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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WALTER COVINGTON, DRUSCILLA
COVINGTON, as parents and
Guardians ad Litem of Student
WAID COVINGTON,

No. 2:07-cv-01811-MCE-GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER

YUBA CITY UNIFIED SCHOOL
DISTRICT,

Defendant.

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This case arises from a dispute regarding the provision of educational services to Plaintiff Waid Covington ("Student"), a child with special educational needs. Student, along with his parents and Guardians ad Litem, Plaintiffs Walter Covington and Druscilla Covington ("Parents" or "Plaintiffs" unless otherwise indicated) have sued the Yuba City Unified School District ("District") for alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1401, et seq. ("IDEA") in connection with the District's provision of educational services.

1 Plaintiffs' dispute was originally adjudicated through a
2 four-day due process hearing conducted through the auspices of
3 the California Office of Administrative Hearings, Special
4 Education Division ("OAH"). Through the present action,
5 Plaintiffs take issue with most of the findings made by the
6 Administrative Law Judge ("ALJ") assigned to hear that
7 proceeding.

8 The District now moves for summary judgment on grounds that
9 the preponderance of the evidence supports the ALJ's findings,
10 with the exception of the ALJ's determination that the District
11 did not provide a Free And Appropriate Public Education ("FAPE")
12 to Student, as required by the IDEA, for the period between
13 August 2005 and January 2007. Plaintiffs, for their part, have
14 filed a cross motion for summary judgment seeking to overturn the
15 ALJ's decision except with regard to the conclusion that no FAPE
16 was offered during the aforementioned 2005-2007 time period. For
17 the reasons set forth below, the Court concludes that the ALJ's
18 findings are proper and should be affirmed.

19
20 **BACKGROUND**

21
22 In October of 2000, when Student was eight years old and in
23 the second grade, the District determined he was eligible for
24 special educational services on grounds that he exhibited both
25 emotional disturbance and specific learning disability.

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1 Thereafter, in February of 2001, Student entered a program for
2 emotional disturbed children operated by Sutter County in Live
3 Oak, California, where he remained until he completed fifth grade
4 at the conclusion of the 2003-04 academic year. Student then
5 attended the District's Andros Karperos Middle School ("AK") in
6 Yuba City for sixth grade during 2004-05, and for the beginning
7 of seventh grade in the Fall of 2005. Student's parents removed
8 him from AK on or about November 17, 2005, and the following day,
9 they unilaterally enrolled Student at the Advent Youth Home
10 ("Advent"), a sectarian, non-public residential school facility
11 operated by the Seventh Day Adventist Church and located in
12 Calhoun, Tennessee.

13 Prior to the upcoming 2005-06 school year, an Independent
14 Educational Program ("IEP") team meeting was conducted for
15 Student on June 9, 2005, during which the District outlined its
16 proposed placement, support and services for Student as a seventh
17 grader at AK. The IEP determined that Student had unique needs
18 in the areas of written expression, mathematics, and behavior.
19 Special education support was to be provided for over 70 percent
20 of Student's school day, with the remainder occurring in a
21 "mainstream" general education environment. Student was assigned
22 a credentialed special education teacher, Jeff Kuhn, who had over
23 five years' experience teaching or working with students having
24 emotional disturbances.¹ Mr. Kuhn was assisted by an aide,
25 making the adult-to-student ration only 1:3-4.

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28 ¹ Mr. Kuhn taught Student's special day class during the
entire time Student was enrolled at AK.

1 The behavioral support component of Student's IEP² included
2 a recommendation that school staff assist Student in identifying
3 his frustrations as they occurred, and allowing him to take
4 breaks in designated campus areas (like the library or
5 counselor's office) where de-escalation could occur in a neutral
6 setting. The ALJ determined, at least at the time of the June
7 2005 IEP, that Student's behavioral support plan had already been
8 implemented for over three months with favorable results.

9 According to Plaintiffs, shortly after starting seventh
10 grade, Student began experiencing increased anxiety. He
11 performed little academic work, and experienced significant
12 behavioral problems which included a practice of leaving the
13 classroom, and even the AK campus, whenever he became stressed or
14 frustrated. The District attributed this to the cyclical nature
15 of Student's bipolar condition, which it characterized as
16 entailing good days and bad days, with mood swings.

17 Between September 8 and November 17, 2005, Student ran away
18 from AK on at least five such occasions. Increasingly concerned
19 by such behavior, Parents asked that an IEP meeting be convened
20 for November 3, 2005, after Student had left the school premises
21 three times.

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26 ² This behavioral support component was allegedly based on
27 25 days of data collected in January and February of 2005
28 concerning Student's noncompliant, disruptive, and aggressive
behavior, data which revealed that Student was not exhibiting
significant aggressive behavior.

1 During the meeting, Parents requested that their son be placed at
2 Advent (See Pls.' Mot., 17:15-16 (Parents "expressed their desire
3 to place their son at Advent Home", and "provided literature and
4 cost information..."; see also Pls.' Opp'n, 16:8-10 (noted
5 desire, if not "specific intent" for Student's placement at
6 Advent)). The District denied Parents' request and further
7 denied an alternative request that Student be returned to the ED
8 program in Live Oak. Aside from changing a writing class,³ the
9 District did not discuss any additional revisions to the IEP's
10 goals, services, accommodations or behavioral support plan during
11 the November 3, 2005 meeting. It believed a continuing trial-
12 and-error process was indicated given Student's bipolar condition
13 and his medication changes, which the District believed
14 contributed to his adjustment difficulties more than any failure
15 to implement appropriate behavioral supports.

16 Student proceeded to leave AK on two more occasions after
17 the November 3, 2005 IEP hearing. On the second occasion, which
18 occurred on November 17, 2005, Student became angry and
19 frustrated and ultimately left campus. He was subsequently
20 apprehended by the police and taken to a Sutter County mental
21 health facility after purportedly telling the officers that they
22 would have to shoot him in order to get him into a patrol car.

23
24 ³ Because Student had run away during his general education
25 writing class on September 8, 2005, the IEP team removed him from
26 that class following the November 3, 2005 IEP meeting and placed
27 him in a special education day class for writing. Aside from the
28 fact that at the first running away incident occurred on
September 8, 2005 incident occurred as Student was having
difficulty in his writing class, the ALJ concluded there was no
evidence that any of the other incidents were triggered in that
class.

1 That same day, after Student was discharged to his parents' care,
2 Student's father called Doreen Osumi, the District's Director of
3 Special Education, and left a message informing Ms. Osumi of his
4 intent to remove Student from AK immediately. Ms. Osumi called
5 back that same evening and tried to dissuade Parents from
6 immediately removing their son from the district, asking that any
7 decision on placement be placed on hold until the parties could
8 convene another IEP meeting and discuss other possible
9 placements. Nonetheless, the next day, November 18, 2005,
10 Plaintiffs flew to Tennessee and Student was enrolled at Advent.

11 On November 17, 2005, the District sent a follow-up letter
12 to Parents reiterating its belief that the Student's placement at
13 AK was appropriate, but offering to hold an additional IEP to
14 discuss Parents' concerns and to make any necessary changes.
15 Although the District asked Parents to attend an IEP on three
16 separate occasions between November 17, 2005 and May 17, 2006,
17 their only response was to submit demands for reimbursement,
18 dated January 8, 2006 and May 7, 2006, for the cost of Student
19 attending Advent.

20 Ultimately, on August 31, 2006, more than nine months after
21 they removed their son from the District, Parents did agree to
22 attend an IEP meeting. At that meeting, Parents again demanded
23 reimbursement. The District, for its part, offered Student the
24 same placement and services that were previously offered and
25 rejected at the November 2005 team meeting.

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1 On October 4, 2006, Parents filed a request for due process
2 alleging that Student's rights under the IDEA had been abridged.
3 As the ALJ who conducted the eventual hearing noted, the only
4 issue raised was a purported substantive denial of FAPE. The ALJ
5 framed that issue as follows:

6 Did the District fail to offer Student a free and
7 appropriate public education (FAPE) beginning in
8 November of 2005 and continuing through the 2006-2007
9 school year by failing to meet his unique needs in the
10 areas of core academics and behavior?

11 Decision, p. 2. The ALJ went on to remark that no other
12 substantive issues were implicated, and that no procedural
13 denials of FAPE were alleged. Id. at p. 3, n. 4. The only
14 remedy sought by Parents in the proceeding was reimbursement for
15 costs they incurred in placing Student at Advent.

16 On January 19, 2007, before any hearing was held on Parents'
17 due process claim, another IEP was convened. That meeting
18 resulted in an offer by the District to provide services directed
19 both to Student's core academics and his behavior/mental health.
20 Student was offered placement at Live Oak, the same school he had
21 attended before going to AK, in a special day class for students
22 with emotional disturbance.

23 The administrative hearing itself was held over four
24 successive days between April 10 and April 13, 2007. A decision
25 was issued on June 4, 2007. The ALJ did find that the District's
26 November 3, 2005 IEP was lacking because the measures the
27 District took to deal with Student's increasing behavioral
28 problems early in the 2005-06 school year were neither timely nor
29 sufficient. Consequently, the ALJ determined that FAPE was not
30 met between November 3, 2005 and January 19, 2007.

1 The ALJ nonetheless did not find reimbursement, the sole remedy
2 requested by Plaintiffs at the hearing, to be appropriate.
3 Moreover, as of January 19, 2007 IEP, the ALJ found that District
4 did offer Student placement, services and supports that met FAPE
5 requirements.

6 Following their receipt of the ALJ's decision, Plaintiffs
7 instituted the present action in federal Court on September 4,
8 2007.

9
10 **STANDARD**

11
12 The standard for district court review of an administrative
13 decision under the IDEA is set forth in 20 U.S.C. § 1415(e)(2).
14 That section requires that the decision be supported by the
15 preponderance of the evidence, stating as follows:

16 In any action brought under this paragraph the court
17 shall receive the records of the administrative
18 proceedings, shall hear additional evidence at the
19 request of a party, and, basing its decision on the
preponderance of the evidence, shall grant such relief
as the court determines appropriate."

20 Decision, p. 2. This modified de novo standard requires that
21 "due weight" be given to the administrative proceedings. Bd. of
22 Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley,
23 458 U.S. 176, 206 (1982). The amount of deference so accorded is
24 subject to the court's discretion. Gregory K. v. Longview Sch.
25 Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In making that
26 determination, the thoroughness of the hearing officer's findings
27 should be considered, with the degree of deference increased
28 where said findings are "thorough and careful".

1 Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892
2 (9th Cir. 1995), citing Union Sch. Dist. v. Smith, 15 F.3d 1519,
3 1524 (9th Cir. 1994). "Substantial weight" should be given to
4 the hearing officer's decision when it "evinces his careful,
5 impartial consideration of all the evidence and demonstrates his
6 sensitivity to the complexity of the issues presented." County
7 of San Diego v. Cal. Special Educ. Hearing Office, 93 F.3d 1458,
8 1466 (9th Cir. 1996), quoting Ojai Unified Sch. Dist. v. Jackson,
9 4 F.3d 1467, 1476 (9th Cir. 1993). Such deference is appropriate
10 because "if the district court tried the case anew, the work of
11 the hearing officer would not receive 'due weight,' and would be
12 largely wasted." Capistrano, 59 F.3d at 891.

13 Because of the deference potentially accorded the
14 administrative proceedings, complete de novo review is
15 inappropriate. Amanda J. v. Clark County Sch. Dist., 267 F.3d
16 877, 887 (9th Cir. 2001). Instead, the district court must make
17 an independent judgment based on a preponderance of the evidence
18 and giving due weight to the hearing officer's determination.
19 Capistrano, 59 F.3d at 892. The preponderance of the evidence
20 standard "is by no means an invitation to the courts to
21 substitute their own notions of sound educational policy for
22 those of the school authorities which they review." Hendrick
23 Hudson, 458 U.S. at 206. Rather, as indicated above, the Court
24 must give "due weight" to the administrative proceedings. Id.

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1 After making the requisite independent assessment under the
2 constraints outlined above, the court is free to accept or reject
3 the hearing officer's findings in whole or in part. Ojai Unified
4 Sch. Dist., 4 F.3d at 1472-73. Even if the review is styled as
5 a motion for summary judgment, the procedure is in substance an
6 appeal from an administrative determination based on a stipulated
7 record. Id.

8
9 **APPLICABLE LAW**

10
11 The IDEA requires that all states receiving federal funds
12 for education must provide disabled school children with a FAPE.
13 20 U.S.C. § 1412(a)(1)(A). The FAPE, consisting of special
14 education and related services provided at no cost to the child's
15 parent or guardian, must meet state educational standards and be
16 tailored to the child's unique needs through development of an
17 IEP. 20 U.S.C. § 1401(9). The IEP is a written statement for
18 each child that is developed and revised each year by a team
19 comprised of the child's parents, teachers and other specialists.
20 20 U.S.C. § 1401(14); § 1414(d)(1)(B). The IEP must be
21 reasonably calculated to provide the student with some
22 educational benefit, although the IDEA does not require school
23 districts to provide special education students with the best
24 education available, or provide instruction services that
25 maximize a student's abilities. Hendrick Hudson, 458 U.S. at
26 198-200.

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1 Rather, school districts must only provide a "basic floor of
2 opportunity" and made available, on an individualized basis, such
3 specialized instructional and related services necessary to
4 provide the requisite educational benefit. Id. at 201.

5 Parents who believe that a public school system is not
6 providing a FAPE may unilaterally remove their disabled child
7 from the public school, place him or her in another educational
8 institution, and seek tuition reimbursement for the cost of the
9 alternate placement. 20 U.S.C. § 1412(a)(10)(C); Burlington Sch.
10 Comm. v. Dep't of Educ., 471 U.S. 359, 374 (1985). Parents are
11 entitled to reimbursement, however, only if the court concludes
12 both that the public placement violated IDEA and the private
13 school placement arranged by the parents was proper under the
14 Act. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15
15 (1993). Even then, the Court retains its discretion to reduce a
16 reimbursement award if the equities so warrant. Forest Grove
17 Sch. Dist. v. T.A., 129 S. Ct. 2484, 2496 (2009). Costs incurred
18 by parents in such alternative placements may also be reduced or
19 denied if parents fail to provide timely and sufficient notice of
20 the placement to the school district. Notice of the parents'
21 actual intent to place the student elsewhere must be provided
22 either at the most recent IEP team meeting attended by the
23 parents before removing their child from public school, or in
24 writing at least ten business days in advance of the placement.
25 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(d).
26 Reimbursement demands may also be reduced or denied upon a
27 judicial finding of unreasonableness with respect to placement
28 actions taken by parents. 34 C.F.R. § 300.148(d).

1 Indeed, in fashioning discretionary equitable relief under the
2 IDEA, the court must "consider all relevant factors." Florence
3 County, 510 U.S. at 16. The conduct of both parties must be
4 reviewed and considered to determine whether relief is
5 appropriate. Parents of Student W. v. Puyallup Sch. Dist.,
6 No. 3, 31 F.3d 1489, 1496 (9th Cir. 1994).

7
8 **ANALYSIS**
9

10 Both sides have agreed that this case should be resolved
11 through summary judgment. (See Parties' Joint Status Report, ECF
12 No. 24, 3:4-12). While Plaintiffs' counsel initially indicated
13 that he would seek an additional evidence hearing pursuant to
14 20 U.S.C. § 1415(i)(2)(B)(ii) prior to submitting the matter by
15 way of motion for summary judgment, he failed to do so. Indeed,
16 counsel stipulated that the case was ready for determination
17 through summary judgment and asked that the Court set the
18 contemplated cross motions pursuant to time frames they
19 themselves had suggested. (See Stipulation and Order, ECF No. 43.
20 4:3-5; Defs.' Opp'n to Pls.' Mot. for Summ. J., 2:6-7.) Because
21 neither side timely sought to submit any additional evidence,⁴
22 this Court in essence reviews the decision of the ALJ, and the
23 administrative record, on an appellate basis.

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25
26 ⁴ On December 3, 2010, after the parties' cross motions for
27 summary judgment had been fully briefed and submitted,
28 Plaintiffs' counsel did submit a Motion to Introduce Additional
Evidence. Given the parties prior representations and the
scheduling of the summary judgment motions in accordance
therewith, Plaintiffs' motion was denied as untimely.

1 As indicated above, it must use its independent judgment to
2 determine whether the Hearing Officer's decision is supported by
3 a preponderance of the evidence as evinced by the record.

4 Capistrano, 59 F.3d at 892.

5 Significantly, as also set forth above, it would be
6 inappropriate for this Court to try the case anew, and due weight
7 must be given to the hearing officer's decision commensurate with
8 the level of careful consideration demonstrated by the decision
9 itself. Capistrano, 59 F.3d at 891-92.

10 In Capistrano, the Ninth Circuit reviewed the district
11 court's adoption of the Hearing Officer's findings following an
12 administrative IDEA hearing that involved ten days of testimony
13 and the consideration of extensive exhibits. Noting that the
14 Hearing Officer issued a twenty-six page single-spaced decision
15 that reviewed the evidence in detail (59 F.3d at 888), the Ninth
16 Circuit described said decision as "especially careful and
17 thorough", so that the district court, in reaching the same
18 conclusions, "appropriately exercised [its] discretion to give it
19 quite substantial deference". Id. at 892. Similarly, County of
20 San Diego, another Ninth Circuit case, approved substantial
21 weight being accorded by the district court where the hearing
22 officer's analysis was "intensive and comprehensive". County of
23 San Diego v. Special Ed. Hearing Office, 93 F.3d at 1467.

24 The ALJ's decision in this matter, like the Capistrano and
25 San Diego cases, was not only "careful and thorough" but also
26 "intensive and comprehensive". Its twenty-three single-spaced
27 pages provide a thorough application of the facts of this matter
28 to the relevant legal contentions made by the parties.

1 The ALJ explained the basis of his opinions, the inferences he
2 drew from the testimony and from the documentary record, and his
3 rationale for affording greater weight to certain evidence and/or
4 testimony. On the basis of all those factors, the ALJ's decision
5 is clearly entitled to substantial deference, as discussed in
6 more detail below.

7 Turning first to the scope of Plaintiffs' due process
8 request, the resulting hearing, and the ALJ's subsequent decision
9 now under scrutiny, this Court rejects Plaintiffs' effort to
10 expand the narrow substantive issues presented by this case to
11 also include additional procedural grounds pursuant to which a
12 FAPE was allegedly denied. As the IDEA makes clear, "the party
13 requesting the due process hearing shall not be allowed to raise
14 issues at the due process hearing that were not raised in the
15 [request for due process, unless the other party agrees
16 otherwise." 20 U.S.C. § 1415(f)(3)(B); Cal. Ed. Code § 56502(i)
17 (emphasis added). The Ninth Circuit has also limited a special
18 education appellant to the issues stated in their request for due
19 process. County of San Diego v. Cal. Special Ed. Hearing Office,
20 93 F.3d 1458, 1465-66 (9th Cir. 1996); A.K. v. Alexandria City
21 Sch. Bd., 484 F.3d 672, 679 n.7 (4th Cir. 2007) ("[F]or issues to
22 be preserved for judicial review they must first be presented to
23 the administrative hearing officer."). This limitation avoids
24 "reduc[ing] the proceedings before the state agency to a mere
25 dress rehearsal." Springer v. Fairfax Co. Sch. Bd., 134 F.3d
26 659, 667 (4th Cir. 1998).

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1 Here, as indicated above, it is clear that the sole issue
2 before the ALJ rested with the substantive issues of whether
3 Student was not provided a substantive FAPE in the areas of core
4 academics and behavior, beginning in November 2005 and continuing
5 through the 2006-07 school year. No procedural issues were
6 raised, and just as the ALJ declined to consider allegations of
7 that nature during the due process hearing itself, so must this
8 Court reject any attempt to resurrect them now.

9 In addition, the scope of the Court's review at this
10 juncture is even more limited than the scope of the ALJ's
11 underlying decision. The sole issue advanced by Plaintiffs in
12 this appeal is reimbursement for tuition and related expenses for
13 the 2005-2006 school year, and through January 19, 2007. See
14 Pls.' Mot., 1:8-19. Plaintiffs are accordingly not challenging
15 the propriety of the January 19, 2007 IEP as adjudicated by the
16 ALJ, or the ALJ's rejection of Plaintiffs' reimbursement requests
17 for any period after January 19, 2007. Those issues are not
18 before this Court.

19 In assessing the propriety of the ALJ's decision on the
20 issues that have been challenged, this Court must first look to
21 whether Student was indeed denied a FAPE between November 2005
22 and January of 2007. Then, the Court must turn its attention to
23 whether the Advent placement selected by Plaintiffs was
24 appropriate. Finally, if both those questions are answered in
25 the affirmative, the Court must look at whether reimbursement is
26 proper and in what amount.

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1 **A. Denial Of FAPE**

2
3 The ALJ felt that during the Fall of 2005, Student's
4 behavior deteriorated significantly in that he failed to respond
5 to strategies and interventions that had been successful in the
6 past. The ALJ pointed to conduct that he specifically
7 characterized as "increasingly defiant and resistant to
8 redirection or intervention." Decision, ¶ 33. He believed the
9 District failed to respond either quickly or effectively, and
10 determined that at the November 3, 2005 IEP, the District failed
11 to seriously discuss how to best identify Student's run-away
12 behavior.

13 The ALJ also felt that District staff "abruptly dismissed"
14 Parents' request for alternative placement either by returning
15 Student to Live Oak or by placing him at Advent. Id. at ¶ 35.
16 Significant, too, in the ALJ's estimation was District's failure
17 to suggest any change in Student's IEP in response to his
18 apparently escalating behavior other than one relatively minor
19 change in his writing class. The ALJ believed this failure to
20 take additional steps was unreasonable and in violation of FAPE
21 inasmuch as the District's inability to adequately address
22 Student's unique behavioral needs resulted in him not receiving
23 services calculated to provide the required educational benefit.
24 Id. at ¶ 36. The ALJ further pointed to the fact that the
25 District continued to offer the same previously rejected
26 placement and services in its follow-up IEP meeting on August 31,
27 2006, even after Parents had removed Student to Advent. Id. at
28 ¶ 41.

1 It was not until the January 19, 2007 IEP that the District
2 retreated from its entrenched position in that regard, and
3 offered both placement at Live Oak and additional mental health
4 services. As already indicated above, the ALJ found that the
5 January 2007 IEP was adequate and provided Student with the
6 requisite FAPE.

7 The District's Motion for Summary Judgment asks that the
8 Court overturn the ALJ's finding that no FAPE was offered for the
9 period between November of 2005⁵ and January 2007. If the Court
10 were to accept the District's contention in that regard the issue
11 of reimbursement would become moot (in the lack of any deficit in
12 FAPE) and the issue of reimbursement/remedy would become
13 unnecessary to even address.

14 Although the District argues that it based its plan on a
15 behavioral analysis based on data obtained over a 25-day period,
16 and argues that Student's fluctuations in behavior were due more
17 to his bipolar condition than to any deficit in the program he
18 was offered, even the District concedes that its "efforts to
19 address Student's behavioral needs met with limited success."
20 District's Opp'n to Pls.' Mot., 15:16-17.

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24
25 ⁵ Plaintiffs contend that the June 9, 2005 also violated
26 FAPE, and suggest that the ALJ's determination to the contrary
27 was in error, despite the fact that their demand for
28 reimbursement is limited to the period between Student's November
2005 placement at Advent and the time of the January 19, 2007
IEP.

1 The District's apparent intransigence in refusing to consider any
2 change to its previous offer despite growing evidence of
3 Student's apparent deterioration in the Fall of 2005 caused the
4 ALJ to conclude that Student was denied an adequate FAPE. That
5 shortcoming was reiterated in August of 2006 when the District
6 failed to budge from its already rejected proposal. The ALJ's
7 conclusion that Student was denied a FAPE between November 3,
8 2005 and January 19, 2007 is supported by a preponderance of the
9 record based on the record as a whole, and the District's request
10 for summary adjudication to the contrary is denied. Because the
11 Court accordingly concludes that an abrogation of the IDEA in
12 that regard indeed occurred, it must next consider the parties'
13 competing contentions concerning the propriety of Student's
14 placement at Advent and Parents' entitlement to reimbursement for
15 the costs they incurred in placing Student there on November 18,
16 2005. The Court must now proceed to those issues.

17
18 **B. Placement At Advent**

19
20 In a case where FAPE was disputed like this one, an
21 alternative placement by parents is not required to meet state-
22 mandated certification requirements. Florence County, 510 U.S.
23 at 14. Despite that relaxed requirement, however, parentally
24 obtained private school placement must nonetheless be deemed
25 appropriate for the child in order to merit potential
26 reimbursement.

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1 Id. at 15 (parents entitled to reimbursement only upon a judicial
2 finding both that the public placement violated the IDEA and a
3 determination that the private placement at issue was proper
4 under the Act).

5 As the ALJ concluded, despite Student's special needs,
6 Advent had no credentialed special education teachers on staff.
7 See Decision, ¶ 70. Moreover, although certification is not a
8 mandated prerequisite to reimbursement, it still merits noting,
9 as the ALJ observed, that Advent's curriculum does not meet
10 California's educational standards. Id. There was no evidence
11 that an IEP was developed at Advent directed to Student's
12 particular areas of deficit, and individualized instruction in
13 his specific areas of need, math and reading, were not provided.
14 With respect to Student's behavioral issues, the ALJ also
15 concluded that Advent was not trained to provide needed
16 interventions. Id. at 72. Advent lacked individualized
17 behavioral supports, and the evidence showed that Student
18 continued to exhibit behaviors similar to those encountered at AK
19 after his move to Tennessee.⁶ In addition, Advent's religious
20 based curriculum, which apparently included significant Bible
21 study and application, had nothing to do with his special needs.
22 This Court finds the ALJ's finding that Advent was not an
23 appropriate placement for Student to be supported by a
24 preponderance of the evidence.

25
26 ⁶ Although Student had not run away from Advent as of the
27 time of the administrative hearing, he did run away from home in
28 December of 2006 while on break. In addition, according to the
ALJ, his other behaviors, including distractability, short
attention span, conflict issues, and poor study habits,
continued. Id. at 71.

1 **C. Propriety Of Reimbursement**

2
3 Even if the Court were to find that Advent was an
4 appropriate placement for Student, which it has not, ordering
5 reimbursement for monies expended by Parents is still a matter
6 within the Court's discretion. Forest Grove, 129 S. Ct. at 2496.
7 As set forth below, factors to be considered in exercising that
8 reduction include whether timely and sufficient notice was
9 provided to the District, and whether the parents' placement
10 actions were reasonable. Those factors will now be addressed.

11
12 **1. Notice**

13
14 As already enumerated above, reimbursement may be reduced or
15 denied if parents fail to provide adequate notice of their
16 proposed private placement to the concerned public school. Said
17 notice must be provided either at the most recent IEP team
18 meeting, or in writing at least ten business days before the
19 intended placement. 20 U.S.C. § 1412 (a) (10) (C); 34 C.F.R.
20 § 300.148(d) The ALJ found that Parents here failed to provide
21 timely notice before enrolling Student at Advent, and further
22 found no basis upon which to excuse Parents' failure in that
23 regard. Decision, ¶ 65. The Court agrees. That failure alone
24 is sufficient reason to deny Plaintiffs' reimbursement request.

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1 Plaintiffs contend they did in fact provide notice at the
2 November 3, 2005 IEP meeting of their intent to enroll Student at
3 Advent. They also claim that November 17, 2005, the day they
4 actually removed Student from the District, was some eleven days
5 following the notice they provided at the time of the IEP in any
6 event. Either way, they argue that the time parameters
7 contemplated by the statute are satisfied.

8 Plaintiffs' contentions lack merit. First, Plaintiffs' own
9 papers belie the argument that any unequivocal notice of the
10 intent to remove Student from the District was provided at the
11 time of the IEP. As Plaintiffs' Opposition to the District's
12 Motion states, Parents "were exploring a possible residential
13 placement" as of November 3, 2005 and allegedly provided the
14 required notice "by noting their desire, if not their specific
15 intent" to move Student. Pls.' Opp'n, 16:6-9. "Exploring"
16 another alternative, and expressing a "desire" in that regard,
17 are not the same thing as telling the District at the time of the
18 IEP, or in writing thereafter, that a move would take place. The
19 purpose of the notice requirement is to give a school district
20 time to present a different placement proposal in the face of a
21 definitive declaration from the parents of an intent to otherwise
22 move their child. Here, on the other hand, at the time of the
23 IEP the Parents only provided brochures and cost information
24 pertaining to Advent, as well as a general request that he be
25 placed at Advent because of their increasing concern over the
26 services being provided by the District. There was no
27 declaration from Parents of an actual intent on their part to
28 effectuate a unilateral placement at Advent.

1 Moreover, even when Parents did express that intent the day they
2 removed Student from the District on November 17, 2005, they did
3 so orally by telephone and not in writing as required by the
4 statute. Consequently, as reasoned by the ALJ, under any
5 plausible scenario the requisite notice was simply not provided.
6 See Decision, ¶ 63.

7 Nor can notice be excused on grounds that Student would
8 otherwise have faced likely physical or emotional harm. Under
9 20 U.S.C. § 1412(a)(10)(C)(iv)(I), an exception to compliance
10 with the notice requirement is recognized under such
11 circumstances. Student's father testified at the hearing
12 concerning his son's apparent statement to the police, during his
13 run-away episode of November 17, 2005, that he would have to be
14 shot in order to be placed inside a patrol car. According to
15 Plaintiffs, this amounted to suicidal ideation and compounded
16 their "grave concern" for their son's welfare. See Pls.' Opp'n,
17 15:11-18. After hearing all the testimony, however, the ALJ
18 concluded that the evidence did not support this claim. She
19 found that there was no indication that Student attempted to harm
20 himself during any of the run-away incidents (in fact the ALJ
21 noted one incident where the Student called 911 and asked that
22 the police return him to school). She further concluded that no
23 evidence supported a finding that serious harm would have
24 befallen Student had the appropriate notice been given.

25 Decision, ¶ 64.

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1 Having reviewed the matter, and after giving appropriate
2 deference to the ALJ's decision this Court determines that the
3 preponderance of the evidence supported that finding. The notice
4 requirement was neither satisfied nor excused in the instant
5 matter.

6
7 **2. Reasonableness of Parties' Actions**
8

9 In addition to notice, in assessing the propriety of
10 reimbursement the Court should also look to the conduct of the
11 parties. Puyallup Sch. Dist., 31 F.3d at 1496. In the present
12 case, after weighing all the evidence, the ALJ found that the
13 Parents' actions were not reasonable inasmuch as they failed to
14 adequately consider other more suitable placements and failed to
15 give District time to explore other placement options before
16 removing Student. Decision, ¶ 75. The ALJ did find the District
17 to be less than cooperative during the November IEP team meeting
18 concerning available placement options. She further believed the
19 District was unreasonable in offering no significant changes when
20 Parents did finally agree to another IEP in August of 2006.
21 Nonetheless, in balancing the conduct of the parties, the ALJ
22 believed the scales tipped against Plaintiffs in evaluating
23 reasonableness. Id. at 74-75.

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1 As the ALJ noted, because of their predisposition to select
2 Advent, Parents did little research before deciding to send
3 Student there. Id. at 68. The Father's apparent claim that
4 Advent was the only school in the entire United States that could
5 meet Student's particular needs (see Pls.' Mot., 16:22-17:1) is
6 less than plausible given testimony from Student's own therapists
7 that placements existed in California, not to mention states
8 closer than Tennessee, that were capable of meeting Student's
9 needs. In addition, when asked at the hearing to identify
10 certified private schools in California that would have been
11 appropriate candidates for placement, the District's Director of
12 Special Education, Doreen Osumi, identified half a dozen
13 institutions and could have discussed more had time constraints
14 permitted. See District's Opp'n to Pls.' Mot., 30:9-15. This
15 caused the ALJ to conclude that schools with credentialed special
16 education teachers (unlike Advent) existed both in and out of
17 California that would have provided a more appropriate placement
18 for Student. Decision, ¶¶ 70, 72. As already discussed above,
19 staff at Advent, on the other hand, did not have the training to
20 offer the educational and behavioral interventions that were
21 indicated in Student's case. Id. at 71. Advent's curriculum did
22 not meet California's educational standards, and, in the
23 estimation of the ALJ, its math and writing interventions
24 programs were not designed to assist students like Student to
25 develop his skills. Id. at 70.

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1 It appears Parents selected Advent not so much for the
2 educational benefit it provided as for its affiliation with their
3 Seventh Day Adventist Church. They had learned of the school
4 through their local church community, and had already placed
5 Student's older brother there (it appears he was attending Advent
6 at the time Student was removed). In the ALJ's view, this caused
7 Parents to be "clearly predisposed" to sending Student to Advent
8 even though his educational and mental health needs were both
9 greater and more complex than his brother's. Id. at 68. Even
10 Parents conceded this was a factor in their selection of Advent.

11 In addition, while Student's therapists ostensibly
12 recommended Advent, neither had visited Advent, not to mention
13 the District's facilities, and their knowledge of the Advent
14 facility was based primarily if not exclusively on information
15 provided by Parents themselves. Indeed, Student's psychiatrist,
16 Dr. C. Herbert Schiro, admitted that he recommended Advent the
17 same day Parents took Student to Tennessee because Parents asked
18 him to do so and because his recommendation was a necessary part
19 of Advent's enrollment process. Dr. Schiro conceded he did not
20 even consider other placements, whether local or otherwise,
21 before making that recommendation. Student's other provider,
22 Pennisue Hignell Ph.D, similarly testified she did not consider
23 placements other than Advent.

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1 See District's Opp'n to Pls.' Mot., 30:14-22.⁷ This testimony
2 caused the ALJ to give "very limited weight" to the opinions of
3 both doctors on the propriety of Student's placement at Advent.

4 Once Parents did provide unequivocal notice (at least
5 orally) to the District (through a phone call on November 17,
6 2005) that they intended to remove Student and place him at
7 Advent, Doreen Osumi returned Parents' call the same evening, she
8 tried to dissuade them from the decision in order to conduct
9 another IEP meeting and revisit the issue of Student's placement.
10 Ms. Osumi followed up that discussion with a letter, also dated
11 November 17, 2005, denying Parent's contemplated placement and
12 requesting that an IEP meeting be scheduled to address Parents'
13 concerns and make any necessary changes to Student's IEP.
14 Decision, ¶ 39. Despite several additional follow up letters,
15 the Parents did not agree to an additional IEP meeting until
16 August of 2006.

17 Although the August 2006 IEP still did not result in the
18 provision of a viable FAPE as discussed above, and while the
19 District did not provide a FAPE until January of 2007, the ALJ
20 concluded that the weight of the evidence nonetheless militated
21 against any reimbursement under a reasonableness analysis, since
22 Parents did not give District an adequate opportunity to explore
23 placement options before removing Student.

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26 ⁷ Despite providing a lengthy Reply in response to the
27 District's Opposition to their Motion, Plaintiffs do not
28 controvert these allegations, and state only that Drs. Schiro and
Hignell both felt that Student needed a more restrictive,
consistent environment than the District had offered. See Pls.'
Reply, pp. 11-12.

1 In the ALJ's view, Parents were committed to an Advent placement
2 and had no serious interest in considering other options.
3 Parents' posture in this regard prevented a process in which the
4 District could have offered additional supports and interventions
5 at AK, revisited a Live Oak placement, or explored local or
6 California residential placements.

7 Once again, this Court finds that the preponderance of the
8 evidence supports the findings made by the ALJ on the
9 reasonableness issue. That factor, along with the propriety of
10 the Advent placement in the first place and Plaintiffs' failure
11 to provide District with proper notice concerning its unilateral
12 placement, all support the ALJ's decision denying Plaintiffs'
13 reimbursement request.

14
15 **CONCLUSION**
16

17 For all the reasons outlined above, the Court affirms the
18 ALJ's decision in this matter as both careful, searching, and
19 supported by the preponderance of the evidence.⁸ The District's
20 Motion for Summary Judgment, or alternatively for summary
21 adjudication (ECF No. 49) is accordingly GRANTED, except for its
22 request that the ALJ's decision be reversed on grounds that the
23 District did provide an acceptable FAPE to Student prior to
24 January 19, 2007.

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⁸ Because oral argument was not deemed to be of material
28 assistance, the Court ordered this matter submitted on the
briefs. E.D. Cal. Local rule 230(g).

1 In that regard, the District's Motion is DENIED. Plaintiffs'
2 Motion for Summary Judgment (ECF No. 50) is DENIED given the
3 Court's affirmation of the ALJ's findings. The Clerk of Court is
4 directed to close this file.

5 IT IS SO ORDERED.

6 Dated: February 4, 2011

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MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

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