defiant disorder.

5. Student's difficulties continued in high school. Although she was enrolled in a specialized college preparatory program and passed the California High School Exit Exam, Student's grades dropped significantly in spring 2007, when Student was in her second half of 10th grade. Student began fabricating stories about a non-existent boyfriend. Finally, in March 2007, Student had a fight with her stepmother while Father was out of town. Student ran away to a friend's home and called her biological mother to pick her up. The following day, Student's mother took her to Children and Family Services. The therapist there informed Student that she would have to return to live with her Father. Student then made threats to commit suicide. She also indicated to the therapist that cuts on her arm were the result of self-injury.

6. In early March 2007, Student was then admitted to College Hospital in Costa Mesa, California where she spent almost a month. Student's treating physician recommended that Student be placed in a RTC to address her mood fluctuations and conflicts in her family relationships.

7. Father attempted to obtain information regarding RTC placements out of

the state of California from Student's school district and from the HCA, but both declined to give specific recommendations. Father was eventually directed by non-governmental sources to the Logan River Academy (Logan River) in Logan, Utah, where he placed Student beginning in spring 2007. Father privately funded the placement.

8. Although Student initially made progress at Logan River for the first year or so she was there, she began to have serious problems in approximately March 2008. Student's moods became more volatile, and she began expressing a desire to hurt herself which ultimately manifested itself in self-cutting. Her moods worsened when she acted out. At the end of March 2008, Student swallowed four AAA batteries. About a month later, Student swallowed body wash and shampoo. She thereafter physically assaulted a staff member at Logan River. Due to her verbal hostility, self-injurious behaviors, and the assault on staff, Logan River determined that it could no longer serve Student and advised Father that he would have to find another placement for her.

9. On May 13, 2008, counsel for Student telephonically contacted the HCA to obtain information regarding RTC facilities which were being utilized as placements for students from Orange County. In response to counsel's oral request, which she followed the next day by a written request, the HCA, through AB 3632 Coordinator Manuel Robles, declined to provide the list. Robles stated that it would be inappropriate for HCA to provide the list because Student had not yet been found eligible for special education and related services under the designation of ED, had not been referred to the HCA by her school district for an AB 3632 assessment, had never been assessed by the HCA, and had never been determined to need an RTC placement.

10. However, by the time that Student's attorney wrote to the HCA on May 14, 2008, for a list of RTC placements, Father had already made other inquiries as to what RTC placements were available and willing to accept Student and had already determined that he would transfer Student to Provo, which had agreed to accept Student into its program.

The day after the Student's attorney made her telephonic request to the HCA for a list of RTC placements, and the day her attorney made a written request for the list, Student was transferred to Provo. Father did not visit Provo before placing Student there. Rather, he made his decision for placement based upon the recommendations he received regarding the facility.

11. Meanwhile, Father had contacted the Huntington Beach Union High School District (Huntington Beach), Student's school district, with regard to finding Student eligible for special education and related services. Huntington Beach and the West Orange County Special Education Local Plan Area (SELPA) administered assessments to Student in February and May, 2008. They thereafter held an IEP meeting for Student on May 21, 2008. The HCA did not attend since Student had not yet been referred for assessment by it.

12. At the May 21, 2008 IEP meeting, Huntington Beach and the SELPA found Student eligible for special education and related services under the category of ED, based upon her general mood of unhappiness or depression and her self-harming behaviors, which impacted her interpersonal relationships and her ability to complete academic tasks. Based upon Student's mental health needs, the IEP team determined that it would be appropriate to refer Student to the HCA for an AB 3632 assessment to determine whether Student required mental health services to benefit from her educational placement and services and, if so, to what extent Student required those services. Additionally, one or more members of the IEP team also believed that Student required an RTC placement. In accord with the applicable California regulations, the IEP meeting was adjourned pending a reconvened meeting with an expanded IEP team to include the HCA. Pending the referral to the HCA and the results of any assessments it conducted, Huntington Beach offered a day program to Student called Pathways. Father declined the placement. The Pathways placement offer is not at issue in the instant case. As will be discussed below, Huntington

Beach and Student ultimately entered into a settlement agreement regarding Student's placement, which included reimbursement of expenses to Father as well as prospective payment of the educational costs of a residential placement for Student.

13. The school psychologist from Student's school of residence sent a referral to Dr. Phyllis Crane, a service chief with the HCA, the same day the IEP meeting took place. The SELPA sent the HCA a corresponding packet of information regarding Student in support of the referral on May 23, 2008, indicating as well that HCA would be invited to the expanded IEP meeting which would be held within 15 days of May 21, 2008, the date of the initial IEP meeting. Dr. Crane received the referral and supporting packet of information, which included the assessments already administered to Student, on May 27, 2008.

14. An expanded IEP team meeting took place on June 3, 2008. The meeting was a continuation of the IEP meeting which began on May 21, 2008, and was for the purpose of presenting Father with an assessment plan. The expanded team included Manuel Robles, who appeared as the representative for the HCA. The team reviewed the continuum of services provided by the HCA. The team also presented an assessment plan to Father so that the HCA could begin its assessment. Father consented to the plan at this meeting. Father also provided releases so that the HCA assessment team could exchange information with Provo. The IEP team made plans to reconvene within 50 days to continue the IEP meeting once the HCA concluded its assessment of Student.

15. The HCA, through Dr. Crane, accepted the referral on June 12, 2008, and informed the SELPA in writing that it would begin its assessment of Student. Dr. Crane delegated responsibility for completing the AB 3632 assessment to Dr. Huma Athar, who

was designated the case manager for Student's referral.⁴

16. Generally, in conducting an AB 3632 assessment, Dr. Athar would interview the child's parents and gather information through the interviews and by reviewing the child's records. Dr. Athar would also conduct a psychological assessment of the child. In the instant case, Dr. Athar began the assessment process by meeting with Father and interviewing him, reviewing Student's educational records and previous assessments, and speaking with Student's former therapist at Logan River and present therapist at Provo. Normally, HCA would conduct its own psychological testing of Student in Orange County. However, on June 6, 2008, Student's present therapist, social worker Penelope Bergeron,⁵ wrote to Dr. Athar and recommended that Student not travel from Utah to California due to her volatile emotional state. Therefore, the HCA relied upon prior psychological testing of Student, review of her records, and a clinical summary completed by HCA social worker Teri Williams,⁶ who had a face-to-face interview with Student at Provo in June 2008.

17. Williams found that Student presented continuing problems with depression, withdrawal, verbal aggression, defiance, mood swings, oppositional behaviors, a history of physical and sexual abuse, suicidal ideation, self-injurious behaviors, family conflicts, and a decline in grades. Williams noted that Student's placement at Provo, which provided a safe and structured environment for her, had permitted Student to address her mental health and family needs and concerns as well as her academic concerns. Williams noted

⁴ Dr. Athar is a licensed clinical psychologist who received her doctorate in 1998. She has worked with the HCA since 2002. Her work experience includes extensive involvement with victims of domestic violence as well as with the families of the victims, and with youth and family counseling. She has held her current position with the HCA for five years and has regularly dealt with placing children in RTCS.

that Student was slowly gaining insight to her problems and was learning coping strategies, but that Student was still struggling with her issues. Based on her observations and interview with Student, Williams found that Student qualified for AB 3632 services. She further recommended that Student be placed in a RTC as the most appropriate placement for her at the time. Based upon Williams's recommendation and her review of

⁵ Bergeron is a certified social worker who has worked at Provo since April 2008. She received her master's degree in social work in April 2008, just prior to beginning work at Provo. Her work experience at Provo, as well as her internship while working on her master's degree, focuses on individual and family therapy with teenagers who have been sexually abused, have had problems with drugs and alcohol, are depressed, and exhibit oppositional defiant behavior.

⁶ Williams has been a clinical social worker II for the HCA for 21 years. Prior to beginning work with the HCA, Williams worked in San Diego and Orange Counties at residential treatment centers, and with various police departments as a diversion counselor. She has a master's degree in social work, and has been a licensed social worker since 1980. Williams also has a teaching credential. Her duties include conducting assessments, crisis evaluations, providing psychotherapy and collateral therapy to HCA patients, and case management. More recently, she has specialized in RTC placements, which includes conducting quarterly case management reviews and paperwork for the RTCS, as well as traveling once or twice a month to personally visit RTCS at which the HCA has placed patients. Williams also does occasional AB 3632 assessments.

Student's records and assessments, Dr. Athar concurred with the recommendations Williams made that Student should be placed at an RTC.

18. Williams has had experience placing Students at RTCS since the early 1990s. After completing her assessment, Williams began considering what RTCS she felt might be appropriate placements for Student. She discussed possible placements with Robles and Dr. Athar. Although Student had made some progress at Provo, Robles, Williams and Dr. Athar did not consider it as a possible placement for Student for a variety of reasons. First, Provo is located in Utah. Under Utah law, students must leave RTCS when they turn 18 years old. Since Student was approaching her 17th birthday and the HCA did not know how long she might continue to require an RTC placement, none of the HCA staff suggested any RTC in Utah. Their valid concern was that they would have to transfer Student to yet another RTC if she was placed anywhere in Utah and still qualified for services after she turned 18.

19. Williams, Robles and Dr. Athar also believed that Provo was not one of the optimum choices for Student because it was an older institution that housed its students in dorm-like rooms and was much more secured than other possible RTCS because it was a locked facility. The HCA staff believed that Student, whose only history of running away had been the one incident in March 2007 (see paragraph 5 above), did not pose a significant risk of flight. They believed that a lockdown facility was not the least restrictive environment for Student.

20. HCA staff additionally believed that Student required a more nurturing environment than the one provided at Provo. They wanted to present for consideration by Student's IEP team facilities that provided a more home-like environment that might assist Student in developing stronger ties with her own family and in helping her develop better interpersonal relationships.

21. Another factor that the HCA staff considered in determining which RTCS it

was going to suggest as potential placements was the availability of transition services to Student. Since she would soon be 18, Student was going to need assistance in transitioning not only from high school to post-graduate education or vocational programs, but also would need assistance in transitioning from the RTC back to the community.

22. Finally, and very significantly, the HCA staff did not consider and could not consider Provo as a possible recommendation for Student's placement because it operated on a for-profit basis. Under California statute,⁷ the HCA and other county mental health agencies are prohibited from placing students at facilities that operate for-profit. The HCA had previously placed students at Provo, as well as at other for-profit facilities, in situations where the facility had a non-profit subsidiary which it had created for purposes of billing for services provided at the for-profit institution. However, in approximately May 2007, a state auditor from the California controller's office conducted an audit of out-of-state claims which the HCA had submitted to the state of California for reimbursement. The auditor demanded proof that the United States Internal Revenue Service had certified Provo and other institutions in question as non-profit. Since Provo was not, in fact, operating as a non-profit facility, the HCA was not able to produce proof of its non-profit status. The auditor informed the HCA that California was disallowing the claims for reimbursement from Provo as well as from some six other institutions which were operating on a for-profit basis. The HCA therefore had to absorb millions of dollars in costs for which the state refused reimbursement, including the placements at Provo. The HCA thereafter determined that although it would continue to absorb the costs for students presently placed at Provo and the other for-profit institutions at issue in the audit because it was better for the students to remain at the placement, it would not be able to

⁷ See paragraph 9 of the Legal Conclusions below.

place students at Provo or any other for-profit institution in the future. The HCA therefore was unable to legally offer Student placement at Provo.

23. After consideration of all the above factors, Williams, in conjunction with Robles and Dr. Athar, decided that the HCA would offer four possible placements to Student's IEP team which the HCA felt could meet Student's needs: Cathedral Home in Wyoming, Devereaux-Cleo Wallace in Colorado, Daystar Residential in Texas, and Yellowstone Boys and Girls Ranch in Montana.

24. Student's expanded IEP team reconvened on July 22, 2008, as a continuation of the May 21, 2008 IEP meeting, to discuss the HCA's assessment of Student. Dr. Athar presented the HCA's assessment of Student to the team, along with the HCA's conclusion that Student required an RTC placement. She also presented the HCA's proposed client service plan (CSP) for Student. The plan noted Student's symptoms and behaviors and the resulting impairment to her academic, emotional and family functioning. It included a treatment goal and short-term objectives. With regard to the type, frequency, and amount of services, the only indicated were that of case management services. The CSP did not contain any recommendation for any specific mental health services that the HCA felt were necessary for Student, and therefore did not indicate the amount, frequency, or duration of any such services. Father was present at this meeting but did not request any specific information regarding related mental health services for Student. He did not ask what the HCA was recommending or whether the RTCS which the HCA proposed could provide the same services Student was receiving at Provo. He did not ask Dr. Athar, who presented the four proposed placements, any questions about them.

25. Although staff from Provo, including Bergeron, Student's treating therapist, was present by telephone at this IEP meeting, the team members did not discuss the specific services Student was receiving at Provo or what her specific needs were. Dr. Athar did give a general description of Student's mental health needs and a general description

of the services that each of the four proposed RTC facilities could offer to Student. Dr. Athar indicated that all four offered individual, family, and group therapy; that they accepted Students past age 18; that they all offered the more personal, home-like environment which the HCA believed that Student required to thrive; and that they all would meet Student's physical, emotional, behavioral, and educational needs. Since this was the first IEP meeting at which the HCA was recommending an RTC placement for Student, and since they did not have permission to discuss Student's private health history or even identify her to any of the proposed RTC facilities, no one from any of the facilities was present or could have been invited to be present at this IEP meeting.

26. Dr. Athar did not have more specific information about the RTCS proposed by the HCA, and she was not personally familiar with them. Williams, who did have personal knowledge of the RTCS, was not present at the IEP meeting. Therefore, Dr. Athar provided Father with the name of each proposed institution and a contact phone number for each. She suggested to Father that he contact each proposed facility so that they could answer whatever specific questions or concerns he might have. Father attempted to contact each facility once.

27. The HCA could not ensure that Student, or any other child, would be accepted for admission to any proposed RTC since each facility is privately run and is not affiliated with the HCA or the state of California. For that reason, the initial IEP meeting at which the HCA recommends an RTC is, and must be, part of a continuing process to find an appropriate placement for any student who requires an RTC placement. Once a mental health agency has determined that a student requires an RTC placement, the case manager assigned to the student's case is responsible for coordinating the RTC placement as soon as possible. This requires a determination not only of what facilities might be appropriate placements for the student, but also a determination of whether a facility has room to accommodate the student and believes that it can provide the specific services

the student requires. The normal procedure that the HCA follows in these circumstances is to obtain the consent of a student's parents to compile and distribute to each proposed placement a packet of the student's information along with request that each facility respectively indicate whether it can provide the services the student needs and if it has a bed available. The HCA generally takes 10 to 14 days to forward the information to the facilities and to receive their responses. The HCA then schedules another IEP team meeting for approximately 14 days after the meeting at which it initially recommended the RTC placement. During the interim, it reviews the responses from the facilities and discusses each with the student's parents. At the reconvened IEP team meeting, after consultation with the child's parents, the HCA would then make an offer of placement at one specific RTC facility.

28. Bergeron, who was present by telephone at this IEP meeting, informed the IEP team that she did not believe it was in Student's best interests to be moved to another facility. However, the HCA could not legally consider Provo and informed Student's Father and representatives that it could not. The HCA, however, was open to considering any other appropriate RTC placements for Student. It suggested four possible placements based on the knowledge it had of Student's needs and the knowledge Williams had of the many possible out-of-state RTC placements that were non-profit and therefore available as potential placements. Neither the HCA nor Father disputed that Student required an RTC placement. Nevertheless, other than insisting on maintaining Student at Provo, Father was not open to discussing other possible placements and did not offer any suggestions of his own for alternative placements for consideration by HCA and the other members of the IEP team.

29. At this IEP meeting, Student's Father refused to sign any consent forms for Student's health history and assessments to be sent to the proposed RTCS. He requested an opportunity to visit the proposed placements before consenting to releasing Student's

information to them, and asked either the HCA or Huntington Beach to pay for his trips to each state to visit each facility. Neither the school district nor the HCA agreed to fund Father's trips at the time of the July 22, 2008 IEP meeting.

30. Although Father refused to sign the consent forms to release Student's information to the proposed RTCS, the HCA still had an ongoing legal obligation to determine an offer of a specific placement for Student. Dr. Athar therefore contacted each of the four facilities the HCA had recommended, giving each a general description of Student's issues without identifying her by name or specific circumstances. Three of the four facilities responded to Dr. Athar's inquiries that they would have room for Student, pending more information regarding her specific unique needs. After a review of each school and after input from Williams, who was personally familiar with each, Dr. Athar determined that Cathedral Home in Laramie, Wyoming, one of the three which responded to her inquiries, was the best equipped of the possible placements to meet Student's unique needs, assuming that Cathedral Home would still agree to accept Student once it had a chance to review her records and complete its normal admissions review.

31. Father was sent a notice that a reconvened IEP meeting would take place on August 5, 2008, to discuss the RTC placement offer. Father, through legal counsel, declined to attend the meeting because he felt that he could not make a decision without more information about the proposed placements. Although the IEP meeting for August 5, 2008, was cancelled, Dr. Athar wrote a letter to Father on that date outlining the HCA's provisional offer of placement for Student at Cathedral Home. The letter stated that Cathedral Home would meet Student's needs, difficulties, and behavior issues, as well as meet the educational goals and objectives that the IEP team had developed for her. Dr. Athar reiterated that Student had multiple emotional and behavioral difficulties that negatively had impacted her educational progress. She cited Student's history of depression, withdrawal, verbal aggression, defiance, mood swings, oppositional behaviors,

physical and sexual abuse, suicidal ideation, self-injurious behaviors, decline in grades, and previous psychiatric hospitalization as reasons supporting the recommendation for an RTC placement. Dr. Athar additionally indicated that the HCA had determined that Cathedral Home would be able to meet Student's needs to address all those areas as it would provide the highly structured environment and stability that Student required. Dr. Athar stated that Cathedral Home provided 24-hour supervision and services to its students, that it provided individual, group, family and milieu therapy,⁸ and that it provided psychiatric treatment. Dr. Athar also noted that Cathedral Home had access to the Laramie Youth Crisis Center, a year-round educational program that consists of academic and vocational training combined with community service projects, as well as wilderness, recreation and horse programs. This letter constituted the HCA's provisional offer of placement to Student and was ultimately incorporated by reference into the IEP document dated August 20, 2008.

32. Although the HCA's offer of placement at Cathedral Home, through Dr. Athar's August 5, 2008 letter, made specific reference to the type of programs available for students placed there, the offer failed to indicate the specific types of mental health therapy HCA believed Student required to meet her unique needs, how much of each type of therapy or related services she required on a daily, weekly, or monthly basis, for how long it believed each therapy or other related services session should last, and when the

⁸ At hearing, Dr. Athar explained that milieu therapy meant that the facility provided an environment that in and of itself was therapeutic to its students based on the home-like environment based on housing students in cottages that mirrored family homes, with kitchens where the students cooked and ate, living areas where they could socialize, and on-site supervision by staff who lived in the cottage alongside the cottage residents.

services would start. However, it was impossible for Dr. Athar to indicate the inception date of the services since HCA was only able to make a provisional offer at this juncture since, due to Father's lack of consent, Cathedral Home had not had the opportunity to review Student's records, contact Father, or interview Student.

33. Father ultimately agreed to proceed with a reconvened IEP team meeting. The team held the meeting on August 20, 2008, for the express purpose of continuing the meeting started on May 21, 2008, in order to review the HCA's residential placement search results. Father, however, was not able to attend the meeting but was represented at it by legal counsel and an educational advocate. In addition to Father's representatives, also present was a SELPA representative, representatives from Huntington Beach, including a teacher, school psychologist, the Director of Special Education, the district's legal counsel, Robles and Dr. Athar, the HCA's legal counsel, and three representatives from Provo, including therapist Bergeron.

34. Father's representatives taped the meeting. However, due to emotions becoming somewhat heated at one point, after the HCA indicated that it could not discuss Provo since it was a for-profit institution, and Father's representative asserting that it was necessary to discuss Provo as a possible placement, the team took a break. After the team returned from the break, Student's representatives forgot to restart the tape recorder. The result was that the remainder of the meeting, consisting of many minutes of discussion concerning Student and the HCA's offer of placement, was not recorded. Although the recollection of his educational advocate, Vikki Rice, was that the Provo representatives left the meeting before the break and, therefore, all conversations with them were recorded, a review of the tape recording, which is in evidence, as well as a transcript of the recording, does not indicate that the Provo staff ever excused themselves or were excused by the other IEP team members from the meeting. The weight of the evidence thus supports the HCA's position that further conversations with Provo staff concerning Student occurred

after the team returned from break and that those conversations were not recorded.

35. Bergeron presented an overview of Student's present mental health. She cited to the fact that Student had had a successful off-campus visit the past weekend with Father, her grandmother, and an uncle. However, despite indicating some successes, Bergeron indicated that Student was still struggling with her anger to the extent that the previous Wednesday she was not able to complete a family therapy session due to how upset she was. Bergeron also indicated that Student's behavior and attitude continued to fluctuate: it would be good for a while, and then something undefined would happen that would instigate another outbreak from Student.

36. Academically, the staff at Provo indicated that Student was progressing and showing signs of improvement. They indicated that she was complaining less and being more industrious, and that she was respectful to her teachers and peers. The only class where Student showed substantial behavior problems was in physical education where she often chose not to participate.

37. However, in spite of her academic improvement, Student's emotional issues were affecting her ability to progress in the status system which Provo applies to its students. The status system consists of six tiers. Good behavior and the accumulation of points permit a student to move to the next highest tier. The higher the tier, or status, the more responsibilities and privileges a student receives. At the time of this IEP meeting on August 20, 2008, Student had been at Provo for over three months but had only progressed one status, to where she had actually moved soon after enrolling at Provo. In other words, Student had been at the second status (called "team") for almost the entire time she had been at Provo. Bergeron indicated that Student was not accumulating good scores and that she was not even close to being advanced to the next status. This was because Student continued to have problems on her housing unit by showing bad attitude to staff and by refusing to abide by rules. The only positive thing that Bergeron could say

about Student's behaviors as they related to her ability to move up in status was that she was not getting into fights or doing anything particularly proactive that would move her down to the first status (known as "pre-team").

38. Bergeron indicated that each student at Provo was unique and therefore there was no specific time frame in which it was expected that any given student would progress to the next status. However, she further remarked that Student definitely could be making a lot more progress and giving a lot more effort. Bergeron indicated that Student's attitude, her habit of getting angry at small things, and irritability toward staff were the main reasons that she was not advancing in status. Nonetheless, Bergeron also indicated that Student has not engaged in any of the self-injurious behaviors at Provo that had marked the final months of her stay at Logan River.

39. The IEP team then spent time discussing goals for Student. Bergeron indicated that Student needed a goal toward learning coping skills because when things did not go her way, Student could become angry in a matter of seconds and did not seem capable of controlling her anger. The team agreed to develop a goal to address that behavior.

40. The IEP team also discussed Student's medications as well as the need for her to meet telephonically with a vocational specialist from Huntington Beach in order to more fully develop an individual transition plan.

41. Father's legal representative then raised her concern that Father had not been given funding to visit any of the proposed placements and had not been given specific information about the placements or a chance to meet with representatives from them as had been suggested at the July 22, 2008 IEP meeting. The legal representative also indicated her position that the team should discuss and consider Provo, which, although for-profit, is certified by the state of California as a non-public school.

42. After taking a break, the IEP team returned to the meeting, albeit without any recording of this latter portion of the meeting. Dr. Athar told the team that the HCA was provisionally making an offer of Cathedral Home, contingent on Father agreeing to provide Student's information to Cathedral Home and contingent on the final agreement of Cathedral Home to accept Student once it had an opportunity to review her actual information and to meet with her. Dr. Athar provided all team members with her August 5, 2008, letter to Father in which the HCA had offered placement to Student at Cathedral Home. Dr. Athar also described in general terms the Cathedral Home facilities as well as described generally the services it could offer Student. As stated in paragraph 32 above, Dr. Athar's August 5, 2008, letter constituted the HCA's provisional offer of placement to Student at Cathedral Home, and was incorporated into the August 20, 2008 IEP.

43. At hearing, Williams described in detail Cathedral Home's facilities, the programs it offered, and the positive aspects of placing Student there. It offers individual, group, and family therapy, as do all the RTCS at which the HCA places students. Williams credibly testified that Cathedral Home offers each of the individualized types of therapy that Student presently receives in anger management, sexual abuse issues, and interpersonal relationships. Cathedral Home has the added benefit, however, of using a social model for its program which emphasizes healing family relationships, a significant area of need for Student. The facility is less institutionalized than Provo. Housing units are houses or cottages, which are grouped together, rather than dormitories as at Provo. Each cottage has a kitchen, living room and bedrooms, and the unit is run like a home, with a staff member living in the cottage with the students. Specialized groups address the spirit of the family and focus on healing family relationships, teaching students how to interact with their families again. Cathedral Home also permits students to remain past age 18 if they still require an RTC placement, but it also has a group home in the outside community where six girls can live. If a girl is able to transition to the community group home, she can

either attend Laramie High School or, if she has graduated, attend community college in Laramie. Cathedral also has a relationship with the Laramie business community and assists its students who are ready for it to obtain jobs in the community as a means of aiding the students' transition back to the community. Additionally, unlike Provo, Cathedral Home does not focus on serving students with criminal histories or other conduct disorders; rather, it focuses on students, who, like Student, have emotional and behavior problems stemming from abuse and family conflicts. Although Williams readily acknowledged that Provo is a good facility which the HCA has used in the past, she credibly stated that its dorm-like setting, cafeteria used for meals, institutionalized atmosphere that included many students with conduct issues, lack of outside recreational opportunities, minimal transitional opportunities and lockdown status, were not appropriate to address Student's needs. Unfortunately, Williams did not attend Student's IEP meetings and Dr. Athar, because of her lack of personal knowledge, was not able to give this detailed information to Father at the meetings.

44. At both the July 22, 2008 and August 20, 2008 IEP team meetings, Bergeron stated that she did not believe that Student should be moved from Provo. She stated that it would be detrimental to Student not only because she would have to develop new friendships if she was moved but, more importantly, Student would have to re-develop a relationship with whatever therapist she was assigned to at her new facility. At hearing, Bergeron credibly testified that it had taken some time for her to develop a relationship with Student, that Student had begun opening up to her, and that Student was beginning to display trust in others. Bergeron opined that it would possibly set Student back many months in her therapy if she had to transfer to another facility and begin work all over again with a new therapist.

45. However, although Bergeron was a credible and sincere witness, her opinion regarding the detriment to Student if she had to transfer to another RTC facility was not

ultimately persuasive. First, there was absolutely no evidence presented that Student would suffer any emotional trauma or that her mental health would be adversely affected by having to move to another facility. Neither Bergeron nor any other witness testified that such would be the case. The only evidence presented on possible detriment to Student was through Bergeron, and Bergeron's only point was that Student would have to redevelop a relationship with a new therapist thereby possibly prolonging the time Student would have to remain at an RTC. That fact – prolonging an RTC placement – is not a sufficient basis for a finding that a proposed placement would not meet a student's needs. As the HCA points out in its closing brief, students move all the time from placement to placement, depending on their needs and on the availability of a given facility, and often have to adjust to a new school or facility, which is simply a matter of time. There was no evidence that Student would be emotionally damaged if she transferred to Cathedral Home.

46. Additionally, the evidence is persuasive that Student is more than capable of making such an adjustment. At the time Logan River informed Father that it could no longer serve Student's needs, Student had been enrolled there for over a year and had been seeing one therapist there for some time. In spite of having apparently developed a relationship with the therapist, Margaret Oaks, Student's behavior and mental health deteriorated after the year there, rather than improving. Father was compelled to find another placement for Student. In spite of having to move from Logan River where she had been for over a year, where she had developed friendships, and where she had a relationship with one therapist, Student made a fairly easy transition to Provo. Although it took her some time to open up to therapist Bergeron at Provo, Student did not suffer any emotional damage, emotional trauma, or other setbacks by her move to Provo. In fact, at Provo, Student has not engaged in any of the self-injurious or assaultive behaviors that prompted Logan River to refuse to continue to provide services to her. The evidence thus

supports the HCA's position that Student can successfully transition to another facility and that Cathedral Home is an appropriate placement for her that can meet all of her unique needs.

47. At the end of the IEP meeting on August 20, 2008, the HCA reiterated the provisional offer of placement to Student at Cathedral Home which it made in Dr. Athar's letter of August 5, 2008. However, the only specific mention of services were those contained in Dr. Athar's letter of August 5, 2008, and the same CSP that had previously been included in the IEP from the July 22, 2008 IEP meeting. The HCA again failed to specify exactly which related mental health services it believed Student should have. At hearing, Jim Hemsley, the SELPA's Executive Director, and all HCA staff witnesses (Dr. Crane, Dr. Athar, Robles, and Williams) stated that it was up to the RTC staff wherever Student was placed to develop a related services plan for Student after she was placed at the facility. Their testimony was that the protocol was for RTC staff to observe Student for a month, after which Student's IEP team would schedule a 30-day follow-up IEP meeting which would include RTC staff. At that follow-up meeting, the RTC staff would recommend, and the IEP team would discuss, the specific therapeutic services to be offered to Student.

48. In addition to the provisional recommendation for Student's placement at Cathedral Home, the August 20, 2008 IEP notes that based upon the suggestions from the staff at Provo, the IEP team would develop additional coping skills goals for Student. Additionally, in response to Father's earlier request to visit Cathedral Home in order to make a reasoned decision as to whether he agreed that it was an appropriate placement for Student, as reiterated by his legal representative at this IEP meeting, Huntington Beach agreed to fund a visitation for Father to that facility. Through his legal representative, Father still declined to sign a consent form for Cathedral to receive Student's information. The HCA indicated that until Cathedral Home received Student's information and reviewed

it, and could speak with Student, the offer of placement there was only provisional as Cathedral Home had not concretely agreed to admit Student.

49. The evidence is persuasive that the HCA was willing to consider recommendations for Student's placement, goals, and services made by any of the IEP team members, including Student's legal representative and her current RTC providers, and that the only placement option that it would not discuss was Provo, at which it was prohibited from placing Student by statute. The evidence thus does not support Student's contention that the HCA predetermined its offer of placement at Cathedral Home, or that it would not consider any other placements had others been suggested.

50. On September 9, 2008, Father and Student entered into a settlement agreement with Huntington Beach regarding an earlier case Student filed against that school district.⁹ The issues Student raised against Huntington Beach concerned issues similar to those in the instant case. As part of the settlement agreement, Father specifically agreed to provide to the HCA, within two days of full execution of the agreement, his written consent for the release of Student's protected health information to Cathedral Home. Father did not send a signed consent form to the HCA until September 16, 2008. The form he used was rejected by the HCA. Father sent the appropriate signed consent form to the HCA on September 23, 2008.

51. As an additional part of the settlement agreement, Huntington Beach agreed to pay \$148 per day toward the educational portion of costs for Student's attendance at any state-certified non-public school of Father's choice, beginning August 30, 2008, in the event that Student's educational placement was still at issue following that date, up to the

⁹ The settlement agreement was admitted into evidence in the instant case at Student's request.

time that either the HCA and Student and Father resolved their placement dispute or up to the time that OAH resolves the dispute between the HCA and Student and Father in the instant case.

52. On September 25, 2008, after receiving Father's signed consent form, Dr. Athar sent Student's information to Cathedral Home for its review. Dr. Athar indicated in her letter to Cathedral Home that Student's IEP team had agreed she needed a residential placement and that they wished Cathedral Home to consider Student for placement there. On October 3, 2008, Dr. Athar wrote to Father indicating that Cathedral Home had contacted her and informed her that it had found that Student would probably be appropriately placed there, but that Cathedral Hill still needed to conduct a face-to-face interview with Student, as it does with all prospective students, as the last part of the admission process. Dr. Athar indicated to Father that he needed to give his consent for the Cathedral Home representative to interview Student. Dr. Athar informed Father that Cathedral Home would be unable to make a final decision on whether it could accept Student without the interview, which it would conduct by telephone. Dr. Athar asked Father to respond by October 10, 2008.

53. By facsimile dated October 3, 2008, Father informed Dr. Athar that he would need an additional week to respond to her request for his consent for Cathedral Home to interview Student. As of the date of the instant hearing, Father had not given his consent to Cathedral Home to interview Student, had not contacted the Cathedral Home admissions counselor to discuss Student's placement there, and had never taken the opportunity to visit Cathedral Home, although Huntington Beach had specifically agreed to fund the visit.

54. Father submitted evidence that he has been charged, and has been paying, a daily fee of \$295 to Provo for Student's placement there. This is the discounted rate Provo charges to students who are privately placed rather than being placed through the IEP

process. The rate charged for students placed through the IEP process is approximately \$395. Of the latter, non-discounted amount, Provo charges \$148 per day for a student's room and board and \$81.20 a day for daily mental health care. The remainder (approximately \$156 a day) is for the educational portion of the student's placement. However, Provo does not break down the \$295 discounted amount per day it charges to parents for privately placed students.

55. In addition to requesting reimbursement for the cost of placing Student at Provo (minus the amounts being paid by Huntington Beach per its settlement agreement with Student and Father), Father requests reimbursement for the costs he has incurred for Student and himself during his monthly family visits to Student at Provo and for her visit in October 2008 to him in California. However, Student presented absolutely no evidence, either by way of testimony or by documentary evidence, that Student required monthly visits by Father to meet her mental health needs or that she required a home visit in October 2008 to meet her mental health needs. The only evidence presented on this issue, other than Father's testimony regarding the costs he incurred during the visits, was testimony by Robles that it has been his experience over the many years he has been involved in making RTC placements, that school districts often agreed to fund quarterly family visits when a student was placed through an IEP at an RTC. Student presented no persuasive evidence that the HCA is responsible for the costs for a student's family to visit her or for the student to make visits home.

56. Student presented no persuasive evidence that the HCA is responsible for Student's medical costs, for the cost of her medication, or for her dental care costs.

LEGAL CONCLUSIONS

BURDEN OF PROOF:

1. With respect to the issues involving special education and related services,

the United States Supreme Court has held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Student filed the Request for Due Process Hearing in this matter and therefore has the burden of proof as to all issues in this case.

PREDETERMINATION OF PLACEMENT (ISSUE 1(A) AND (B)):

2. Student contends that the HCA predetermined her placement at Cathedral Home both because it refused to consider Provo as a possible placement and because HCA staff discussed and decided on Cathedral Home as the placement for Student without the meaningful participation of Father. Neither contention is supported by the weight of the evidence.

3. Pursuant to the Individuals with Disabilities in Education Improvement Act (IDEIA), effective July 1, 2005, and California special education law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).)

4. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*).)

5. The IDEA requires that a due process decision be based upon substantive

grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); Rowley, supra, 458 U.S. at pp. 206-07; see also Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 892.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1483 (hereafter Target Range).) Procedural errors during the IEP process are subject to a harmless error analysis. (M.L., et al., v. Federal Way Sch. Dist. (9th Cir. 2005) 394 F.3d 634.)

6. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (Target Range, supra, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she 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; Fuhrmann v. East Hanover Bd. of Educ. (3d Cir. 1993) 993 F.2d 1031, 1036 [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].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (Ms. S. ex rel G. v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1131.) The test is whether

the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp. 1253, 1262 (hereafter *Doyle*.)

7. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) However, merely pre-writing proposed goals and objectives does not constitute predetermination; nor does providing a written offer to a student before her parents have agreed to it. (*Doyle, supra*, 806 F.Supp. at p. 1262.) Indeed, a district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

8. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

9. California Government Code sections 7570 through 7588 shift responsibility for certain services from local education agencies to other state agencies, such as the HCA

in the instant case, to provide services, such as occupational therapy, physical therapy, nursing services, mental health services, and residential placements. In pertinent part, California Code of Regulations, title 2, section 60100 provides:

(h) Residential placements for a pupil with a disability who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of subsections (d) and (e) [of section 60100] have been met. Out-of-state placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3). For educational purposes, the pupil shall receive services from a privately operated non-medical, non-detention school certified by the California Department of Education. (Emphasis added.)

Welfare and Institutions Code section 11460, subdivision (c)(3), provides:

State reimbursement for an AFDC-FC rate paid on or after January 1, 1993, shall only be made to a group home organized and operated on a nonprofit basis. (Emphasis added.)

10. The dictates of Welfare and Institutions Code, section 11460, subdivision (c)(3) are reiterated in California Code of Regulations, title 2, section 60025, subdivision (h), which states, in pertinent part, that "a group home is a nondetention facility that is organized and operated on a nonprofit basis in accordance with Welfare and Institutions Section (sic) 11400(h)."

11. As set forth in Factual Findings 22, Provo is an out-of-state group home/residential care facility that operates on a for-profit basis. It is not operated on a nonprofit basis. Accordingly, the HCA is prohibited by statute from funding residential placements at Provo. As found in Factual Findings 22, the HCA had been audited by the state of California, which found that the HCA was not in compliance with its statutory duty to only place students at non-profit RTCS. The result of the HCA's placement of students at for-profit RTCS such as Provo was that the HCA was denied state reimbursement of millions of dollars for residential placements of students. The HCA was compelled to absorb the costs of the placements itself. Since it could not by statute authorize a placement at Provo, and since it risked substantial monetary liability if it did, the HCA's refusal to consider or discuss placement of Student at Provo was not based on a predetermination of placement but on its inability to legally make the placement. Student's contention that the HCA predetermined that it would not consider or discuss placement at Provo is therefore without merit.¹⁰

12. Student also contends that the HCA predetermined its offer of placement at Cathedral Home. However, the weight of the evidence fails to prove that contention. Although the HCA, after discussions among staff, determined that it would offer four RTC facilities as potential placements for Student, there is no evidence that it initially was

¹⁰ This case is distinguishable from that of *Student v. Riverside Unified School District and Riverside County Department of Mental Health* (Jan. 15, 2008) OAH Case No. 2007090403. In that case, the ALJ determined that there were no non-profit RTC facilities that were appropriate for the student. In contrast, as elaborated below, the HCA here offered an appropriate placement to Student at Cathedral Home that would have more than met her unique needs.

unwilling to discuss the four equally, or unwilling to consider suggestions from Father, other than its inability to consider Provo. Nor does the fact that the HCA assessment team, based upon the recommendation of Williams, ultimately determined that Cathedral Home was the most appropriate placement of the four it initially considered, compel a contrary finding. There is simply no evidence that the HCA was unwilling to discuss any placement that any IEP team member might have offered. The reality is that other than Father's insistence on placement at Provo, the only other placement submitted to the IEP team for consideration was Huntington Beach's offer of its Pathways day program to Student while the IEP team determined the appropriate RTC placement for Student.

13. Nor is there any evidence that any HCA employee, be it an IEP member or other staff person, directed the HCA assessment team to only consider Cathedral Home. There is no evidence that the HCA had any vested interest in selecting Cathedral Home over any other placement (other than not being able to offer Provo or any other for-profit facility). Indeed, the persuasive evidence at hearing was that the HCA assessment team, particularly Williams and Dr. Athar, considered numerous factors concerning Student's unique needs before arriving at the conclusion that Cathedral Home should be offered as the placement for Student. Nor is there any evidence whatsoever, either directly or by implication, that the HCA would have refused to discuss or consider other options had any other IEP team member suggested them. The evidence showed simply that other than Provo, neither Father nor his legal or educational representatives suggested any other placement for Student. Unlike the circumstances in the Deal case, Student here presented no compelling evidence that the HCA had a policy of refusing to place students at particular facilities, unless they were legally prohibited from doing so. Nor has Student proven that high-level HCA officials were dictating placement decisions concerning special education students. Unlike the school district in Deal, the HCA provided many opportunities for Father, his legal representative, and the representatives from Provo, to

offer their opinions and recommendations. Contrary to the circumstances in Deal, both the HCA and the Huntington Beach IEP team members not only permitted, but also encouraged, Student's father and his representatives, as well as the Provo staff, to contribute to the discussions concerning placement and services. There was no evidence that the HCA attempted to quell discussion concerning placement for Student or what her needs were, other than the HCA's stated inability to consider a for-profit facility such as Provo. To the contrary, a review of the IEP meetings indicates that many different IEP members, including Provo staff, dedicated considerable portions of the IEP meetings to discussing different aspects of Student's needs as well as to considering modifications to her proposed goals. Furthermore, there is no evidence that the HCA made statements either at or outside of IEP meetings that it would never consider anything other than placement at Cathedral Home.

14. The evidence thus fails to support the Student's position that the HCA predetermined its offer of placement and services for Student. Student has therefore failed to meet her burden of persuasion that the HCA's offer of placement at Cathedral Home was predetermined before the IEP meetings and has thus failed to prove that the HCA procedurally violated her rights under the IDEA with regard to her RTC placement. (Factual Findings 15 through 53; Legal Conclusions 3 through 14.)

FAILURE TO MAKE A SPECIFIC OFFER OF PLACEMENT (ISSUE 2):

15. Student contends that the HCA was required but failed to make a specific offer of placement and services to her at the IEP team meetings held on July 22, 2008, and August 20, 2008. Student asserts that the HCA's proposal of four RTC placements at the July 22, 2008 IEP meeting constituted a multiple offer of placement in violation of state and federal law. She further contends that the HCA's assessment report and subsequent IEP offers were required to include a list of proposed related services, in this case the specific types of proposed therapeutic mental health services to be provided to Student, along

with the start date, duration, and frequency of the services. The HCA contends that the state statutory scheme does not require a specific description of the mental health services a student will receive at an RTC placement. Rather, the HCA asserts that it is only after the IEP team has mutually agreed upon a specific RTC placement for a student that the specific related mental health services must be defined. The HCA argues that residential placement and treatment is a step-by-step process that starts with a search by the local county mental health agency for an appropriate placement. Once a placement is offered and then accepted by the student's IEP team, the student is enrolled at the chosen RTC. The HCA asserts that it is only after the student begins attending the RTC and the RTC staff have an opportunity to observe the student and become familiar his or her needs can the RTC staff recommend the specific mental health services for the student along with an initiation date, and the amount, duration, and frequency of the services. The HCA, through the testimony of Robles, indicated that an IEP team meeting is generally scheduled for 30 days after a student begins attending an RTC in order for the IEP team to determine the student's specific related mental services. In other words, the result of HCA's procedure is that the student's RTC placement will drive or determine the necessary related services rather than the student's need for specific services driving or determining the offer of placement. The HCA asserts that since it has no control over the admission process at the RTC facilities or control over whether any given facility will have a vacancy, the procedure it used, in accordance with its interpretation of the regulatory scheme, which included providing various possible placements, placing some of the burden on the parent to investigate and help determine an appropriate placement, and waiting for the RTC placement itself to specify related services, met HCA's legal requirements concerning the offer of an RTC placement to Student. While the ALJ accepts this contention with regard to the initial discussion of four potential RTC placements at the July 22, 2008 IEP meeting, she rejects the contention with regard to HCA's failure to make a specific offer of related

mental health services at any time during the IEP process in this case. As elaborated below, Student has failed to meet her burden of proof that the HCA's proposal of four potential RTC placements at the July 22, 2008 IEP meeting constituted multiple offers of placement. With regard to Student's contention that HCA failed to specify the type, frequency, and duration of the mental health services it believed Student required, the ALJ finds, as discussed below, that Student met her burden of proof that the HCA was required to make a specific offer of placement and related services within a reasonable amount of time subsequent to the IEP team's determination that Student required a residential placement. However, as discussed below, Student has failed to persuasively meet her burden of proof that HCA's procedural violation of failing to specify related mental health services resulted in a loss of educational benefit to Student or deprived Father of his right to meaningful participation in the IEP process. Student has therefore failed to prove that HCA's procedural violation resulted in a substantive loss of FAPE for Student. (Target Range, *supra*, 960 F.2d at p. 1483; *M.L., et al., v. Federal Way Sch. Dist.*, *supra*, 394 F.3d 634.)

16. An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

17. In *Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (hereafter *Union*), the court emphasized the importance of the formal offer requirement. The formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district and involved public agency will greatly assist parents in presenting

complaints with respect to any matter relating to the educational placement of the child. (See also *Glendale Unified Sch. Dist. v. Almasi* (hereafter *Almasi*) (C.D. Calif. 2000) 122 F.Supp.2d 1093, 1107.)

18. In the *Union* case, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. A school district or other public agency cannot escape its obligation to make a formal placement offer on the basis that the parents had previously “expressed unwillingness to accept that placement.” (*Union*, *supra*, 15 F.3d at p. 1526.)

19. In interpreting *Union*, California special education decisions have held that, when parents are determining whether to accept or reject a placement, the parents have the right to consider the entire offer. The reasons to impose this requirement is (1) to alert the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA; (2) to help the parents determine whether to oppose or accept the placement with supplemental services; and (3) to allow the district to be more prepared to introduce sufficient relevant evidence at hearing regarding the appropriateness of the placement. (*Union*, *supra*, 15 F.3d at p. 1526; *Student v. San Juan Unified Sch. Dist.* (SN02-02308) March 7, 2003.) A school district must provide a parent a clear, coherent written offer that the parent can reasonably evaluate in order to decide whether to accept or appeal the offer. (*Almasi*, *supra*, 122 F.Supp.2d at p. 1108.)

20. The HCA argues that the statutory scheme for residential placements mandates a finding that *Union* is not controlling in this case. The HCA contends that California Code of Regulations, title 2, section 60100, et seq., which delineates the process of identifying an appropriate residential placement, describes a step-by-step collaborative process whereby the designation of a specific residential placement and corresponding specific related mental health services is the final step in the process, not part of the first

steps in it. The regulatory scheme states that a community mental health service case manager, in consultation with the IEP team's administrative designee, shall identify a mutually satisfactory placement that is acceptable to the parent and addresses the pupil's educational and mental health needs in a manner that is cost-effective for both public agencies, subject to the requirements of state and federal special education law, including the requirement that the placement be appropriate and in the least restrictive environment. (Cal. Code Regs., tit. 2, § 60100, subd.(e).)

21. Pursuant to California's regulations for implementing Chapter 26.5 mental health services, when an IEP team member recommends residential placement for an ED-eligible student, an "expanded IEP team" must be convened within 30 days with an authorized representative of the community mental health service. (Cal. Code Regs., tit. 2, § 60100, subd. (b)(1).) When the expanded IEP team recommends a residential placement, "it shall document the pupil's educational and mental health treatment needs that support the recommendation for residential placement," including identifying "the special education and related mental health services to be provided by a residential facility" that cannot be provided in a less restrictive environment. (Cal. Code Regs., tit. 2, § 60100, subd. (d).)

22. The facts of this case establish that the expanded IEP team met on July 22, 2008, and, pursuant to the HCA's assessment of Student, recommended that Student be placed in an RTC. The HCA had considered possible placements prior to the IEP meeting, and, based on Student's needs and the knowledge of HCA staff of RTCS in general, suggested four possible placements. The intent was that another IEP meeting be held within a reasonable amount of time. In the interim, the HCA would submit Student's information to each of the four potential placements and determine whether any of the four hand space available for Student as well as believed it could serve Student's needs.

23. At the July 22, 2008 IEP meeting, the HCA did not offer the four placements to Father and then suggest that he choose the one he liked the best. Rather, it suggested four possible placements since it had no way of knowing whether any of them would have space available for Student or agree to accept her for admission. The HCA was seeking to shorten the RTC placement process; had it only suggested one placement and then that placement subsequently refused to accept Student, the placement process would have to start anew. Rather than in engage in serial offers of placement, the presentation of four possible placements was an appropriate manner of determining an RTC placement in as short a time as possible, given the HCA's lack of control over the admissions process at any given RTC. There is a dearth of case law addressing this point. None of the parties has cited any authority regarding what constitutes a reasonable amount of time for an offer of a specific residential placement to be made after an IEP team determines that residential placement is necessary. However, two prior California special education decisions are instructive. In the first case, a Special Education Hearing Officer concluded that a period of 13 days was reasonable for the identification of a specific residential placement after a determination that residential placement was necessary. (See *Student v. San Diego County Mental Health* (Jan. 29, 2003) SN02-01954 (hereafter *San Diego*)). In the second case, the Hearing Officer found that the 65 days that had elapsed between the IEP determination that the student in that case required residential placement and the time when he was unilaterally placed by the parents, after the start of a new school year was not a reasonable amount of time, particularly since the IEP team in that case never reconvened and a specific residential placement was never identified in a written offer during the 65 days. (See *Student v. San Carlos Elementary School District and San Mateo County Mental Health* (March 11, 2003) SN02-0200 (hereafter *San Carlos*)).

24. The facts in the instant case more closely mirror those of San Diego than they do San Carlos. Here, unlike the situation in San Carlos, the IEP team specifically made

plans for the HCA to investigate the four potential RTC placements and then reconvene within 14 days of the IEP meeting at which the team determined Student required an RTC placement. Within 14 days of the July 22, 2008 IEP team meeting, by letter dated August 5, 2008, the HCA made a specific offer of an RTC placement to Student at one RTC: Cathedral Home. Clearly, a short delay of 14 days coincides with the 13-day delay which the Hearing Office found reasonable in the San Diego case, and thus comports with the IDEA's timely implementation requirements. Therefore, even assuming that the HCA's submission to the IEP team of four potential placements at the July 22, 2008, IEP meeting constituted a multiple offer of placement, the HCA cured that defect by making a specific offer of placement at one facility – Cathedral Home – through Dr. Athar's letter dated August 5, 2008.

25. However, the HCA's failure to specify at any time and in any document the related mental health services Student needed clearly does not comport with either state or federal statute. The HCA's assertion that it was the obligation of the RTC to determine the Student's specific need for mental health services after the RTC had an opportunity to observe her and that such a process meets the standards of Union, is not supported by statute. Adopting this argument would ignore IDEA's essential mandate to individualize the program to meet the particular student's unique needs. This argument also conflicts with California's definition of specific educational placement as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the individualized education program, in any one of a combination of public, private, home and hospital, or residential settings." (Cal. Code Regs., tit. 5, §3042, subd. (a).)

26. The HCA's argument is also unpersuasive because the expressed intention of the Chapter 26.5 regulations "is to assure conformity with the federal Individuals with Disabilities Education Act or IDEA . . . and its implementing regulations Thus,

provisions of this chapter shall be construed as supplemental to, and in the context of, federal and state laws and regulations relating to interagency responsibilities for providing services to pupils with disabilities.” (Cal. Code Regs., tit. 2, § 60000). Thus, the ALJ concludes that Union is applicable to offers of residential placement. The HCA did not comply with its obligation under Union to make a formal offer of specific related mental health services in writing because it failed to identify the type of related mental health services Student required, such as individual, family, and/or group services, and what specific type of group services it believed Student required, such as anger management, sexual abuse therapy, and/or interpersonal skills group therapy. The position of the HCA staff members that it was the responsibility of the RTC chosen by the IEP team to determine those services is contrary to Union. While California Code of Regulations, title 2, section 60100, subdivision (e), requires that the residential placement be “acceptable” to the parents, it does not relieve the HCA of the obligation of identifying and offering an appropriate placement that addresses the pupil’s educational and mental health needs. The purpose of offering the parent specific mental health services is to enable the parent to evaluate and decide whether to accept or reject both the placement and the services offered.

27. However, it is well established that “procedural flaws will not automatically require a denial of a FAPE.” (Target Range, supra, 960 F.2d 1479 at p. 1485.) Only “procedural inadequacies that result in a loss of educational opportunity, or seriously infringe the parent’s opportunity to participate in the IEP process, clearly result in the denial of a FAPE.” (Ibid.) Although the HCA failed to delineate the specifics of its offer of mental health services to Student, Student has neither alleged nor shown that she lost educational opportunity due to this procedural violation. Furthermore, although Student argues that Father’s right to participate in the IEP process was impinged, the evidence fails to support this contention. To the contrary, the evidence supports a finding that if Father

was not able to participate in the process, it was due to his affirmative failure to engage in the steps necessary to determine a final, concrete placement for Student. Father declined to consent to having Student's records and health information to the four facilities proposed by the HCA. This resulted in the inability of the three RTCS that responded to the HCA's inquiries to make concrete offers of admission to their respective facilities to Student. This in turn resulted in the HCA being forced to make a provisional offer of placement to Student in the IEP of August 20, 2008, since it could not be certain that Cathedral Home would still believe itself to be an appropriate fit for Student once it had reviewed her records and interviewed her. Additionally, the weight of the evidence is that Father had no interest in considering a placement other than Provo for Student. He did not engage in any discussion of other possible placements at any of the IEP meetings he attended (nor did his counsel at the August 20, 2008 IEP meeting). Neither Father nor his legal representative gave any indication that they were interested in discussing Cathedral Home's services or whether it might be an appropriate placement for Student. Father's disinterest in any placement other than Provo is evident given his failure to visit the school even though a paid visit was offered to him at the August 20, 2008 IEP meeting. In spite of that offer, Father never took advantage of it. Furthermore, he has never provided his consent for Cathedral Home to interview Student, further hampering the process of obtaining a residential placement for Student. Finally, Father never even asked the HCA whether the services Student was receiving at Provo were appropriate for her or if they would be equally available at Cathedral Home, or the other three proposed RTCS. The evidence is thus persuasive that Father had no interest in any placement other than Provo and that even had HCA included specific descriptions of proposed mental health services for Student in the IEP offer, he would not have considered it. Therefore, the evidence supports a finding that Father's participation in the IEP process was not significantly impeded. Student has thus failed to meet her burden of showing that the HCA's

procedural violation resulted in a substantive harm to her. Student was not denied a FAPE by the HCA's failure to specify the parameters of the mental health services she required in its offer of RTC placement. (Factual Findings 24 through 29, 31 -32, 42, 47 through 50, and 52 - 53; Legal Conclusions 15 through 27.)

Substantive Failure to Make an Offer that Met Student's Unique Needs
(Issue 3):

28. As stated above in Legal Conclusion 3, pursuant to the IDEA and California law, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs. Student contends that the HCA's offer of placement at Cathedral Home failed to meet her unique needs because her mental health needs would not be met if she was moved from Provo to another facility. Student, however, has failed to meet her burden of proof that Cathedral Home was not an appropriate placement for her or that moving her from Provo would fail to meet her mental health needs.

29. In *Rowley*, supra, 458 U.S. at p. 201, the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

30. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v.*

Longview School District (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (Ibid.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (Ibid.)

31. Student has not presented any evidence that moving her to another facility would have caused her mental health to deteriorate, would have caused her emotional trauma, or would have denied her a FAPE. The only evidence Student presented was the opinion of her therapist, Penelope Bergeron, that Student would have to re-establish a working relationship with a new therapist, something that might take months to do, and which would thus set Student's therapy and ultimate recovery back a couple of months. Student presents no legal support for her contention that a possible short set back in recovery time or having to adjust to a new therapist amounts to a denial of FAPE. Additionally, the evidence demonstrates that Student had previously been able to adapt to a change in RTC placement without ill effect, and had actually demonstrated some improvement, when she was compelled to leave Logan River and transferred to Provo.

32. Additionally, Student has failed to meet her burden of proof that Cathedral Home was not an appropriate placement for her. To the contrary, the evidence substantially supports a finding that Cathedral Home not only was an appropriate placement for Student, but was a more appropriate placement to meet her unique needs than was Provo. Student has therefore failed to meet her burden of proving her contention that the HCA failed to offer her a placement that would meet her unique needs. (Factual Findings 20 through 23, 28, 30, 35 through 39, 42 through 46, and 48; Legal Conclusions 28 through 32.)

DETERMINATION OF RELIEF:

33. Because the ALJ has concluded that no substantive denial of FAPE occurred, this Decision does not address Student's reimbursement claims.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that here, the HCA was the prevailing parties on all issues presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: December 30, 2008

/s/

DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings