

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS  
STATE OF COLORADO**

**CASE NO. ED 2002-009**

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**DECISION UPON STATE LEVEL REVIEW**

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**IN THE MATTER OF:**

**[STUDENT], by and through their parents,  
[PARENTS],**

**Petitioner,**

**v.**

**ACADEMY SCHOOL DISTRICT 20,**

**Respondent.**

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This is a state level review of a decision of an impartial hearing officer pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA") and the Colorado Exceptional Children's Education Act, 22-20-101, C.R.S. *et seq.* ("ECEA").

**PROCEDURAL BACKGROUND**

A hearing was held before impartial hearing officer (IHO) Fred B. Adam in accordance with the IDEA on June 24-28 and July 1, 2002. The IHO issued his Decision on July 15, 2002. Academy School District 20 (the District) appealed the decision on August 14, 2002.

Oral argument in the appeal was held on December 18, 2002, before Administrative Law Judge Judith F. Schulman (ALJ) in the offices of the Colorado Division of Administrative Hearings. The District was represented by Brent Benrud and Robert Cohn of Stettner, Miller & Cohn, P.C. [student] ("the Student") through her parents, [parents] ("the parents"), were represented by J. Kevin Bridston of Holland & Hart and Elizabeth Wylie Johnston of The Legal Center for People With Disabilities and Older People. The parties filed briefs prior to oral argument. A transcript of the hearing below was prepared and received along with all the documentary evidence presented at the hearing below. No new evidence was offered or received in connection with the appeal.

## **IMPARTIAL HEARING OFFICER DECISION**

This case involves the removal of the Student from her general education classroom to more restrictive settings based on behavior problems. The parties agree that the behavior issues in question are manifestations of the Student's disability. The parties disagree as to whether the behavior problems justified the District's decision to place the Student in more restrictive settings and whether the Student received a free appropriate public education.

Issues presented at the local level hearing included whether the Student's placements were appropriate and in the least restrictive environment and whether an order for compensatory education was appropriate.<sup>1</sup> The IHO concluded in his Decision that the District had failed to mainstream the Student to the maximum extent appropriate because the District failed to implement or utilize proper supplementary aids and services (in particular, proper behavioral supports). The IHO thus concluded the District failed to comply with the appropriate placement and least restrictive environment provisions of the IDEA. The IHO additionally determined the District's placements of the Student from mid-October 2001 through the end of the 2001-2002 school year failed to provide the student with educational benefit. Consequently, the IHO ordered, *inter alia*, seven months of compensatory education for the Student.

### **ISSUES ON REVIEW**

On appeal, the District asserts the IHO's decisions concerning placement, least restrictive environment and failure to provide a free appropriate public education were in error. The District asserts it acted appropriately in removing the Student from the general education classroom and placing her in more restrictive settings and further maintains that the District provided the Student with a free appropriate public education in the more restrictive settings.

### **FINDINGS OF FACT**

Based on the exhibits and testimonial record, the ALJ enters the following findings of fact, giving due deference to the findings of the IHO:

1. At the time of the hearing in this matter the Student was a 12-year old child residing with her parents in Colorado Springs, Colorado. She was enrolled in the District's Mountain Ridge Middle School ("Mountain Ridge" or "the middle school") for the school year 2001-2002, although she began the year part-time at Explorer Elementary ("Explorer") and part-time at Mountain Ridge.

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<sup>1</sup> The Student also raised issues at the local level concerning compliance with the procedural requirements of IDEA. In his Decision, the IHO found that while the District had violated certain procedural aspects of the Act, the infractions were not sufficiently egregious to constitute the denial of a Free Appropriate Public Education. The IHO's determinations concerning the Student's procedural claims have not been appealed.

2. The Student was diagnosed at birth with Down Syndrome. At the time of the hearing, the District's Director of Special Education estimated the Student's level of functioning to be 2-3 years while Kenyee Jarrett, a special education and severe needs specialist for the District, testified that the Student was functioning as a 3-4 year old in many areas. Ms. Jarrett indicated that the Student functions at a higher level in some areas and at a lower area in other areas.

3. At the time of the hearing, the Student's most recent Individualized Education Plans (IEPs) listed her primary disability as Significant Limited Intellectual Capacity. Some of her strengths indicated were: good visual discrimination skills, able to identify letters, a small meaningful sight word vocabulary, tends to read single words but is learning short phrases, ability to count to 10 and identify numbers up to 6, recognizes coins and reacts positively to colors and textures. The IEP additionally notes that the Student enjoys when other students read to her, and also enjoys music, library and physical education and is interested in cultures and historical eras.

4. The Student's October 11, 2001 and March 13, 2002 IEPs listed the Student's needs, including her need to: follow school routines and learn to transition; learn comprehension skills relative to sight words; communicate her needs in a variety of school activities; direct and sustain attention to activities; increase number sense; develop sense of time, as related to school and classroom schedule; learn to adapt to changes in schedule, with adult and peer assistance; learn modified concepts in content areas; learn from peer and adult models; follow routine using picture schedule; develop tolerance for a variety of expectations, *e.g.*, environment, people, noise; increase task completion; develop compliant behavior in the school environment; have positive interactions with peers in school social settings; and establish social relationships with peers to motivate successful and positive educational and social interaction.

5. Among the annual goals provided for the Student in her October 2001 and March 2002 IEPs was that she will successfully use appropriate verbal and nonverbal communicative behaviors in social context that are associated with expectations of grade-level peers. Related objectives stated that the Student will actively and safely participate in age-appropriate peer and classroom activities and she will actively and safely follow peers during activities and transitions throughout the day.

6. Over the years the Student has demonstrated various behavioral problems at school. These problems are characterized by the District as disruptive and sometimes physically aggressive or dangerous to other students or staff. In contrast, the parents, while conceding the behavior is sometimes disruptive, do not agree that the Student's behavior is particularly aggressive or dangerous. The behaviors, which are directed both at other students and adults, include grabbing clothing, eyeglasses, and necklaces, hitting, throwing objects such as books and flowerpots, pulling hair, biting, pushing over furniture such as bookshelves, clearing off desktops with sweeping hand motions, and pulling down posters and decorations from walls and lockers.

For example, the Student's January 10, 1995 Progress Report notes that when the Student first began preschool, her behavior was a problem as illustrated by the fact that she pulled hair, pinched, and moved around the room pulling things off shelves and walls. The Student's October 29, 1997 IEP indicated that a behavior plan was being followed to restrict the Student's aggressive behavior and her "avoidant tossing behavior," which behavior was severely impacting her ability to learn and interact with peers. The Student's October 19, 1998 behavior plan notes that her physically aggressive behavior directed at other students and staff and avoidant throwing of objects had increased, was of concern to the staff at Prairie Hills Elementary School and was interfering with the learning environment. The Student's February 8, 2000 IEP notes that the Student was exhibiting inappropriate aggressive behavior in the classroom that severely impacted the Student's ability to learn and interact with peers. These behaviors included pulling hair, grabbing and breaking necklaces, making social grabs to interact, tearing pages from books or papers that belong to classmates.

Over the period of time the Student has been in the District, the District made various efforts to respond to the Student's behavior problems, including completing functional behavioral assessments, preparing and attempting to implement behavioral support plans, and consulting with experts.

7. A number of behavior assessments of the Student have been made over the years and a number of behavior plans have been implemented, in an attempt to address the Student's problem behaviors. These plans have met with some degree of success at certain times. At times, the Student's behavior can be predicted because it is preceded by physical indicators such as an eye turning inward, or noisy, loud or silly conduct. At other times, however, the behavior occurs without any advance warnings or indicators and is therefore unpredictable. Several behavioral assessments, including one performed by Dr. Lewis Jackson, a behavioral psychologist and consultant to the District, have concluded, and the ALJ finds, that the Student on occasion uses her problem behaviors to escape from activities and requirements she finds uncomfortable or undesirable. The Student also uses her behaviors to try and obtain activities and experiences that are more desirable to her than what she is presently experiencing and to express her reaction to interpersonal control situations that she finds invasive. The Student's behavior problems are often associated with the fact that she does not transition well to other tasks, locations, environments or people.

8. During part of the 1999-2000 school year and throughout the 2000-2001 school years, the Student attended Explorer Elementary School. At the beginning of the Student's fifth grade year (2000-2001), she was included in the general education classroom for a substantial portion of the school day. However, as the year went on, the Student's behavior problems increased. As a result, the Student was removed entirely from the general education classroom between November 2000 and January 2001. Later in the year, the Student's behavior improved and she was gradually re-introduced into the general education classroom, but never at the level of the start of the year. There were 4

or 5 days of suspension during the Student's fifth grade year because of behavior. The Student had a full-time schedule at Explorer during her fifth grade year.

9. The Student's special education teacher at Explorer was Kenney Jarrett. Ms. Jarrett continued to be involved in the Student's education during her sixth grade year as well. Ms. Jarrett has an undergraduate and Masters degree in special education and is certified in Colorado to teach special education.

10. An annual IEP review was conducted for the Student on April 12, 2001, toward the end of her fifth grade year. Goals and objectives included increasing time in general education from 1.75 hours per day to 4 hours per day over the course of the coming school year. The Student was to receive instruction with both modified curriculum in the general education classroom and a parallel curriculum in the special education setting. An explicit behavioral plan was part of the IEP. Transition to Mountain Ridge was not discussed at this time.

11. In May 2001, a meeting was held to discuss plans for the Student's coming school year. The Student's parents wanted her to remain at Explorer Elementary for the 2001-2002 school year rather than transition to Mountain Ridge Middle School with her age group peers.<sup>2</sup> They felt that because the Student was not familiar with the staff, students and routines of middle school and there was not enough time for a smooth, gradual transition, such an abrupt change might cause regression. The District was in favor of transition so the Student could continue to be educated with age-appropriate peers. The District was particularly concerned that as the Student grew older and physically larger and stronger, her aggressiveness would pose a greater danger to elementary age children at Explorer. In contrast, the District felt children at the middle school would be both physically bigger and emotionally more mature and thus would be better equipped to respond to the Student. The District believed that goals and objective of the Student's IEP could be met and that middle school was the least restrictive placement. In addition, the District felt that an outright transfer to middle school was the preferable approach, rather than having the Student splitting her days initially between Explorer and Mountain Ridge or changing schools mid-year. Also, Dr. Jackson, who had been retained by the District, would be available to help with the transition.

12. In July and August 2001, the parents and the District entered into mediation, using a Colorado Department of Education-sponsored mediator, in an attempt to solve the disagreement as to which school the Student would attend in 2001-2002. A Memorandum of Understanding (MOU) was developed regarding staff training and an exchange of videotapes for familiarization of the Student to the school and her classmates to the Student, implementation of a behavior plan developed by Dr. Jackson, transition needs and classroom environment. The MOU sets forth a plan that the Student would start school in

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<sup>2</sup> In fact, as early as January or February 2001, the parent had specifically asked about the Student remaining at Explorer an additional year. At the time, however, the Student's special education teacher had stated a preference to defer the decision until a later time.

the morning at Explorer and finish at Mountain Ridge in the afternoon with a gradual increase in the time spent at the middle school. There were to be weekly conference calls involving the parents, Dr. Jackson, special education teachers at both schools and middle school teachers working with the Student. The MOU states that it is the intent of the parties to have the Student in regular education classes "except for instances of behavior concerns" which were to be addressed "in accordance with the behavior plan." As indicated by the MOU, the parties contemplated that an IEP staffing would be convened when the Student's transition was completed. Among the individuals involved in these discussions was the current principal at Mountain Ridge.

13. The District signed the MOU; however, the parents did not. The conference calls referenced in the MOU were discontinued around September 11, 2001, due to the unavailability of various parties, particularly Dr. Jackson. As provided in the MOU, the parents developed a video of the Student to be shown to her middle school classmates to assist in the transition. However, the District did not show the video to the Student's classmates because the District's equipment was incompatible with the videotape format used by the parents. The District did meet with the Student's prospective middle school general education classmates to provide background information to those classmates about the Student.

14. Shortly before the Student started the 2001-2002 school year, a new principal was named at Mountain Ridge. The parents do not believe that the new principal was as supportive of the Student's presence at Mountain Ridge as the prior principal had been. However, the evidence indicates that the new principal appropriately participated in decision-making concerning the Student and does not indicate that the new principal was uncooperative or acted inappropriately with respect to the Student's educational experience at Mountain Ridge.

15. The Student began the 2001-2002 school year on August 22, 2001. The Student began her first day at Explorer and then the transition between Explorer and Mountain Ridge was initiated. Initially, the Student spent the morning at Explorer and was transported by bus to Mountain Ridge for the last period of the day, an art class.

16. On August 28, 2001, the Student was involved in an incident at Mountain Ridge in which she grabbed a teacher's eyeglasses and pulled them from the teacher's face, scratching the teacher's eyelid. The Student also pushed the teacher who lost her footing but did not fall.

17. On September 7, 2001, the Student struck an Explorer staff member in the face causing swelling on her nose and lip and loosening front teeth. The Student was suspended for one day.

18. The Student was suspended for two days (9/18-9/19/01 or 9/19-9/20/01) for grabbing a student by the back of his shirt collar and choking him.

19. On September 24, 2001, the Student slapped a classmate in a science class at Explorer and grabbed her shirt, scratching the student's neck in several places. The Student was suspended for the balance of the day based on first-hand reports of incident, including a report by the Student's paraprofessional indicating that after grabbing and scratching the classmate, the Student "would not let go and was pulling the little girl's shirt off." The report further indicates that the Student's fingers were pried off the girl's shirt and the Student was escorted to special education significant support needs classroom.

20. The Student was suspended a portion of the day of September 26, 2001, for grabbing a teacher, scratching her neck, pulling a tape deck off a shelf and attempting to grab a teacher and paraprofessional. The incident reports upon which the suspension was based indicate that while walking in the hall at Explorer accompanied by a paraprofessional, the Student grabbed a teacher from behind, scratching the teacher's neck and pulling her backward by her shirt nearly to the ground. The Student was then escorted to special education significant support needs ("SSN") room where she pulled a tape deck off a shelf and attempted to grab a teacher and paraprofessional.

21. On September 26, 2001, Deborah Montgomery, the District's Special Education Director, suggested to the parents that the parties engage in mediation to discuss ongoing issues and differences. Among the issues the District wished to discuss was the possibility of accelerating the Student's transition to Mountain Ridge. It was the District's belief that a quicker transition to full-time at Mountain Ridge would minimize the number of changes the Student would be subjected to in any given day and allow the Student to feel grounded and have a sense of belonging. The District believed eliminating the Student's daily transitions from the elementary school to the middle school would have a positive impact on the Student's behavior. However, the parents indicated they were not interested in mediation at that time. As a result, no change was made in the existing transition schedule.

22. The Student was suspended October 1, 3 and 8, 2001 for behavior reasons.

23. As contemplated by the MOU, an annual review IEP staffing was convened on October 11, 2001, to determine how well the Student's current program was meeting identified needs and to discuss any possible changes in the Student's education program. The IEP team met on October 11, 2001, but was unable to complete the IEP in one meeting. Therefore, a continuation of the IEP meeting was scheduled for October 24, 2001.

24. Between the time of the first IEP meeting on October 11, 2001 and the scheduled IEP continuation meeting, another behavior incident occurred. On October 16, 2001, the Student threw either a book or a box of sandwich bags at another Explorer student, hitting the student in the head. According to the statement of paraprofessional John Norgard, the Student grabbed a teacher's shirt and had to be physically restrained. According to Kenney Jarrett's analysis, the Student attacked the teacher, grabbed her shirt, scratched her neck and was pulling the shirt down so that the teacher was afraid of

exposing herself to the class. The teacher's written statement did not mention any concern of exposure but did state that ". . .students watched this happen in shock. Afterward, I was shaking and scared." Later, when the Student was brought back into the room, the teacher stated that ". . .[the Student] reached out at me again. The aide had hold of one arm, and she was flailing her other arm out toward me. At this point, I asked the aide not to bring her back to the class because I was worried about my safety, as well as that of the students. I do not feel comfortable teaching with [the Student] in the room, as she is unpredictably violent and frightening to myself and the students."

25. The initial October 16, 2002 incident was witnessed by parent advocate Sandra Martinez who did not observe anything being thrown at another student, did not see a scratch on the teacher or observe that the teacher was scared. The Student's mother also observed the incident and did not observe any struggle or perceive any need for intervention.

26. As a result of the events of October 16, 2001, the Student was suspended from school from October 17 through October 24, 2001, the date of the next IEP meeting. Home tutoring was offered to the Student for this period of time but was rejected by the parents because they did not feel that home tutoring would meet the Student's needs.

27. The behavioral incidents that led to suspensions of the Student in August, September and October 2001 as described above were not the only incidents of problem behavior by the Student during that period of time. The Student was involved in a number of other incidents that were disruptive and required significant interventions by District staff during this period of time. Sometimes when such behaviors occurred, the District called the parents and asked them to stay with the Student as a condition for the Student remaining in school. For example, on October 12, 2001, both the principal and the assistant principal were called to assist in deescalating the Student's dangerous behavior in the bathroom of the SSN room. The Student was unwilling to have her pull-up garment put back on so she could leave the restroom. She grabbed and kicked at adults who attempted to assist her and endangered herself by lunging toward heavy items on a nearby shelf. She also flung urine-containing water from the toilet at the adults in the room. The adults were unable to calm the Student without the ultimate intervention of her mother who was called on an emergency basis and was asked to remain with the Student for the remainder of the day. In addition, in September 2001, both the Student's middle school SSN teacher and a paraprofessional filed Division of Worker's Compensation Employer's First Reports of Injury in connection with injuries they received as a result of the Student's behavior.<sup>3</sup>

28. In the fall of 2001, the Student's behavioral problems had increased in severity over previous years, in part because the Student was larger and stronger. Students and teachers were fearful of being injured by the Student and the Student's conduct was disruptive and distracting.

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<sup>3</sup> Between April 2000 and September 2001, a total of seven Employer's First Reports of Injury were filed by staff and teachers of the District as a result of injuries sustained in interactions with the Student.

29. On October 24, 2001, the Student's IEP team conducted a manifestation review and determined that the Student's behavior was a manifestation of her disability.

30. Also on October 24, 2001, the team completed the IEP meeting and addressed the Student's educational placement. Based on the intervening October 16, 2001 incident, there was a change in the designated special education instructional setting for the Student and a change in the description of the special education and related services the Student would receive to insure the Student's safety and the safety of others in the school environment. The team determined that the Student would receive educational services in a segregated setting at the middle school. The services would be designed by a Severe Needs special education teacher and would be provided on a 1-on-1 basis by a tutor and paraprofessional. The IEP describes the setting as "Center or Other School/Outside the General Classroom greater than 60% of the time" and "similar to home-bound instruction." The IEP also provided that contact with the other students was to be increased as the Student demonstrated the ability to interact safely with others, a behavior specialist would be consulted as needed to design and implement a behavior plan, and the parents would receive quarterly reports at report card time.

Other decisions concerning the Student's program included a determination that the Student's school day would be reduced from full-time to a two-hour daily routine. Also, as the Student's behavior improved, the staff would utilize other environments and locations in the middle school for providing services. In addition, a peer tutor would be utilized in the segregated classroom to the extent that the Student's behavior permitted, to provide the Student with additional peer contact.

31. As determined at the October 24, 2001 IEP meeting, the Student's program was to be carried out initially in the school psychologist's office, immediately adjacent to the SSN classroom.

32. Among the individuals present at the October 24, 2001 IEP meeting was Dr. Jackson. He agreed that goals and objectives for the Student set forth in the IEP were excellent although he did not support the decision to provide segregated services to the Student.

33. The District's staff made substantial efforts between August and October 24, 2001, to address the Student's behavioral issues so as to continue her existing general education placement. For example, the District had retained Dr. Lewis Jackson in the fall of 1999 to develop a behavior support plan for the Student. The District hired him again in the summer of 2001 to work on behavior matters concerning the Student. Dr. Jackson conducted approximately three observations of the Student and met with various members of the Student's IEP team periodically between August and October 24, 2001, in an effort to complete a functional behavioral assessment of the Student and create and refine a

behavior plan for the Student.<sup>4</sup> A behavioral plan drafted under the direction of Dr. Jackson was in place in September 2001 and was adjusted periodically by Dr. Jackson in consultation with the Student's IEP team in response to ongoing events. In addition, Kenyee Jarrett telephoned and wrote to Dr. Jackson on several occasions describing behavioral incidents and requesting additional clarification and advice in dealing with the Student's behavioral issues. Further, the Student's teachers and District staff also met regularly (sometimes with the parents) in an effort to devise positive and effective ways to address the Student's ongoing behavioral problems. The District also provided ongoing training sessions for the Student's instructors.

34. Prior to arriving at its the October 24, 2001 decision to place the Student in a segregated classroom, the IEP team considered homebound services as another placement option. However, in response to a request from the parents, the team chose an in-school placement setting, with the idea that the setting would be broadened to include other environments beyond the isolated office setting as well as contact with peers, as soon as the Student's behavior was established to be sufficiently safe. The IEP team did not choose a less restrictive setting on October 24, 2001 because the team did not believe such a placement would be safe, given the Student's current behavior pattern. For example, the team felt that the Student's explosive behavior made it unsafe to place her in the SSN classroom where there were medically fragile students. The team's goal was to integrate the Student into the SSN classroom and then into regular education classrooms when her behavior was under control.

35. There was a successful precedent for removing the Student from the general education classroom for a limited period of time in the face of escalating behavioral issues. The Student had been removed from general education classes for two months as a fifth grader and had been successfully re-integrated into the general education classroom as her behavior improved.

36. Immediately following the October 24, 2001 IEP meeting, at least one additional meeting was held, on October 30, 2001, between the parents and District staff to further discuss the Student's IEP and placement. In addition, adjustments in the goals and objectives of the Student's IEP were made during November and December 2001 in response to suggestions from the parents.

37. On November 6, 2001, District staff members met to plan the Student's tutoring sessions. At that meeting it was determined that the Student's behavior plan, last revised in October 2001 with input from Dr. Jackson, would be implemented. Goals for future placement were integration into the SSN room as the Student's behavior improved, followed by gradual integration into general education classrooms. The parents, who were not invited to the November 6, 2001 meeting, objected to some of the decisions reached at

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<sup>4</sup> Dr. Jackson attempted to arrange additional observations of the Student but was informed on various occasions that she was suspended.

the meeting, when they were informed of those decisions by the Mountain Ridge principal shortly after the meeting.

38. Pursuant to the October 2001 IEP changes, the District hired a tutor for the Student and designed the Student's program, which was developed by Kennye Jarrett. The District began providing services to the Student in the segregated setting on November 12, 2001, with instruction provided in a 1-on-1 setting by the tutor and a paraprofessional. The tutor was certified by the State of Colorado to work as a substitute teacher and at the time of the hearing was nearing completion of a Master's Degree in counseling. The District selected the paraprofessional based upon the recommendation of the parents. The District attempted to gear instruction in the segregated setting toward the academic goals and objectives in the Student's IEP and to implement her behavior plan.

39. The segregated classroom in which the Student received services beginning November 12, 2001, was small with no windows, a carpet, folding table and 3-4 chairs, a mat in one corner, and a few posters. As one of the District's own witnesses testified, the facilities were certainly less than ideal.

40. The Student was without services from the District from October 11 until November 12, 2001. The delay in implementation resulted from the need to design a program for the Student and the District's difficulty in locating a tutor for the Student.

41. During the fall of 2001, Dr. Jackson's status as a full-time professor at the University of Northern Colorado as well as his other commitments and obligations sometimes made it difficult for him to respond to the District's needs and requests for advice with respect to the Student. In addition, District staff had some frustration that Dr. Jackson was not providing more explicit assistance and suggestions concerning how to deal with the Student's aggressive outbursts.

42. On November 12, 2001 the District terminated the services of Dr. Jackson, based on ongoing logistical problems in arranging meetings with Dr. Jackson and a wish to have fresh input from a different source. In notifying Dr. Jackson of this decision, the District requested that Dr. Jackson complete a promised write-up of the functional behavioral assessment he had performed on the Student.

43. In November 2001, the District began working with Colorado Department of Education consultants Janet Filbin and Cyndi Boezio (CDE consultants) concerning the Student's behavior issues, as well as with the District's own behavior specialist, Stephanie Barron. The CDE consultants observed the Student on November 30, 2001 and then met with a team consisting of Ms. Barron, Deborah Montgomery, the middle school assistant principal, the SSN teacher, the Student's previous teacher, the tutor, the paraprofessional and the Student's mother. Ms. Filbin and Ms. Boezio conducted a follow-up observation on December 18, 2001, and again met with the same individuals. On both occasions, the CDE consultants made recommendations to the team. These recommendations were

committed to writing in a March 21, 2002 report (Ex. 97). Among the recommendations were:

- Complete a functional behavior assessment that includes detailed antecedent behavior consequences to determine what things provoke negative and positive behavior from the Student; have SWAAAC team assess the Student so she has appropriate technology to meet her communication needs because her behavior is closely linked to her ability to communicate.
- Start instruction with the least intrusive prompt; decrease the amount of verbalizations used with the Student, use more gestures.
- Stick to a schedule and review it with the Student visually; use activities with clear beginnings and ends; use a timer; provide upfront information about task expectations; utilize an incremental token system with visual cues to encourage the Student to stay on task; allow the Student to exchange tokens for favored activity.
- The goal is to have the Student included with her peers as much as possible; allow a number of periods outside the small, isolated classroom, including activities that are part of her everyday routine such as computer time in the lab and PE in the gym; facilitate interactions and communications between the Student and typical peers.
- Reinforce appropriate behavior, not inappropriate behavior. Don't engage in power struggles over picking up materials the Student has thrown or direct her to time out that involves physically moving the Student. If the Student demonstrates she is unwilling to participate in a task, put the materials out of reach, turn away for a few minutes, then attempt to re-engage after a short period. Have the Student carry or push something as she walks down the hall so that she is not tempted to hit out or grab at others.

44. The District accepted the recommendations of the CDE consultants and attempted to implement them. For example, the District began videotaping the Student's tutoring sessions and reviewing those videotapes in an attempt to gain a greater understanding of antecedent behavior consequences and in an attempt to correct inappropriate staff responses. Kennye Jarrett viewed the videotapes as part of her effort to complete a functional behavioral assessment of the Student. In addition, other District employees viewed the videotapes to assist in improving instruction. Based on the consultants' determination that the level of reinforcement of the Student was too low, the team began to use pennies and to increase the frequency of reinforcement. The team also began offering choices of activities to the Student and using less intrusive prompts. Additionally, use of communication devices and visual schedules was increased.

45. Apart from the recommendations of the CDE consultants, Special Education Director Deborah Montgomery made suggestions to the staff. Overtime, Ms. Montgomery observed improvement in how the staff was dealing with the Student's behaviors and in their instructional technique.

46. In January 2002, Bonnie Gavaletz was added to the team. From that time forward, Ms. Gavaletz worked with the Student, along with the tutor and paraprofessional, and developed the educational program. Ms. Gavaletz, who is licensed to teach special education in Colorado and has a Master's Degree in special education, generally provided the direct instruction to the Student. Instruction continued to be provided in a segregated classroom, with time spent in other settings as the Student's behavior permitted.

47. From November 12, 2001 forward, although the Student began her day in the segregated classroom, other settings in the middle school were utilized, including settings such as the gym where other children were present. As reflected in the testimony of Kenney Jarrett and Deborah Montgomery, generally the Student spent approximately 50% of her day in the segregated classroom and the rest of her time in other parts of the building. In addition, a peer tutor came to the segregated classroom to be with the Student when her behavior permitted.

48. After the Student was moved to a segregated classroom in November 2001, she continued in an unpredictable way to engage in the some of the same disruptive and dangerous behaviors that led to her removal from the general education classroom.

49. In December 2001, the District requested an evaluation of the Student by Children's Hospital. Three reports from the evaluation were received by the District during the month of January 2002. The first of these was a January 2, 2002 Augmentative Communication and Learning Enhancement Report (Ex. 79). The Student was found to have severe expressive and receptive language delay secondary to her diagnosis of Down Syndrome, with limited ability to comprehend and respond to verbal communication that varies according to motivation and context of the interaction. The Student's prognosis for continued development of oral speech was listed as "guarded," however, the prognosis for enhancement of communication and language-learning abilities was described as "fair" with appropriate technological support and training. The report included seven detailed recommendations to be coordinated with the school team and other support networks to maximize functional outcomes. Among the recommendations were items that were already part of the District's education strategy for the Student (such as use of assistive technology tools including picture representations to ease transitions, use of social scripts and simple social stories, and providing the option of making limited choices) and other items that needed to be added to the Student's IEP as needs (such as an explicit list of communication needs and adding to the IEP specific activities and locations in which social skills are to be taught).

50. A Children's Hospital Medical Evaluation Summary dated January 23, 2002, of Ed Goldson, M.D. addressed prior conflicting reports of a seizure disorder. He recommended follow up to determine whether a seizure disorder exists. He also recommended consideration of medications if there was evidence of anxiety or mood instability. Dr. Golson also recommended a diet for the Student because of her excessive

weight which could make behavior management and inclusion in the classroom more difficult.

51. A Children's Hospital Psychological Evaluation was completed by licensed clinical psychologist Jennifer Hillis Epstein, Psy.D., in mid-January and received by the District on January 30, 2002. The report includes the following recommendations:

- Rehire Dr. Jackson because of his familiarity with the Student and the fact that he had developed solid behavioral programs in the past. Development of a specific plan to increase the Student's time in the school setting is essential.
- Augment tutoring with time in regular classroom, initially by starting the day in the regular classroom for 15 minutes performing highly rewarding activities so the Student can be retrained to understand school can be a pleasurable place. With success, time in the regular classroom can increase and can focus on more academic activities.
- Introduce a method of reinforcement in terms of social praise and a token system to be exchanged for tangible reinforcers.
- Use sensory integration program to deal with over-arousal issues.
- Pair high interest reinforcers with appropriate behavior.
- Consider use of an anti-depressant.

52. In a subsequently-written summary report issued after she had had an opportunity to consult with Deborah Montgomery, Dr. Epstein changed her recommendation from the use of Dr. Jackson to the use of Dr. Marsha Braden as a consultant due to issues of proximity.

53. The Children's Hospital reports were based on observations of the Student outside the school setting only. None of The Children's Hospital evaluators visited Mountain Ridge or observed the Student in her school setting.

54. On January 18, 2002, while the Student and her special education teacher, Bonnie Gavaletz, were walking in the hall at the middle school, the Student unexpectedly turned and pulled Ms. Gavaletz' hair and then slapped Ms. Gavaletz very hard. The slap left a very visible red handprint on Ms. Gavaletz' upper chest and neck, as clearly reflected in a photograph of the injury taken approximately one hour later. Ms. Gavaletz described the injury as painful, scary and traumatizing. In her nine years of teaching special education, Ms. Gavaletz had never previously been injured by a student.

55. On January 29, 2002, Bernard Maly, CDE Behavior Specialist, issued a report concerning the Student in which he made recommendations to the District. Among his suggestions were that the adults avoid power struggles with the Student, handle times when the Student is out of control as non-intrusively as possible, and discuss with the Student during her calm times how she can acceptably handle difficult times and angry feelings. In addition, the report recommended that the Student be included with typical

peers in different environments as quickly as possible. Mr. Maly also indicated “strong support” for the plan to “limit one to one instructional time to less than an hour in any given lesson.” Although at hearing Mr. Maly expressed the opinion that the Student was not really dangerous, the evidence did not reflect that he has spent extensive periods of time with the Student so that he would be aware of the full range of her behaviors.

56. On February 20, 2002, the Student started out having a good day at school. She had worked with a peer tutor, as permitted according to her behavior. As the day progressed, the Student’s special education teacher took her to a special education classroom to use the computer, an activity the Student enjoyed. Although she was within inches of Ms. Gavaletz as they walked in the hall, upon entering the classroom, the Student veered suddenly toward a medically fragile, wheelchair-bound student in the room and without provocation struck him hard in the face. Although the child was not hurt, as a result of his medical condition, the Student’s conduct could have had extremely serious health consequences for the child. Correspondence from the mother of the child who was struck to the District indicates that she was extremely concerned about the incident and held the District responsible for the safety of her child.

57. As a result of the February 20, 2002 incident, the Student was returned to the segregated classroom. Effective February 22, 2002, the Student was suspended pending a review of her educational placement by her IEP team.

58. The IEP team met on March 13, 2002. This meeting resulted in a service delivery change. Based on continuing safety concerns stemming from the Student’s behavior, the team determined the Student would be placed in an “out-of-district placement in a private separate school facility.” (Ex. 90, March 13, 2002 IEP). It was also determined that while the District pursued out of district placement option, the Student would receive homebound tutoring services. Homebound services were to be designed by the SSN teacher/specialist and were to be carried out by a tutor and a paraprofessional. Homebound services were to be provided one hour per day, to be increased as tolerated up to two hours a day.

59. No alternative private placement facilities were identified in the March 13, 2002 IEP, although one was discussed at the meeting. The recommendation for one hour per day tutoring was taken from Bernard Maly’s January 29, 2002 report. At the hearing, Mr. Maly clarified that his intent in the report was to recommend a maximum of one hour per each one-on-one session but he did not necessarily mean to limit instruction or school time to one hour per day.

60. The District investigated various out-of-district facilities as possible placements for the Student. However, as of the time of the due process hearing, none was willing to accept the Student.<sup>5</sup>

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<sup>5</sup> As of the date of oral argument in this matter counsel indicated that the Student was successfully attending school in another district.

61. Following the March 13 IEP meeting, the District and the parents discussed the implementation of tutoring services, including the possibility of providing services at a neutral site other than the Student's home. A local church was identified as an agreeable site; however, insurance problems needed to be addressed. At the conclusion of the hearing, the insurance issue had yet to be resolved and the church site was not being utilized for tutoring purposes. The District had not provided the church with a certificate naming the church as additional named insured, a requirement imposed by the church as a prerequisite for holding the tutoring sessions on church property. The evidence did not establish why the District had been unable to produce the requested certificate. The District did not offer an alternative outside-the-home instructional location to the Student.

62. The Student did not receive any educational services, tutoring or otherwise, from February 22, 2002 until May 15, 2002, when homebound tutoring began at the Student's residence and continued until June 20, 2002, for an hour per day, eventually extended to an hour and ten minutes.<sup>6</sup> The homebound tutoring during this period was developed and implemented by the Student's SSN teacher, Bonnie Gavaletz, in conjunction with Kenyee Jarrett. A paraprofessional was also available for all tutoring sessions along with a district administrator, who was present for each of the tutoring sessions as well.

63. For some time, the Student's IEPs had stated that the Student was eligible for extended school year services (ESY). In past years, the Student had attended a summer day camp at District expense. The Student did not get registered in time to participate in the same program for the summer of 2002. The parties differ on who had the responsibility to enroll the Student. The evidence did not establish the District was at fault in this regard.

64. As a result of the enrollment miscommunication, in the summer of 2002 the parents enrolled the Student in a different level program than the one she had previously attended. Although the District did not feel this program was appropriate for the Student and instead offered homebound services, when the parents expressed a preference for the day camp over homebound services, the District provided two support personnel to assist the Student at the day camp program. It appears the summer program chosen for the Student was not successful. The District believes this reflects that the program was not a good match for the Student; the parents believe the lack of success was due at least in part to a hasty and inadequate transition.

65. An IEP staffing was not convened in 2002 to specifically address the ESY issue. It had not been the practice of the parties in the past to convene an IEP staffing specifically for this purpose.

66. All of the individuals assigned by the District to work with the Student during the times at issue in this matter were legally qualified to perform their assigned functions. Although the parents expressed concern that the Student's Mountain Ridge special

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<sup>6</sup> Although the District's school year ended on May 24, 2002, the District voluntarily extended the Student's tutoring beyond the official end of the semester.

education teacher did not have necessary skills to deal with the Student effectively, the evidence did not support a determination that any of the individuals working with the Student lacked competence to perform their jobs.

67. The goal of the District at all times after the Student was initially removed from her general education classes in October 2001 was for the Student to have more peer interaction and ultimately to return to the general education classroom.

68. Supplementary aids and services provided by the District during the initial few months of the 2001-2002 school year and/or an ongoing basis, included the following:

- During the 2000-2001 and 2001-2002 school years, the District provided the Student with a paraprofessional on a full-time, one-on-one basis. The District additionally provided the services of a certified special education and regular education teachers. After her removal from the general education setting during the 2001-2002 school year, the District provided the Student with a tutor and paraprofessional who worked full-time, one-on-one with the Student during her instructional time, in addition to the services being provided by the Student's certified special education teacher. Beginning in January 2002, certified special education teacher Bonnie Gavaletz worked full-time with the Student during her instructional time, along with the full-time tutor and paraprofessional.
- The District retained numerous outside behavioral and other consultants to evaluate and assist in working with the Student, including Dr. Jackson, Bernard Maly, and experts from the Children's Hospital and the Colorado Department of Education. Additionally, the District utilized its own behavioral expert, Stephanie Barron, to work with District staff in addressing the Student's behavior issues and provided training for staff members working with the Student.
- The District, along with its consultants and on its own, conducted various functional behavioral assessments to identify and analyze behavior triggers for the Student and developed and implemented various behavior plans for the Student.
- As indicated by the Student's IEPs, the District provided the Student with direct and indirect speech/language pathology and occupational therapy services and special transportation services.
- The District provided a modified schedule to allow a gradual transition from elementary school to middle school and a modified educational curriculum developed and overseen by certified special education teachers.
- The District met with students in the Student's regular education classes to prepare them for the Student's presence in class.
- The District provided assistive technology devices, including a large key calculator, a picture/label communication board and specialized computer access.

69. As established by the testimony of Daniel Faulkner, Pastoral Ministries Coordinator at Harvest Bible Fellowship, the Student successfully participates at church, with proper behavioral support, about two hours every Sunday. The Student spends the first hour in Sunday school and spends the remaining time participating in youth activities. The Student interacts well with peers during these activities and thrives on peer interaction. Mr. Faulkner perceives no risk to other children from the Student's participation in these activities. The record did not establish that the Student's experience at church can be generalized to the school environment. In the spring of 2002, the church offered to provide tutoring space for the Student. According to Mr. Faulkner, as of the hearing dates the church remained available for tutoring purposes if the District would provide a certificate of insurance naming the church as an additional named insured.

70. After removing the Student from school in February 2002, the District contacted the Round Up Fellowship, a residential childcare facility for developmentally disabled children and adults, in an effort to locate an alternative placement for the Student. Round Up Division Director Charlie Tomkins observed the Student and felt Round Up was not an appropriate placement for the Student in part because she was not as aggressive or dangerous as other children in the program.

71. The videotapes of the Student in the segregated school setting during December 2001 and January 2002 were admitted into evidence as Exhibit 105. Included in the videotapes was an excerpted version, which is representative of the Student's behaviors while not necessarily showing all the extremes of her behavior, such as truly aggressive behavior. Incidents depicted in the excerpted tape and other tapes include hair pulling, hitting, throwing objects, and sweeping objects off the desk.

The videos show a contrast in the Student's behavior and in the quality of instruction. In certain instances, it is clear that the staff is bored and less than enthusiastic about being there. Prompts and rewards are not always consistent and, at times inappropriate, including one comment that the Student's glasses would be taken away if she did not behave. However, the videos also reflect appropriate attempts by the Student's instructors to implement the suggestions of the various consultants in addressing the Student's academic needs and behavioral issues. One excerpt of Exhibit 105 (Petitioner's Exhibit UUUUU) from December 20, is an example good, compliant behavior on the part of the Student with excellent technique on the part of an experienced teacher, Kenye Jarrett. Ms. Jarrett persuasively testified, however, that she also experienced very difficult days in her interactions with the Student when the Student was not compliant and her behavior was very dangerous and very frightening. Such behavior included instances of the Student lunging at Ms. Jarrett and grabbing at her neck and collar with both hands, scratching, biting and pinching Ms. Jarrett and pushing over furniture.

72. Dr. Jackson's final written behavior assessment of the Student, requested by the District on various occasions including November 12, 2001, was finally provided to the District on March 18, 2002, after the IEP meeting. The report included a summary of many

of the suggestions Dr. Jackson and others had previously recommended and the District had previously attempted to implement to address the Student's disruptive behaviors. Suggestions in the report included providing supplemental visual prompts; having individuals perform tasks beside the Student and give her assistance; alternating learning tasks; providing augmentative communication supports; allowing extra time in making adjustments to new situations and people; and initiating crisis prevention and intervention steps. Dr. Jackson noted that the least restrictive environment and the environment that is most appropriate for allowing the Student to acquire necessary life skills is the general education classroom. He also indicated "the District has been exceptionally open to trying to meet [the Student's] needs within typical school environments and using steps and procedures that represent the results of careful and systematic analysis of [the Student's] behavior." Dr. Jackson felt, however, that at the school level interventions had not always been conducted in an ideal manner.

As part of his report, Dr. Jackson opined that the Student's behavioral events in the middle school during the fall of 2001 were sometimes the product of the Student's motivations to do such things as escape requirements she finds uncomfortable or undesirable, to express a need for a change when she feels out of control, to obtain more desirable activities, to "test" new people, to secure attention, and to express anger and frustration with adults. However, according to Dr. Jackson, "some portion" of these events "were also the result of behavioral expectations set in motion by the adults" and "were the consequences of inconsistent and/or inexperienced program delivery." Other factors, according to Dr. Jackson, included reactions to the transition to middle school and imposed absenteeism (the ongoing suspensions). With respect to the issue of inconsistent or inexperienced program delivery, Dr. Jackson noted that a certain amount of learning time is normally required for the implementation of behavior plans and indicated he felt the plan had been "terminated prematurely."

Dr. Jackson included the following recommendations in his report. The Student needs a positive behavioral support plan modeled after those previously developed (identified by Dr. Jackson as solution focused, comprehensive) with a start-up period of sufficient duration to allow for inevitable and unavoidable mistakes and for necessary staff preparation. Movement into the general education environment must remain the goal and the plan that is developed must include explicit steps and reasonable timelines to accomplish this goal. Dr. Jackson noted that he was especially concerned about problem behavior patterns that emerged from the interpersonal relationships between the student and the special education staff. He indicated that these individuals must "know how to conduct moment-to-moment problem solving, know how to develop and implement curriculum modifications, and know how to pull back from her such that the natural controls of the general education teacher, peers, and curriculum becomes the reason she no longer strikes out at her environment." He also indicated that failure to accomplish these goals would mean that the Student would remain "dysfunctionally dependent on adult control, isolated from other human beings, and trapped within her present patterns of behavior." Dr. Jackson also felt that changing the Student's educational setting to another district or entity was not a solution and that the present special education team must be held

accountable for effectively dealing with the challenges presented by Student's needs and behaviors. He recommended additional staff training, if necessary, to allow the staff to accomplish these goals.

73. Dr. Jackson's report was based on approximately three observations of the Student during the fall of 2001 prior to October 24, his meetings during the summer and fall of 2001 with members of the IEP team, his past knowledge of the Student, and his review of a few of the videotaped tutoring sessions from December 2002. He had no direct contact with District personnel or the Student at any time after October 24, 2001 through the time of the hearing.

74. Dr. Jackson also testified at the hearing. At that time he reiterated the themes of his March 2002 report. He also focused on what he considered to be the negative impact of the District's actions in regularly suspending the Student in connection with her disruptive conduct. Dr. Jackson opined that suspensions will not change the Student's behavior; only success at school will change her behavior. While he believes that sending the Student home for the remainder of the day when her behavior has been inappropriate is acceptable, suspending her for longer periods of time, in Dr. Jackson's opinion, is counter-productive. Dr. Jackson also indicated that the Student's homebound-like or homebound instructional environment is unnatural, results in a bored child and bored adults, cannot address the Student's behavioral issues, and sets her up for more failures. According to Dr. Jackson, it is not possible to utilize a segregated setting to train the Student to behavior appropriately in an integrated setting. The segregated environment does not present the Student with sufficient incentives or models to alter her behavior and it is not possible to generalize any behavioral lessons learned in the unnatural segregated setting. Thus, according to Dr. Jackson, it is necessary to establish a measured transition plan for the Student rather than retaining the Student in isolation until she is "ready."

75. Dr. Jackson agreed that the District had provided sufficient supports and services to the Student in the initial few months of the 2001-2002 school year, but felt that the behavior program had been terminated prematurely. However, neither Dr. Jackson nor any other witness testified as to how long the behavior plan should have remained in effect. In addition, the evidence did not establish that the Student's behavior would have improved if she had been permitted to remain in the general education classroom.

76. Dr. Jackson acknowledged that District personnel, both at the administrative level and the individuals providing services at the school level, were well-meaning, sincere, and trying to do the right thing.

77. Prior to removing the Student from general education classes in October 2001, the District and the Student's instructors made diligent and good faith efforts to develop, implement, and fine-tune the Student's educational program, including implementation of Dr. Jackson's suggestions. While they did not act flawlessly in dealing with the Student and the Student's behavioral issues, District employees did act competently.

78. Although Dr. Jackson recommended that District staff back away from the Student in order to allow natural environmental factors to act as moderating influences on the Student, safety considerations made it difficult for staff members to follow this recommendation when the Student was in a setting with other students.

79. District staff members desired to mainstream the Student as fully as possible but felt that the Student's unpredictable and aggressive behavior made this difficult to accomplish.

80. In Dr. Jackson's opinion, the Student did not receive any educational benefit from homebound tutoring. This opinion is based in part on the fact that the District did not provide evidence of quantified progress. It is also based on research that, according to Dr. Jackson, indicates children such as the Student cannot gain educational benefit in a segregated setting for reasons similar to those that inhibit behavioral progress in such a setting: the segregated environment fails to provide sufficient incentives or models and any academic "learning" that does occur cannot be generalized to a real life setting.

81. Dr. Jackson's report and testimony were convincing in part but some of his criticisms were undermined by his lack of knowledge of the full measure of the District's efforts with respect to the Student and his unwillingness to acknowledge the degree to which the Student's behavior in both general and special education settings was disruptive and physically harmful to other students and staff.

For example, Dr. Jackson was unaware that from November 12, 2001 until February 22, 2002, the Student had a peer tutor in her classroom on various occasions and was spending about 50% of her time outside the segregated classroom in such environments as the gym and the SSN room, sometimes with other students. He also had only limited awareness that after his consulting position with the District was terminated, District staff working directly with the Student received training or other assistance and input from the District's behavioral specialist, from the District's special education director, and from various CDE consultants.

Additionally, Dr. Jackson was apparently unaware of, or was unwilling to acknowledge, the extent of the physical injuries that the Student had actually caused to District students and staff and the threat of physical harm that the Student presented. Dr. Jackson testified that while he agreed the Student's behavior was "definitely disruptive," he believed the seriousness of her conduct was "greatly exaggerated" and that the Student did not present "a safety issue." However, Dr. Jackson did not remember an incident in which an Explorer staff member was hit in the face and two teeth were knocked loose. He did not specifically recall that a staff member was struck hard enough to have a big red hand imprint on her chest. He also did not address the safety implications of the Student's behavior on February 20, 2002, when, without provocation, she hit a medically fragile SSN student. Dr. Jackson indicated that the Student's peers needed to learn to get along with her and respond to her and that her classmates would sort themselves out according to

which students felt comfortable interacting with her. He did not explain how this process would protect students from unprovoked attacks, particularly in light of his recommendation that the Student's instructors should back away and allow natural controls within the environment to moderate the Student's behavior.

It is apparent that Dr. Jackson's laudable commitment to inclusion and promoting the interests of the Student led him to minimize the difficulties and dangers presented by efforts to integrate the Student fully into the middle school community. As Dr. Jackson himself noted, because he was getting conflicting reports as to whether the Student was actually injuring people, he chose to ignore the dangers and difficulties presented. He decided instead he would "stay with the positive, keep everybody moving as best as possible toward our future goal, and not let those reports . . .take me too far down in terms of my thinking."

82. There was a dispute in the testimony as to who was responsible for initiating the suspension policy that was implemented with respect to the Student beginning in the fall of 2001. The District took the position that it implemented the policy at the suggestion of Dr. Jackson, who indicated the Student should be subjected to the same consequences as other students when her behavior was unacceptable. Dr. Jackson seemed to indicate that his recommendations with respect to suspensions were merely made to placate the District and were not intended to involve multi-day suspensions. The ALJ determines that the District reasonably believed its decisions in the fall and winter of the 2001-2002 school year to impose behavior-related suspensions on the Student were consistent with Dr. Jackson's recommendations regarding appropriate disciplinary policy.

83. Despite the fact that the District provided appropriate and adequate supplementary aids and services during the fall of the 2001-2002 school year and modified its regular education program, the Student's behavior did not improve and was disruptive of the educational environment to an extent that the education of other students was significantly impaired and her behavior presented a significant danger of physical injury to the staff and students of the District.

84. The District made appropriate efforts to maintain the Student in her general education classroom least restrictive environment placement during the fall of 2001. The District's decision to remove the Student from that placement as of October 24, 2001 was justified by the educational disruption caused by the Student and the danger presented by the Student to District personnel and other District students. As of October 24, 2001, when the District decided to remove the Student from the regular classroom on a temporary basis, education of the Student in the regular classroom could not be satisfactorily achieved.

85. Between November 12, 2001 and February 22, 2002, the District attempted to provide the Student with exposure to environments in the school other than her segregated classroom and also attempted to interact with peers through a peer tutoring arrangement. By taking these actions the District made appropriate and adequate efforts to provide an

appropriate placement for the Student and to mainstream the Student to the maximum extent appropriate.

86. Beginning May 15, 2002, the District provided approximately one hour per day of homebound tutoring to the Student as a substitute to her prior segregated classroom placement at the middle school. Although the February 20, 2002 incident with the medically fragile SSN student again indicated the Student's potential for dangerous conduct, the homebound tutoring placement provided by the District to the Student beginning May 15, 2002, which allowed no exposure at all to peers or to the outside world, was more restrictive than was required by the Student's behavior problems.

The District did not adequately explain why a less restrictive out-of-home placement such as the Student's church, which would have provided greater real-world exposure for the Student, could not be utilized. At hearing, the District implied, but failed to establish, that such a setting was unavailable. Testimony at hearing merely indicated that the District failed to provide an insurance certificate required by the church. However, the District did not clarify why the certificate was never supplied. In the absence of a specific explanation from someone with knowledge establishing that insurance issues had unavoidably prevented the church placement, the District's "explanation" as to why the church placement had not occurred was inadequate and was insufficient to justify the homebound setting that was actually chosen.

Additionally, the District failed to take adequate steps toward reintegrating the Student into the school community following the February 20, 2002 incident after it became evident that an out-of-district placement would not occur quickly. The District merely offered a homebound tutoring placement and had no discernible plans to alter this arrangement until the following school year. In addition, the evidence did not indicate that the District continued its behavior consultations after February 20, 2002, in an effort to further address the Student's ongoing behavioral issues.

87. From October 17 until November 12, 2001 and from February 20, 2002 until the close of the 2001-2002 school year, the District failed to offer or provide the Student with an educational placement in the least restrictive appropriate setting.

88. The Student did not receive any public education from Oct 17 until Nov 12, 2001 or from February 22 through May 14, 2002. The District did not establish that it offered the parents an appropriate placement during these time periods that the parents failed to accept.

89. Evidence regarding Student's educational progress in her segregated settings was limited. The District presented testimony that progress toward the Student's academic goals occurred during this period, however, no quantitative data was offered to support that conclusion, despite the fact that the Student's IEPs contain numerous specific quantitative measures for assessing academic progress.

89. A primary aspect of the Student's educational needs and a critical component of the Student's IEP goals and objectives is appropriate interaction with her peers in a school setting. The Student cannot make progress toward his peer-interaction goals and objectives when she is absent from the school setting for extended periods of time.

90. Because the Student continued to have exposure to the middle school community during portions of her time at school between November 12 and February 20, 2002, she had at least some opportunity to make progress toward her peer-related behavioral goals, as well as making progress toward her academic goals during that time period. During the period from May 15 ongoing because the Student had no opportunity to interact with the middle school community, she had no opportunity to progress in her behavioral and social goals. Under these circumstances whatever unmeasured academic progress the Student may have made was overshadowed by the lack of an opportunity to make behavioral progress and thus, taken as a whole, during this period of time the Student's program was not calculated to provide meaningful educational benefits and did not provide meaningful educational benefit to the Student.

91. The parents did not agree with the October 11, 2001 IEP or the March 13, 2002 IEP. As of the time of the hearing they were not necessarily opposed to a private school placement in the Colorado Springs area and were not insisting on a regular education placement for the Student, although that remained their long-term goal.

92. The District, not by way of any admission of wrongdoing on its part, has offered, without any conditions attached, 60 days of compensatory education under the October 2001 and March 2002 IEPs because of the time the Student was without any educational benefits.

## **DISCUSSION**

### **I. Scope of Review**

Pursuant to IDEA and ECEA, on state level review, the ALJ makes an "independent" decision after conducting an impartial review of the IHO's decision. 20 U.S.C. § 1415(g); 34 C.F.R. Section 300.510; Section 2220-R-6.03(11)(b)(v), (1 CCR 301-8). In the context of court reviews of state level decisions under the current and prior versions of the IDEA, such independence has been construed to require that "due weight" be given to the administrative findings below, *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), while still recognizing the statutory provisions for an independent decision and the taking of additional evidence, if necessary. *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999).

The 10<sup>th</sup> Circuit Court of Appeals has similarly held that the appropriate standard of review for district courts reviewing final administrative decisions under IDEA is to “independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence while giving ‘due weight’ to the administrative proceedings below.” *Murray v. Montrose County School District*, 51 F.3d 921, 927 (10<sup>th</sup> Cir. 1995). See also *Sioux Falls School District v. Koupal*, 526 N.W.2d 248 (S.D. 1994). It is appropriate to apply this standard by analogy at the state administrative review level.

The impartial due process hearing in the present matter spanned six days, resulted in a transcript of more than 1,000 pages and involved several hundred exhibits. Neither party presented additional evidence on review, as permitted by 20 U.S.C. § 1415(g) and 34 C.F.R. Section 300.510(b)(2)(iii). Having reviewed the entire record, the ALJ has given deference to the IHO’s findings of fact and accorded the IHO’s decision “due weight,” while reaching an independent decision based on a preponderance of the evidence.

## **II. Jurisdiction and Statutory Background**

The ALJ has jurisdiction to conduct this review pursuant to § 1415(g) of the IDEA, 34 C.F.R. §330.510(b), ECEA, Title 22, Article 20, C.R.S. (ECEA), and State Board Rule 2220-R-6.03(9)-(11), 1 CCR 301-8.

IDEA is a comprehensive federal education statute that grants disabled students the right to a public education, provides financial assistance to states to meet the educational needs of disabled students, and conditions a state’s federal funding on its having in place a policy that ensures that a free appropriate public education is available to all children with disabilities. 20 U.S.C. §1412(a)(1); *Weber v. Cranston School Committee*, 212 F. 3d 41 (1st Cir. 2000). IDEA requires the District to provide each child with a disability with a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”), tailored to the unique needs of the child through the establishment of an individualized education program (AIEP) 20 U.S.C. §1401(8); 20 U.S.C. §1412(a)(1), (5); 20 U.S.C. §1414(d).

## **III. Matters Not In Dispute**

A. The IHO determined that the burden of proof rests with the District on issues of placement, LRE and FAPE. He placed the burden of proof on the Student with respect to compensatory education. Neither party has appealed these determinations and they are therefore binding at this level of review.

B. At the due process hearing level, the Student asserted a number of procedural violations of IDEA. The IHO found certain of the alleged procedural violations had occurred (change of placement inappropriately occurred five days prior to IEP meeting) and others had not (issues related to middle school transition meetings and notices, written offer of placement, adequacy of evaluations and reports of progress, and ESY meetings).

Additionally, the IHO concluded that the procedural violations that did occur were not sufficiently egregious to constitute the denial of a FAPE. None of these determinations has been appealed and therefore these determinations are at issue in the current proceeding.

#### **IV. Issues Raised on Appeal**

##### **A. Least Restrictive Environment.**

1. The IHO concluded in his Decision that from October 17, 2001 until the end of the 2001-2002 school year the District failed to mainstream the Student to the maximum extent appropriate because the District failed to implement or utilize proper supplementary aids and services (in particular, proper behavioral supports). The IHO thus concluded the District failed to comply with the appropriate placement and least restrictive environment provisions of the IDEA. The District asserts that the IHO erred in making this determination.

2. There is no dispute that the Student is a child with a disability. The District is therefore required to provide her with a free appropriate public education in the least restrictive environment. 20 U.S.C. §1401(8); 20 U.S.C. §1412(a)(1), (5). The IDEA defines free appropriate public education as "special education and related services" which are provided at public expense, under public supervision and direction, meet state standards, and comply with the child's individualized education program. 20 U.S.C. §1401(8). Special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instruction in classrooms and other settings and physical education instruction. 20 U.S.C. §1401(25).

3. One of the policies behind IDEA is to enable disabled children to be educated alongside their non-disabled peers rather than be shut off from them, 20 U.S.C. §1412(a)(5)(A), and disabled students are to be educated in a mainstream or regular classroom whenever possible. *Gill v. Columbia 93 School District*, 27 F.3d 1027 (8th Cir. 2000); *Rowley*, 458 U.S. at 202. Thus, in addition to the FAPE requirement, the IDEA provides that states must establish procedures to assure that:

To the maximum extent appropriate children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(5)(A); see also 34 C.F.R. 300.550. Supplementary aids and services are defined, in turn, at §1401(28) of IDEA as "aids, services, and other education-related

settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . . .” As has been noted by numerous courts, these least restrictive environment provisions of IDEA create a “strong Congressional preference” for integrating children with disabilities in regular classrooms. *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993).

ECEA and Colorado regulations similarly reflect this preference. ECEA defines least restrictive environment as:

Programs used to educate a child with a disability using the delivery system most appropriately meeting the needs of the child, and, to the extent possible . . . the term means an environment in which a child with a disability is educated with children without disabilities, unless the nature or severity of the disability is such that education in regular classes with the use of supplement aids and services cannot be achieved satisfactorily, or, when provided with supplementary aids and services, the nature or severity of the disability is so disruptive that the education of other children in such classes would be significantly impaired.

Section 22-20-103(5.5), C.R.S. See also Section 2220-R-5.02 (1 CCR 301-8).

In addition to expressing this preference for placement in the least restrictive environment, both federal and state regulations define a continuum of alternative placements to be decided upon in conformity with LRE requirements. Possible placements include regular education with supports and modifications, special classes for part or all of the day, special programs on or off campus, and services in out-of-unit locations, including residential facilities, hospital or institutional settings, and home and community services. Section 2220-R-5.03(3) (1 CCR 301-8). See generally, 34 C.F.R. 300.550-552.

4. Although different federal courts have articulated various standards for determining when placement decisions comply or fail to comply with LRE requirements under IDEA, the 10<sup>th</sup> Circuit Court of Appeals has not directly addressed the question of how to define appropriate LRE compliance. See *Murray v. Montrose County School District*, 51 F.3d 921, 927 (10<sup>th</sup> Cir. 1995). The parties agree, however, that the appropriate standard to be applied in the present case in making this determination is found in *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5<sup>th</sup> Cir. 1989) (“*Daniel R.R.*”). As did the IHO, the ALJ agrees that the standard set forth in *Daniel R.R.* is appropriately applied in this case.

5. As the 5<sup>th</sup> Circuit in *Daniel R.R.* recognized, by creating a statutory preference for mainstreaming over segregated settings, Congress created a tension between two provisions of IDEA. Under the Act, “school districts must both seek to mainstream handicapped children and, at the same time, must tailor each child’s educational placement and program to his special needs.” However, because regular classes will not, in every

case, provide an education that addresses each child's special needs, "the laudable policy objective [of mainstreaming children with disabilities] must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handicapped children with a free appropriate public education." *Id.* At 1044-1045. Furthermore, "although Congress preferred education in the regular education environment, it also recognized that regular education is not a suitable setting for many handicapped children." As a consequence, "the [Act] allows school officials to remove a handicapped child from regular education . . . if the child cannot be educated satisfactorily in the regular classroom." Thus, "when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education." 874 F.2d at 1045.

As the Court additionally recognized, the difficulty comes in attempting to articulate a substantive standard for striking the proper balance between the IDEA's dual requirements for inclusion and for providing a free appropriate public education. Basing its reasoning on the language of the IDEA and bearing in mind that Congress left the choice of educational policies and methods in the hands of state and local school officials, the Court discerned a two-part test for assessing the least restrictive environment:

(1). The Court inquires first whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily.

(2). If not, and the school district intends to remove the child from regular education, the Court next inquires whether the district has included the child in the regular classroom to the maximum extent appropriate.

*Id.* at 1048.

In connection with this two-part test, the 5<sup>th</sup> Circuit identified a number of non-exclusive factors to be considered. These include, at the first stage:

(a). The steps taken by the school district to accommodate the student in the regular classroom setting, including such things as providing supplementary aids and services and modification of the regular education program;

(b). Whether the child with disabilities will receive educational benefit from regular education in terms of being able to grasp the academic components of the regular education program;

(c). Whether the child will receive overall educational benefit in the mainstreamed environment, including benefit from interaction with typical students modeling necessary skills; and

(d). What impact the disabled child's presence will have on the regular classroom environment, including disruptive behavior or excessive demands on the instructor's time

and attention. With respect to this element the Court cited the Comment from 34 C.F.R. 300.552, quoting 34 C.F.R. Part 104—Appendix, Paragraph 24, as follows: “Where a handicapped child is so disruptive in the regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore the regular placement would not be appropriate to his or her needs.” The Court additionally noted that when a disabled child requires so much teacher or aide time that the rest of the class suffers, the balance “will tip in favor of placing the child in special education.” 874 F.2d at 1049-1050.

Under the *Daniel R.R.* analysis, if it is determined that education in the regular classroom cannot be achieved satisfactorily, the next level inquiry is whether the child has been included to the maximum extent appropriate based on IDEA’s requirement of providing a continuum of services. As noted by the *Daniel R.R.* Court, “because the [Act] and its regulations do not contemplate an all-or-nothing educational system in which disabled children attend either regular or special education,” a school “must take intermediate placement steps where appropriate.” *Id.* at 1050. These include such things as placing the child in regular education for some academic classes and in special education for other classes, inclusion in regular classes for non-academic subjects only, or providing interaction with typical children during lunch and recess, with the appropriate mix varying from child to child and from year to year. The Court summarized by indicating that “if school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation” under the Act. 874 F.2d at 1050. *See also, Board of Education of Murphysboro v. Illinois Board of Education*, 41 F.3d 1162 (7<sup>th</sup> Cir. 1994).

6. Applying the *Daniel R.R.* analysis to the present case, the IHO determined that the District’s decision to remove the Student from the regular classroom to a segregated setting for safety was not justified because the Student’s behavior is not “so disruptive as to cause other children’s education to be significantly impaired if she is provided with appropriate supplementary aids and services.” The IHO further found that the District “has not mainstreamed [the Student] to the maximum extent appropriate because it has not implemented or utilized, in all instances, proper supplementary aids and services.” In reaching this conclusion, the IHO adopted Dr. Jackson’s position that the Student was not successful in the classroom because the behavioral support plan had been terminated prematurely. IHO Decision at 17. Thus, the IHO appears to have concluded that the District failed to educate the Student in the least restrictive environment because it failed to allow the behavior plan additional time to work, and therefore failed to implement or utilize proper supplementary aids and services.

7. Although the decision of the IHO is entitled to due weight, the ALJ is unable to concur with the IHO’s analysis as applied to the facts of this case up until February 22, 2002. After independently reviewing the record, the ALJ concludes instead that the District did not run afoul of IDEA’s preference for mainstreaming at any time prior to February 22, 2002. Taking into account the factors identified in *Daniel R.R.*, the ALJ concludes that as of the time the District removed the Student from the regular classroom, the District was

unable to educate the Student satisfactorily in a regular classroom. Furthermore, up until that date the District took creative and extensive steps to provide the Student with as much access to typical students as it could and therefore included the Student to the maximum extent possible during that period of time.

8. Certain factors utilized by the *Daniel R.R.* Court in assessing LRE compliance are not at issue in this case. The parties do not question whether the Student can receive educational benefit from regular education; the District removed the Student from the regular classroom solely based on behavioral considerations. Thus, the *Daniel R.R.* factors relevant to this proceeding are those listed as “a” and “d” above, relating to education in the regular classroom with the use of supplementary aids and services and disruptive behavior.

9. In terms of the *Daniel R.R.* analysis, the initial LRE issue in this case is whether the District provided the Student with sufficient supplementary aids and services to address her behavioral issues in the fall of 2001 prior to removing her from the regular classroom based on a determination that the Student could not be educated satisfactorily in a regular classroom at that time due to her dangerous and disruptive behavior.

Application of the *Daniel R.R.* analysis to this case begins with consideration of the Student’s behavior. The evidence established that the Student’s behaviors were unpredictable. At times, educators were able to identify antecedents and avert negative conduct but on numerous other occasions no precursors could be identified. As a result, the Student’s conduct was often unpredictable and was all the more frightening and potentially damaging because it caught educators and others off guard. In addition, the Student’s behavior caused real and substantial injuries to a number of individuals, including her teachers, and posed a threat of extraordinary harm to at least one of her schoolmates. Further, although the parents sought to imply that the Student’s behavior problems during the 2001-2002 school year were largely due to inexperienced personnel or substandard teaching, the evidence, including IEPs and progress reports from prior years, established that in fact the Student’s behavior has been a significant ongoing issue for a number of years, presented safety concerns in the past, and substantially impaired the ability of the Student and her classmates to learn and interact over a long period of time. Moreover, the Student’s troublesome behavior persisted despite numerous attempts by the District over the years to address these issues. When combined with the unpredictability of her behavior, as the Student grew, it became more and more difficult to restrain and control the Student’s aggressive behavior and the physical injury that she was capable of inflicting on others increased.

Taken as whole, despite the IHO’s determination to the contrary, the evidence compels a conclusion that during the 2001-2002 school year the Student’s behaviors presented a danger of significant physical injury to those around her. She in fact caused such harm to her teachers during and prior to that period of time, as reflected by the Employer’s First Reports of Injuries that were filed, by the photographic evidence of a red hand print on Bonnie Gavaletz’ chest, and by the testimony of Kenney Jarrett. These

injuries occurred while behavior plans for the Student were in place and numerous supplementary aids and services were being employed.

In addition to presenting a significant danger, the Student's conduct was also disruptive, as acknowledged by Dr. Jackson in his testimony. Even if, contrary to the ALJ's findings, the Student's aggressive behaviors did not present a danger of significant physical injury to those around her at school, it is essentially uncontroverted that those same behaviors were distracting to teachers, staff and students. These distractions, including fear of injury on the part of students and teachers, were substantial, interfered with the learning environment in the Student's classes, and significantly impaired the education of other students in the regular classroom.

10. The District took numerous steps to provide supplementary aids and services to the Student both before and after the Student was removed from the regular classroom. Many of these supplementary items were intended to and did address the Student's behavioral issues, either directly or indirectly. For example, the District provided a paraprofessional on a full-time, one-on-one basis, as well as the services of a certified special education and regular education teachers; retained numerous outside behavioral and other consultants to evaluate and assist in working with the Student and also utilized an in-house behavioral specialist; performed functional behavioral assessments in an attempt to identify and analyze behavior triggers; provided direct and indirect speech/language pathology and occupational therapy services and special transportation services; provided a modified schedule to allow a gradual transition from elementary school to middle school; provided a modified educational curriculum developed and overseen by certified special education teachers; met with students in the Student's regular education classes to prepare them for the Student's presence in class; and provided assistive technology devices, including a large key calculator, a picture/label communication board and specialized computer access.

11. Contrary to the conclusion of the IHO, the supplementary aids and services provided by the District were substantial and sufficient. The IHO did not directly address any of the above-listed supplementary aids or services. Nor did he specifically find that any or all of them were inadequate. Relying heavily on the testimony and report of Dr. Jackson, the IHO merely determined that Dr. Jackson's behavioral plan in place for eight weeks in the fall of 2001 was terminated prematurely. Yet, as the District has noted, neither Dr. Jackson nor any other witness testified as to how long the behavior plan should have remained in effect. Nor was there any evidence that established the Student's behavior would have improved if the Student had remained in the general education classroom.

Although Dr. Jackson asserted the Student should have been allowed to remain in the regular education setting longer while the behavior plan was fine-tuned and became effective, his assessment of the possible benefits versus the potential risks of such a course of action is suspect. Dr. Jackson was not fully aware of the scope of the Student's disruptive behaviors or the extent of the injuries that had been caused by the Student's conduct in the fall of 2001 and other times. As Dr. Jackson acknowledged at hearing,

rather than investigating the conflicting reports he received in the fall of 2001 as to whether the Student was actually causing injuries to individuals at school, he chose to accentuate the positive and not let the reports of behavioral disruptions discourage him.

Furthermore, as Dr. Jackson also acknowledged in his testimony, the supports provided by the District were appropriate. As he also acknowledged at hearing, and as the evidence established, the District acted in good faith in the fall of 2001 in attempting to maintain the Student in an inclusive setting and in attempting to deal with her behavioral issues. Thus, the District's efforts to accommodate the Student and address her behavioral problems were not mere token gestures. On the contrary, in the fall of 2001, the District, acting through qualified educational personnel, made sincere, determined and extensive efforts, as evidenced by the array of supplemental aids and services described above, to tackle the very difficult problems presented by the Student's conduct at school. These efforts included ongoing attempts over a period of eight weeks to develop, implement and fine-tune the Student's behavioral plan, as evidenced by regular staff meetings and consultations concerning behavior issues and ongoing staff efforts to obtain additional information and suggestions from Dr. Jackson and others.

12. Despite the District's extensive efforts, the Student's disruptive and dangerous behaviors persisted. Without any indication of improvement over an eight-week period, the District had little basis for determining the Student's behavioral issues would resolve in the general education classroom. Furthermore, the decision to remove the Student from the regular classroom to a segregated setting for a limited period of time and then re-integrating her into the regular education setting as her behavior warranted had been successful in the past. In light of all these factors, the ALJ agrees with the District that it was not required to retain the Student in her regular education setting for an open-ended period of time with the hope that her behavior problems might improve. As of October 24, 2001, the District was unable satisfactorily to educate the Student in the regular classroom, even with the use of supplementary aids and services, due to the disruptive nature of the Student's behavior. The District's decision in the fall of 2001 to remove the Student on a temporary basis from the regular education classroom was thus not inconsistent with the IDEA's preference for inclusion.

13. Having determined under the *Daniel R.R.* analysis that the District's decision in the fall of 2001 to remove the Student from regular education classes on a temporary basis did not violate the LRE provisions of IDEA, the next issue to be addressed is whether the Student's subsequent placements mainstreamed the Student to the maximum extent appropriate. The ALJ concludes that the Student's placements were in compliance with this requirement until February 22, 2002 and failed to comply with this requirement thereafter until the end of the school year.

14. The Student's initial placement following her removal from the general education classroom in October 2001, was instruction developed by the SSN teacher provided on a one-on-one basis in a segregated setting for two hours per day. A qualified tutor and a qualified paraprofessional initially provided instruction to the Student, with some

assistance from the SSN teacher. Beginning in January 2002, a certified special education teacher was made part of the team and became the primary direct provider of instruction. As conceded by District witnesses, the instructional setting, a small, windowless office segregated from the rest of the middle school student population, was not ideal. However, consistent with the District's goal of moving the Student back to an inclusive setting as soon as her behavior would allow, the placement included use of other settings in the middle school as permitted by the Student's behavior. Thus, the Student spent approximately 50% of her school time outside the small classroom in such environments as the gym and using the computer in the SSN room. In addition, a peer tutor came to the segregated classroom when the Student's behavior permitted.

From November 2001 until February 20, 2002, incidents of disruptive behavior did not subside. The Student continued in an unpredictable way to engage in the same disruptive and dangerous behaviors that had led to her removal from the general education classroom in October 2001. The District, however, did not merely rest on its decision to remove the Student from the general education classroom as a "solution" to the Student's behavioral problems. Instead, the District obtained medical and behavioral consultations from The Children's Hospital, as well as behavioral consultations from CDE. In addition, the District enlisted its own behavioral specialists to work with the Student's team. The District was receptive to the suggestions made by these consultants. Some of the recommendations made from these sources were already being implemented by the District and others were implemented when received.

The Student's placement from November 2001 until February 22, 2002, was appropriate in light of the Student's continuing behavior issues and the District's ongoing efforts to address the that behavior with the use of supplementary aids and services so that the Student could be returned to a full-time inclusive setting as quickly as possible.

15. The parents rely on the testimony of Dr. Jackson, Bernard Maly, Dan Faulkner, Charlie Tompkins in support of their position that the Student was not genuinely dangerous or violent such that placement in a segregated setting was justified. However, the testimony of these individuals does not overcome the evidence that the Student, in fact, caused significant injuries to teachers and presented a danger of significant injuries to others in the school environment. Additionally, the evidence did not establish that these individuals ever observed the Student on a bad day.

With respect to the specific testimony cited, as previously noted, Dr. Jackson's assessment of the dangers presented by the Student is suspect because Dr. Jackson affirmatively chose not to investigate conflicting reports he was receiving concerning possible injuries caused by the Student at school. Mr. Tompkins' testimony that the Student was not an appropriate candidate for the Round Up Fellowship setting in part because she was not as aggressive or dangerous as the children in the program provides little information as to whether the Student was too dangerous for a placement in a regular education classroom run by the District. Mr. Faulkner's testimony concerning the Student's success in Sunday school settings certainly established that in at least one non-public

school setting, the Student was able to function and interact safely and quite effectively. However, given the Student's long history of behavioral issues at the District while interacting with many different teachers and children, it is difficult to know how this experience relates to the Student's conduct at school. Because the ALJ is unwilling to conclude (and the parents have not asserted) that all of the Student's teachers at the District have been incompetent and all of her programs over the years have been ill-advised, the ALJ determines that the Student's behavior with Mr. Faulkner's program is not readily transferable to the District's public school setting. Finally, the evidence did not reflect that Mr. Maly has spent extensive periods of time with the Student such that he would have had an opportunity to observe the full range of her behaviors.

The parents also maintain that the District failed to provide the Student with appropriate supplemental aids and services prior to removing her from the general education classroom. Specifically, the parents asserted that the Student's problems during the 2001-2002 school year were due largely to the District's failure to carry out Dr. Jackson's behavioral plan. The ALJ has found, however, that the District, through its qualified instructors and other personnel, made diligent, good faith efforts to develop, implement and fine-tune behavior plans for the Student, including implementation of Dr. Jackson's suggestions and on-going consultations with him and other. The fact that in the fall of 2001 the District was not successful in turning around the Student's behavior does not mean that the District failed adequately to implement Dr. Jackson's program; it means, instead, that despite good faith efforts to follow and implement the plan, the Student's behavior unfortunately did not improve. Further, contrary to the parents' arguments, the fact that the District sought additional consultations and obtained reports from those consultants does not indicate the District was failing the Student. The District was instead renewing its attempts to resolve the Student's behavioral issues. The District was receptive to the suggestions in the reports. Furthermore, in certain circumstances the reports included recommendations that the District had already implemented.

16. In contrast to her placement from November 12, 2002 until February 22, 2002, the Student's placements from February 22, 2002 until the end of school, failed to comply with the IDEA's requirement that the Student be mainstreamed to the maximum extent appropriate.

From February 22, 2002 until March 13, 2002 the Student was suspended pending an IEP meeting as a result of the incident involving the Student's unprovoked attack on a medically-fragile wheelchair-bound student in the SSN room. Following the March 13, 2002 IEP meeting, based on continuing safety concerns, the team determined the Student would be placed in an out-of-district placement in a private separate school facility. While the District pursued out of district placement option, the Student was to receive homebound tutoring services one hour per day, to be increased as tolerated up to two hours a day.

In fact, however, the Student received no services at all until May 15, 2002. The District, up through the date of the due process hearing, was unable to identify an out-of-District placement that was appropriate and willing to accept the Student. The parents

preferred a neutral setting outside the home as an interim, less restrictive setting than the homebound placement identified by the District and suggested a church as an alternative. The church was willing to provide space if the District provided proper insurance documentation. The District had no objection to the church location but never supplied complying insurance documentation and also failed to provide an alternative outside-the-home instructional location. In-home tutoring finally began on May 15, 2002 and continued until June 20, 2002 when the Student began summer camp with District aides assisting.<sup>7</sup>

In contrast to the in-school placement from November 12, 2002 through February 22, 2002, the Student's homebound tutoring involved only one location—her home, and did not include exposure to other settings or association with peers. In addition, the District had no discernible plans to alter this arrangement until the following school year, short of its up-until-then unsuccessful efforts to locate an out-of-district placement. There is also no indication the District continued its behavioral consultations during this period time in an effort to find a better way to deal with the Student's behavioral issues so that a reintroduction into the school community could be facilitated.

The District's placement of the Student from February 22 through the end of school was simply inadequate to meet the least restrictive environment and continuum of placement requirements of IDEA and ECHA. The District kept the Student out of school completely from February 22 through March 13 without an offer of placement and thereafter offered a placement that, even in light of the Student's behavioral issues, was inappropriately restrictive. Even assuming, without deciding, that it was appropriate to remove the Student from the school setting following the February 20, 2002 incident, at a minimum a neutral, out-of-home setting for tutoring was required at that point. Such a setting would at least allow the Student to have exposure to the outside world and to individuals other than her family and instructors and would allow her to receive instruction in a context other than her home environment. The District, in fact, agreed to such a setting in principle, but failed to take adequate actions to effectuate such a placement. Although the District contends that insurance issues prevented the church placement, it failed to provide any explanation for its inability to provide the church with the necessary documentation. The District also failed to provide alternative out-of-home locations.

The District does not contest the fact that homebound tutoring is an extremely restrictive placement. It asserts, however, that the setting was intended to be temporary while a less restrictive out-of-district placement could be located. This argument is unconvincing. The District may not, for months on end, delay providing an appropriate placement for a Student while it searches for a way to hand off a difficult problem to another district or entity. Even if all parties were in agreement that an out-of-district private placement was the appropriate next step, the District had an obligation to provide an interim

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<sup>7</sup> Although there was a miscommunication regarding ESY camp registration, the evidence did not establish the District was at fault for this problem, and the parents chose the available day camp program over home tutoring beginning June 20, 2002. Thus, any issue concerning appropriate placement after the end of the 2001-2002 school year is not attributable to the District.

placement in the least restrictive environment, which in this case was not the Student's home. This obligation was heightened by the fact that the District's search for an out-of-district placement was unsuccessful for such an extended period of time, and the District had no plans for a reassessment until the following school year.

In light of all the above factors, the ALJ concludes the Student was not mainstreamed to the maximum extent appropriate from February 22, 2002 until the end of the school year.

## **B. Free Appropriate Public Education**

1. The IHO concluded that the Student's homebound and homebound-like services did not provide her with any educational benefit. He therefore concluded that the District failed to provide a free appropriate public education to the Student from October 17, 2001 until the conclusion of school for the 2001-2002 school year.

2. As noted above, IDEA requires the District to furnish each child covered by the Act with a free appropriate public education consisting of special education (specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability) and related services in compliance with the child's individualized education program. 20 U.S.C. §1401(8), (25).<sup>8</sup> Through this requirement, the IDEA provides each child with a disability with a basic floor of educational opportunity, *Rowley, supra*. A school district provides this basic floor of opportunity and satisfies the minimum requirements of the IDEA by providing a child with a disability with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. The school district is not required to maximize educational opportunities or provide the best possible education, *Mather v. Hartford School District*, 928 F. Supp. 437 (D.Vt. 1996), but must offer a program calculated to provide more than a trivial educational benefit to the child, *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), and that is likely to produce meaningful progress. *Mather* at 445-6; *Board of Education v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986). In evaluating whether progress is being made, consideration must be given to the unique needs of the child with a disability, including behavioral and emotional growth, when applicable. *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458 (9<sup>th</sup> Cir. 1996).

As established by *Rowley*, a FAPE is provided if, first, there has been compliance with the procedural requirements of the IDEA and, second, the IEP developed pursuant to these procedures is reasonably calculated to enable the child to receive educational benefits.

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<sup>8</sup> ECEA regulations also require school districts to provide covered children with a free appropriate public education and define a FAPE in a manner similar to the IDEA and its implementing regulations. Section 2220-R-5.01.

In this case, there are no issues before the ALJ as to procedural violations because the IHO's determinations in this regard have not been appealed. There are also no issues raised as to whether the IEPs developed for the Student (other than the placements reflected in the IEPs as discussed above) were reasonably calculated to enable her to receive educational benefits. Instead, the issue is whether, in light of the Student's placements after October 2001, the Student's IEPs could be implemented in such a manner as to provide educational benefit to the Student. The ALJ concludes the District provided the Student with a FAPE from November 12, 2001 through February 22, 2002, during the time the Student was receiving services in a segregated educational services at Mountain Ridge, but failed to provide the Student with a FAPE from February 22, 2002 until the close of school for the semester. The District also failed to provide the Student with a FAPE during the period October 17 through November 11, 2001, when the Student had been removed from general education and her segregated in-school placement was not yet available.

3. An individualized education plan ("IEP") is a written statement for each child with a disability that is developed, reviewed and revised in accordance with the requirements of the IDEA. 20 U.S.C. §1414(d)(1)(A). Each IEP must include "a statement of the special education and related services and supplementary aids and services to be provided to the child." 20 U.S.C. §1414(d)(1)(A)(iii). In order to provide a FAPE, special education services must be provided in conformity with the IEP. 20 U.S.C. §1401(8)(d); 34 C.F.R. 300.13(d).

It is undisputed that the Student's behavior problems have interfered over a long period of time with her educational progress. It is also undisputed that an important ultimate goal for the Student is a return to the general education classroom where she can enjoy the benefits of social interaction with and learning from typical children of her own age.<sup>9</sup> Recognition of the importance of peer interaction in a school setting is reflected in the Student's IEPs. For example, in addition to the various identified academic needs, goals and objectives contained in her October 2001 and March 2002 IEPs, those IEPs list numerous needs that can only be met when the Student is able to interact with her peers in a school setting, including: learning to adapt to changes in schedule with adult and peer assistance; learning from peer and adult models; developing compliant behavior in the school environment; having positive interactions with peers in school social settings; and establishing social relationships with peers to motivate successful and positive educational and social interaction. Similarly, goals and objectives in the Student's IEPs that can only be achieved when the Student is able to interact with her peers in a school setting include: successfully using communicative behaviors in a social context that are associated with expectations of grade-level peers; actively and safely participating in age-appropriate peer

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<sup>9</sup> The parties differ on how these goals can be achieved. The District asserts that before the Student can return to the classroom her behavior must improve. The parents, through Dr. Jackson, assert that the Student can only learn to interact positively and appropriately with her peers when she is in contact with them; they maintain that no improvement in the Student's behavior toward peers can be generalized from a segregated environment.

and classroom activities; and actively and safely following peers during activities and transitions.

4. The issue raised by the parties in this case is whether, in light of these goals and objectives that require peer interaction in a school setting, the Student nevertheless received educational benefit in her segregated educational settings following October 17, 2001. The District asserts it presented uncontroverted evidence of academic progress. The parents assert that no quantitative evidence of such progress was presented and, in any event, any academic progress the Student may have made in the segregated setting is meaningless because it cannot be generalized and no true progress can be made on any of the Student's IEP goals and objectives outside the general education classroom setting.

The evidence established that the Student made academic progress in the segregated settings. However, despite numerous quantitative measures for the Student's academic goals and objectives listed in her IEPs, the District presented virtually no quantifiable evidence about the Student's academic successes in those settings. Thus, it is difficult to evaluate the extent of the Student's academic progress. Additionally, the ALJ concludes that a critical component of the Student's IEP goals and objectives is appropriate interaction with her peers in a school setting and that academic achievement in the absence of any peer interaction over an extended period of time is unlikely to result in result in meaningful educational benefit for the Student.

Weighing the Student's identified but unquantified academic achievements along with the issue of peer interaction and after giving due weight to the decision of the IHO, the ALJ nevertheless concludes that while the Student was in her in-school segregated placement she achieved meaningful academic benefit. During that period of time, the Student's educational program resulted in some academic progress, the Student had some opportunity to interact with peers, and efforts were made to reintroduce the Student to school life in a variety of settings within the middle school. In this environment the Student had a meaningful opportunity to make progress toward both critical components of her goals and objectives—academic and appropriate behavior with her grade-level peers. She thus had an opportunity to achieve more than a trivial educational benefit and did make academic progress.

In contrast to possibility for meaningful progress in her in-school setting, the Student's homebound tutoring placement in the spring of 2002 provided no opportunity at all to make progress toward a critical component of her goals and objectives—interaction with and development of appropriate social and behavioral skills with peers. In addition, although the District considered the homebound placement to be temporary, the District failed to make adjustments in the isolated homebound situation when it became apparent that an alternative out-of-district placement was unlikely to materialize quickly. In fact, the District had no plans to make any changes (and, thus, no plans to address the lack of peer interaction) until the following school year. Consequently, the Student remained in her "temporary" isolated setting with no opportunity to make progress toward her social and

behavioral goals and objectives with respect to peers for the better part of a semester—from February 22, 2002, when she was removed from the middle school until May 15, 2002, when in home tutoring began and from May 15 forward through the close of school. Under these circumstances, whatever unquantified academic progress the Student may have achieved in the homebound setting was insufficient to overcome her inability to make any progress in the critical area of peer relationships. The Student’s educational program during this period of time was thus not calculated to provide more than a trivial educational benefit, was unlikely to produce meaningful benefit, and did not in fact produce meaningful benefit to the Student. *County of San Diego v. California Special Education Hearing Office, supra; Rowley, supra; Hall v. Vance County Board of Education, supra; Polk v. Central Susquehanna Intermediate Unit 16, supra.* Consequently, the District failed to provide a FAPE to the Student from February 22, 2001 through the end of the 2001-2002 school year.

5. The parents assert the in-school segregated setting failed to provide a FAPE, based largely on the testimony of Dr. Jackson. Their arguments in this regard are unconvincing. Dr. Jackson’s testimony concerning the inability of the Student to make progress in this setting was unpersuasive because it was based in part on an inaccurate understanding of the extent to which the District was attempting to expand the Student’s contacts with peers and the extent to which the Student was exposed to environments outside the segregated classroom during this period of time, including the general education classroom. Furthermore, to the extent that Dr. Jackson based his opinion on an underlying determination that educational progress is possible only in a general education setting, the ALJ agrees with the District that such opinion is inconsistent with the continuum of placements concepts found in IDEA and ECEA. The evidence established that in connection with the Student’s in-school segregated setting, the Student made some academic progress and additionally had exposure to the school community and peer contact such that progress toward the Student’s goals with respect to peer interaction was possible.

Under these circumstances, the District provided the Student with a FAPE during the period November 12, 2001 through February 22, 2002.

6. The District asserts that it provided a FAPE to the Student in the homebound setting. This assertion is also unconvincing. Although the Student’s instructors testified that the Student made academic progress in the homebound setting, their testimony did not reference the Student’s quantified IEP goals and objectives in a meaningful way so as to permit independent evaluation of such asserted progress. In addition, the Student’s teachers did not indicate the Student made progress in her social and behavioral goals with peers, nor could they in light of the fact that the Student had no peer contact during this period of time. As reflected in the Student’s most recent IEPs, a substantial component of this particular Student’s goals and objectives is learning to interact with her peers. The Student’s inability to make progress toward her peer-related IEP goals and objectives in the extended homebound setting, which prevented any peer interaction, overshadowed whatever unquantified academic progress she may have made during that time, in light of

the overall importance of her goals concerning peer relationships.

The District also contends that reliance on Dr. Jackson's testimony concerning the inability of the Student to make progress in an isolated setting is misplaced in part because Dr. Jackson's opinions are essentially ideological and are not based on the Student's specific circumstances. Although the ALJ has concluded Dr. Jackson's conclusions are suspect with respect to the Student's segregated in-school setting in part because he did not take into account efforts made by the District to expand the Student's peer interactions and physical movement within the school building, his understanding of the nature of the homebound placement was accurate. In contrast to the school setting, the Student's homebound placement was completely isolated without any opportunity to interact with peers. Without acceding to Dr. Jackson's overarching opinion that educational progress is never possible in a restricted setting, the ALJ is satisfied, consistent in part with Dr. Jackson's opinions, that because improvement in this particular student's ability to interact with her peers is a crucial part of her educational program, she was unable to make meaningful progress toward that goal in the context of an extended homebound placement without peer contact.

In light of these factors, the ALJ concludes the District failed to provide a FAPE to the Student from February 22, 2002 until the end of the 2001-2002 school year.

### **C. Compensatory Relief.**

1. The ALJ has determined that, contrary to the conclusions of the IHO, the Student's in-school placement from November 12, 2001 until February 22, 2002, complied with the FAPE and LRE provisions of IDEA and ECEA. The ALJ has also determined, however, that the District failed to comply with the FAPE and LRE requirements of IDEA and ECEA with respect to the Student's homebound placement from May 15, 2002 until the end of the 2001-2002 school year and also failed to comply with these requirements from October 17, 2001 until November 12, 2001 and from February 22, 2002 until May 15, 2002, during the period of time when the District failed to provide any educational services to the Student. The period of lack of compliance is approximately four months.

2. The Student suffered a substantial educational deprivation as a result of the District's actions. Thus, an award of compensatory education is appropriate. *Urban v. Jefferson County School District R-1*, 89 F.3d 720 (10<sup>th</sup> Cir. 1996).

3. Although the Student is apparently no longer attending school in the District, compensatory education may still be provided in the form of an order requiring the District to provide reimbursement to the subsequent district. Reimbursement to the subsequent district would be for services purchased during the later placement to compensate for services the District should have provided in the first instance.

4. Several issues arise in ordering compensatory education in this case. As stated, the Student apparently is now receiving educational services through another district. Additionally, at the time of the hearing the parents sought ultimate mainstreaming

but were not insisting on such a placement immediately and the ALJ is unaware of the nature of the Student's current placement. Under these circumstances it is not possible to order a specific type of compensatory education. It is therefore most appropriate to identify a specific maximum number of hours of compensatory education services to which the Student is entitled and allow a determination to be made at a later time as to the nature of those services. Thus, the Student's existing or future IEP team shall be permitted to determine, based on the Student's then-existing educational and related circumstances, whether to utilize the compensatory educational services made available pursuant to this decision.

5. The ALJ concludes the Student is entitled to a maximum of 160 hours of compensatory educational services (representing two hours per day for four months with an average of 20 school days per month). Thus, the District will be obligated to pay for a maximum of 160 hours of special education services to be provided to the Student by or through her current or subsequent district within three years of the date of this order for the purpose of addressing the Student's special education needs, subject to the following terms and limitations:

a. Such special education services shall be provided to the Student only if the Student's IEP team agrees that such services are appropriate and warranted in light of the Student's then-existing educational placement, schedule and special education needs and circumstances.

b. Such special education services shall be provided to the Student within three years from the date of this order. The District shall not be responsible for reimbursement for any special education services provided to the Student by another district after that date.

c. To the extent possible, the compensatory services shall be in addition to services that would normally be received for future school years and in addition to ESY services to which the Student might otherwise be entitled.

d. Such services may include, but are not limited to, tutoring, additional aides, supplementary aids and services, and behavioral consultations.

e. With respect to any tutoring, additional aides, behavioral consultations or other similar services provided to the Student pursuant to this order, the Student's then-current school district shall hire a qualified individual to provide services to the Student pursuant to customary procedures utilized by the then-current district when it provides such services. The District shall then be billed for costs incurred by the Student's then-current district in providing the services to the Student and the District shall promptly reimburse such costs to the then-current school district.

## **CONCLUSIONS OF LAW**

The ALJ enters the following conclusions of law:

1. The District provided the Student with a free appropriate public education in the least restrictive environment from August 22, 2001 through October 17, 2001 and from November 12, 2001 through February 22, 2002.

2. The District failed to provide the Student with a free appropriate public education in the least restrictive environment from October 17, 2001 until November 12, 2001 and from February 22, 2002 through the end of the 2001-2002 school year.

3. The Student is entitled to compensatory education as set forth in the order below.

### **ORDER**

1. The IHO's award of compensatory education must be amended in light of the ALJ's determination that the District provided the Student with a free appropriate public education in the least restrictive environment from August 22, 2001 through October 17, 2001 and from November 12, 2001 through February 22, 2002, and in light of the fact that the Student is no longer receiving educational services from the District. In place of the IHO's compensatory education award, it is ordered that the District shall be obligated to pay for a maximum of 160 hours of special education services to be provided to the Student by or through her current or subsequent district within three years of the date of this order for the purpose of addressing the Student's special education needs, subject to the following terms and limitations:

a. Such special education services shall be provided to the Student only if the Student's IEP team agrees that such services are appropriate and warranted in light of the Student's then-existing educational placement, schedule and special education needs and circumstances.

b. Such special education services shall be provided to the Student within three years from the date of this order. The District shall not be responsible for reimbursement for any special education services provided to the Student by another district after that date.

c. To the extent possible, the compensatory services shall be in addition to services that would normally be received for future school years and in addition to ESY services to which the Student might otherwise be entitled.

d. Such services may include, but are not limited to, tutoring, additional aides, supplementary aids and services, and behavioral consultations.

e. With respect to any tutoring, additional aides, behavioral consultations or other similar services provided to the Student pursuant to this order, the Student's then-

current school district shall hire a qualified individual to provide services to the Student pursuant to customary procedures utilized by the then-current district when it provides such services. The District shall then be billed for costs incurred by the Student's then-current district in providing the services to the Student and the District shall promptly reimburse such costs to the then-current school district.

4. In light of the fact that the Student is no longer receiving services from the District all other aspects of the relief granted by the IHO are vacated.

DONE AND SIGNED

December \_\_\_\_\_, 2003

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JUDITH F. SCHULMAN  
Administrative Law Judge

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above Agency Decision was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

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on this \_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Secretary to Administrative Law Judge