

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

JL, A MINOR, by and through
his Guardian Ad Litem, PARENT,

Plaintiff,

v.

Case No. 5:07-CV-01539

TEMECULA VALLEY UNIFIED
SCHOOL DISTRICT, a public entity,
CAROL LEIGHTY, Ed.D.,
SUPERINTENDENT OF
TEMECULA UNIFIED SCHOOL
DISTRICT, in her official capacity,

HON. AVERN COHN

Defendants.

DECISION AND ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

This case arises out of a school district's proposed placement of a student, J.L., in a particular class for the 2007-2008 school year, when the student was in seventh grade. The student's parent disagreed with the proposed placement, preferring instead that the student remain in a private school where he had been taking summer classes. On August 23, 2007, an Administrative Law Judge ("ALJ") concluded that the placement complied with the Individuals with Disabilities Act ("IDEA"); the present appeal by the student's parent ensued. The complaint states six (6) causes of action. The first and second causes of action seek reversal of the ALJ's decision. Upon review of the ALJ's decision, the pleadings, and the administrative record, the Court **AFFIRMS** the ALJ's

decision. This decision therefore disposes of plaintiff's first and second causes of action.

II. THE ALJ'S DECISION

A. Background

The ALJ's August 23, 2007, decision ("ALJ decision") begins by outlining the student's educational history. The student was diagnosed with ADHD and exhibited serious behavioral problems as early as first and second grade, the 2001-2002 and 2002-2003 academic years. ALJ decision at 3. In third grade, the 2003-2004 academic year, the student's behavioral problems continued, but he was able to perform academically and complete his work. Id.

In the fourth grade, the 2004-2005 academic year, the student was evaluated to determine whether his behavioral issues were caused by something other than ADHD. Id. The school psychologist concluded that the student has behavioral problems that were characteristic of emotional disturbance. Id. Nevertheless, because the student's academic performance was not affected, he was found ineligible for special education services and was placed in a general education classroom. Id.

In the fifth grade, the 2005-2006 school year, the student continued to have behavioral problems and was not attentive in class. Id. at 3-4. His mother was in class with him for several weeks to assist him in controlling his behaviors and focusing his attention on his school work. Id. at 4. During that year, he was also assessed by a school psychologist, who conducted interviews with the student and administered a number of psychological tests to the student. Id. The psychologist found that the student exhibited symptoms of both attention deficit disorder ("ADD") and attention

deficit hyperactivity disorder (“ADHD”), and that the student’s social problems were rated at the extreme end of the clinically significant range. Id. The psychologist opined that in addition to extreme ADHD, the student had not made normal social emotional growth, exhibited hostility, aggression and inappropriate behavior; the student was extraordinarily self-centered, he lacked empathy, but expected acceptance from others. Id. He found that the student was unable to build or maintain relationships with peers and teachers, and that his educational ability was adversely effected by this ADHD. Id. The psychologist recommended the student be examined by a neurologist. Id.

On October 31, 2005, a meeting to formulate the student’s individualized education plan (“IEP”) was held. Id. During the IEP meeting, the IEP team agreed that the student was eligible for special education services under the disability category of “severe emotional disturbance” (“SED”). Id. at 4-5. The student’s mother disagreed with the eligibility category, and the team agreed that the student’s category for special education services would be classified as “other health impairment” (“OHI”). Id. at 5.

The district implemented the IEP, which included the use of a one-to-one aide and counseling sessions. Id. Goals were defined as managing frustration, eliminating aggressive behaviors, personal hygiene, responsibility for actions, and assignment completion. Id. Although some initial improvement was noted, the student’s behavior deteriorated through the school year, and his disruptive behaviors required his teacher to stop class instruction multiple times daily. Id. at 5-6.

On February 1, 2006, another IEP meeting was held. The school district team proposed placing the student in a more restrictive special day class to work on the student’s behavior. Id. at 6. The student’s mother rejected that recommendation. Id.

After the student's teacher took a stress leave of absence because of the student's behavior and her frustration with the student's placement, on March 3, 2006, another IEP team meeting was held. Id. This led to the independent educational evaluation of the student conducted by Jose L. Fuentes, Ph.D., a neuropsychologist. Id. Dr. Fuentes administered a number of psychological and educational tests to the student. Id. He also observed the student before and after the student took medication for ADHD, finding a dramatic change in the student's demeanor and attention within an hour of taking the medication. Id. Dr. Fuentes determined that the student possessed a high average to above average cognitive ability, and found no significant discrepancy between the student's cognitive ability and his measured achievement. Id. at 7. He opined that the student would be eligible for special education services under either the OHI or SED category. Dr. Fuentes ruled out autism as a cause for the student's inappropriate behavior. Id. Pursuant to a settlement agreement, the student spent the last two months of fifth grade in a special day class for the emotionally disturbed. Id.

To prepare for the student's transition to sixth grade (from elementary to middle school), the 2006-2007 academic year, an IEP meeting was held on June 15, 2006. Id. at 8. Dr. Fuentes was in attendance, and opined that the student could function in a general educational setting with appropriate supports, including a one-to-one aide. He was so placed, with five 53 minute resource specialist program sessions each week, a 53 minute small group social skills session once a week, and a 6 hour per day one-to-one aide to support task initiation, task completion, behavioral intervention, and social skills. Id.

The student's sixth grade year was marked with inappropriate behavior. The

student would growl, run at inappropriate times, would show inappropriate frustration, would wipe nasal mucous on surfaces around him, and would suck his thumb. Id. at 10. Alarmingly, the student was defiant and violent toward other students and the aide no fewer than sixteen times between September 8, 2006, and May 25, 2007; the student's actions included pushing students to the ground, spitting on other students and the aide, spitting objects at another student, slapping and hitting other students, striking other students and the aide with objects, kicking other students, and flicking pencil lead into the eye of another student. Id. at 10-11. The student's relationship with the one-to-one aide, although initially successful, also deteriorated, such that by the end of May 2007, the student struck the aide with an object, grabbed her clothes, and spit on her arm and face. Id. at 11. Throughout this time, the student disrupted his classes, was defiant, and refused to follow instructions from school personnel. Id. at 10. The student was impulsive and fidgety, and had difficulty completing his assignments. Id. However, when he completed his work, it was of high quality. Id. Nevertheless, as his behavior deteriorated, so too did his grades – to the point that he was in danger of failing classes because of his failure to complete his work. Id.

Against this background, the ALJ analyzed the appropriateness of the district's placement offer for the 2007-2008 academic year, the student's seventh grade year, examining the identified unique needs of the student, the student's identified goals, and the district's placement offer, including the whether the offer consisted of the least restrictive environment in which to provide the student with a FAPE.

B. Identification of Unique Needs

The ALJ examined the student's identified unique needs as identified by his IEP. Id. at 9-10. Overall, the student was capable of performing academically at grade level in light of his average to above-average cognitive abilities. Id. at 9, 10. Nevertheless, the student's classroom performance was adversely effected by his socially immature, aggressive, and disruptive behaviors. Id. at 9. The student was in need of a small, structured environment with attention to his behavior. Id. at 10.

C. Identification of Goals

The ALJ took note of certain goals identified for the student, which focused on behavior, communication, daily living/community participation, and social emotional development. Id. at 12. Specific measurable goals were outlined, including, for example, the student having no reported incidents of inappropriate behaviors involving others on three out of five days. Id. at 12.

D. Placement Offer 2007-2008 Academic Year

The ALJ considered the district's placement offer at length. After an IEP meeting on March 22, 2007, the district offered full time placement to the student in its special day class for the emotionally disturbed ("SDC-ED") at the student's school of residence. Id. at 9. The placement would be accompanied by a small group social skills session once a week, a collaborative occupational therapy twice a year, and a once-a-year occupational therapy training for school staff. Id. Additionally, Riverside County Mental Health was to provide outpatient individual counseling once a week and medication monitoring every two months. Id. The student was also deemed eligible for an

extended school year. Id.

The SDC-ED class was taught by Todd Barrowcliff and two aides. Id. at 13. Mr. Barrowcliffe has a master's degree in special education and a special education teaching credential. Id. He has taught the class for five years. Upon review of the student's IEP, he opined that the provisions could be fully implemented in his classroom. Id.

The SDC-ED facilities consist of two rooms: One is the academic class; the second is a room with activities in which the students can engage for fun. Id.

The class is self contained and consists of 8 to 12 students who received individualized instruction in a highly structured environment designed to meet the behavioral goals of their IEPs. Id. Most students work on grade level, and it was anticipated that the student would do so as well, although the class could accommodate an above-grade level curriculum if needed. Id. Generally, the SDC-ED students do not mix with the general education population, but are given the opportunity to join their peers when their IEPs so provide; however, the student's IEP specified full-time placement in the SDC-ED. Id.

E. Restrictiveness of Environment

In order to determine whether the district's offer represented a placement in the least restrictive environment, the ALJ inquired into the academic and non-academic benefits of the placement versus an alternative (i.e., mainstream) placement and into the negative effects the student's presence may have on the teacher and other students. Id. at 14-15.

The ALJ found that the student was not obtaining any educational benefit from

his mainstream placement, even with the assistance of a one-to-one aide. Id. at 14. Although the student's performance at the beginning of the 2006-2007 school year was acceptable, his academic performance fell consistently through the year. Id. He had not completed his homework or class work on a consistent basis and missed much of class because of suspensions and disruptive behavior in class. Id. Despite average to above average cognitive ability, he was unable to complete his grade level curriculum. Id.

Similarly, the ALJ noted no non-academic benefit from the student's mainstream placement, mostly due to his behavioral difficulties. Id. at 14. The student is socially isolated, is friendless, and engages in no social interactions with other students during unstructured time. Id. He has been disciplined many times. Id.

The ALJ also noted the adverse effect of the student's behavior on his classmates, teachers, and school staff. Id. at 14-15. The student's behavior is regularly disruptive; classes must be halted on a daily basis to address his behavior. Id. One teacher took stress leave as a result of dealing with the student's behavior. Id. at 15. Other students were injured by him. Id. Although able to identify and articulate appropriate behavior, the student was unable to effectuate it. Id. at 14-15. Similar disruptive and aggressive behavior was noted at the student's summer 2007 placement. Id. at 15.

III. THE IDEA

THE IDEA guarantees all disabled children a free and appropriate education ("FAPE") "that emphasizes special education and related services designed to meet

their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). A FAPE is defined as special education and related services that: (1) are available to the student at public expense, under public supervision and direction, and without charge; (2) meet the state education standards; (3) include an appropriate education in the state involved; and (4) conform with the student's individualized education plan ("IEP"). 20 U.S.C. § 1401(9).

"Special education" is defined as instruction specially designed to meet a disabled student's unique needs, at no cost to parents, whether it occurs in the classroom, at home, or in other settings. 20 U.S.C. § 1401(29); Cal. Educ. Code § 56031. "Related services" include developmental, corrective, and supportive services, such as speech-language services, needed to assist a disabled child in benefitting from education, and to help identify disabling conditions. 20 U.S.C. § 1401(26); Cal. Educ. Code § 56363.

The primary tool for achieving the goal of providing a FAPE to a disabled student is the IEP. Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 50 F.3d 811, 818 (9th Cir. 2007). An IEP is a written statement containing the details of the individualized education program for a specific child, which is crafted by a team that includes the child's parents and teacher, a representative of the local education agency, and, whenever appropriate, the child. 20 U.S.C. § 1401(14), § 1414(d)(1)(B). An IEP must contain: (1) Information regarding the child's present levels of performance; (2) a statement of measurable annual goals; (3) a statement of the special educational and related services to be provided to the child; (4) an explanation of the extent to which the child will not participate with non-disabled children in the regular class; and (5) objective

criteria for measuring the child's progress. 20 U.S.C. § 1414(d)(1)(A).

In determining whether a placement or level of instruction complies with the IDEA, ALJs and courts examine whether an IEP is designed to meet the unique needs of the student, whether the placement or level of instruction comports with the IEP, and whether the placement or level of instruction is reasonably calculated to provide the student with some educational benefit. Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176, 204-06 (1982). The IDEA does not impose a requirement that a school district “maximize [a] child’s potential”; rather, it requires that school districts provide a “basic floor of opportunity” by providing access to education that is “sufficient to confer some educational benefit upon the handicapped child.” Id. at 198-200. In determining whether the placement or level of instruction complies with the IDEA, ALJs and courts “focus primarily on the District’s proposed placement, not on the alternative that the family preferred.” Gregory K. v. Longview School Dist., 811 F.2d 1307, 1314 (1987).

The student must be placed in the least restrictive environment, and a special education student must be educated with non-disabled peers to the maximum extent possible. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(1)-(2)(i). The student may be removed from a mainstream educational environment only when the use of supplementary aids and services fail. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).

The IDEA contains numerous procedural safeguards to ensure that the parents or guardians of a disabled student be kept informed and involved in decisions regarding the child's education. 20 U.S.C. § 1415. As part of this procedural scheme, the local

educational agency must give parents an opportunity to present complaints regarding the provision of a FAPE to the child. 20 U.S.C. § 1415(b)(6). Upon the presentation of such a complaint, the parent or guardian is entitled to an impartial due process administrative hearing conducted by the state or local educational agency. 20 U.S.C. § 1415(f).

IV. JUDICIAL REVIEW OF IDEA ADMINISTRATIVE DECISIONS

The IDEA provides that a party aggrieved by the findings and decisions made in a state administrative due process hearing has the right to bring an original civil action in federal district court. 20 U.S.C. § 1415(i)(2). The party bringing the administrative challenge bears the burden of proof in the administrative proceeding. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005) (“We hold that the burden lies, as it typically does, on the party seeking relief.”). Similarly, the party challenging the administrative decision bears the burden of proof in the district court. Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099, 1103 (9th Cir. 2007).

The standard for district court review of an administrative decision under the IDEA is set forth in 20 U.S.C. § 1415(i)(2), which provides as follows:

In any action brought under this paragraph the court --
(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(C). Thus, judicial review of IDEA cases is quite different from review of most other agency actions, in which the record is limited and review is highly deferential. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir. 1993).

Nevertheless, in IDEA cases, courts give "due weight" to administrative proceedings, Board of Educ. of the Hendrick Hudson Central Sch. Dist. Westchester County v. Rowley, 458 U.S. 176, 206 (1982), but how much weight is "due" is a question left to the court's discretion, Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In exercising this discretion, the Court considers the thoroughness of the hearing officer's findings and accords more deference where the hearing officer's findings are "thorough and careful." Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995).

A hearing officer's findings are treated as "thorough and careful when the officer participates in the questioning of witnesses and writes a decision contain[ing] a complete factual background as well as a discrete analysis supporting the ultimate conclusions." R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007) (internal quotation marks and citations omitted).

V. ANALYSIS

A. The Student's Arguments

Relying on R.B., 496 F.3d at 942-43, the student argues that the ALJ's decision should not be subject to a deferential review; rather, he contends that the ALJ's decision ignored key evidence and thus should be subject to a *de novo* review. Once that decision is subjected to a *de novo* review, the student argues that the Court should reverse the ALJ's decision. The student also contends the District has violated the Americans with Disabilities Act ("ADA"), the Rehabilitation Act ("Rehab Act"), Cal. Civ. Code § 51, and Cal. Gov't Code § 11135. For the reasons set forth below, the Court does not find that a *de novo* review is warranted, the Court will affirm the ALJ's decision.

The student's argument for a less deferential standard of review is not without support. In R.B., the Ninth Circuit examined a hearing officer's decision, giving deference to much of the decision. See id. at 942-43 (finding deference was appropriate where hearing officer set forth several pages of relevant factual background, asked follow up questions of many witnesses, and discretely analyzed all the issues for each of two academic years at issue). However, the Court refused to give deference to the decision to the extent that the hearing officer completely failed to discuss or consider the testimony of the student's special education teacher and his school psychologist. Similarly, the Northern District of California, in a case cited with approval by the Ninth Circuit, the district court applied the *de novo* standard of review to a particular issue, the appropriateness of mainstreaming the student, in light of the hearing officer's failure to consider the testimony of the individuals involved in the student's education, including a summer teacher and speech therapist and aide hired by the student's parents. Katherine G. ex rel. Cynthia G. v. Kentfield School Dist., 261 F.Supp.2d 1159, 1175 (N.D. Cal. 2003) (cited with approval in K.B., 496 F.3d at 943).

Here, the student does not so much contend that the ALJ's decision completely ignored any witness's testimony as he contends that the ALJ cherry-picked evidence by ignoring the testimony that supported his position. See Pltfs.' opening brief at 11 (ALJ ignored testimony from Dr. Jose Fuentes that did not support the student); at 13 (ALJ dismissed Dr. David Liebert's report in a single footnote); at 15 (ALJ gave undue weight to the Dr. Owen's report); at 16 (ALJ gave undue weight to Dr. Helm's testimony, ignoring testimony that supported the student's position). Similarly, the student contends that the ALJ discounted evidence suggesting that the SDC-ED class could not

meet his needs and that it was not the least restrictive environment for him. See Pltfs.' opening brief at 18 (teacher of class stated class was inappropriate for student and occupational therapist's recommendation of a "sensory diet"); at 19 (SDC-ED teacher's lack of knowledge re "sensory diet"); at 20 (ALJ failed to compare testimony of SDC-ED teacher with testimony of Mary Sterling from Winston school on the issue of restrictiveness). Finally, the student contends the ALJ ignored testimony that showed that his needs could be met at the Winston School. See Pltfs.' opening brief at 20 (ALJ failed to consider part of Mary Sterling's testimony); at 21 (ALJ failed to consider characteristics of Winston School and student's success at Winston School); at 22 (ALJ ignored evidence that Winston School better able to meet the student's sensory needs); at 23 (ALJ ignored evidence that Winston School can meet the student's academic needs). The Court examines each contention.

B. Dr. Fuentes

The student contends that the ALJ ignored Dr. Fuentes' recommendation that he not be placed in the SDC-ED, and that he in fact does not suffer from an emotional disturbance. Pltfs.' opening brief at 12 ("In fact, [Dr. Fuentes] specifically stated that he *does not believe JL suffers from a mood or emotionally based disorder at all.*"). However, an examination of Dr. Fuentes' testimony reveals that his opinion is not quite so clear. As contended by the student, Dr. Fuentes did testify at length why he believed that the student's inappropriate behavior was linked to his ADHD (and therefore neurobiological in nature) rather than to an emotional disturbance (which would be psychological in nature). However, Dr. Fuentes also acknowledged that the student's behavior met the criteria "for the educational diagnosis of emotional disturbance," and

his assessment concluded that the student was eligible for placement under both “OHI” (other health impairment) and serious emotional disturbance, A.R. at 996, 998 (“Q: Now . . . , just to clarify. You found . . . in your assessment that [the student] was eligible under both OHI and serious emotional disturbance.”). The ALJ’s decision recognized that Dr. Fuentes believed that the student’s behaviors were the result of severe ADHD rather than of a mood or conduct disorder. ALJ Decision at 7. The ALJ did not expressly note that Dr. Fuentes did not believe that the student suffered from an emotional disturbance, but this is understandable in light of the fact that Dr. Fuentes’ testimony is equivocal on this issue, as described above.

The student also complains that the ALJ did not discuss potential problems with the student’s placement hypothesized by Dr. Fuentes, i.e., that immature ADHD students can fall prey to emotionally disturbed “street smart” students that might be found in an SDC-ED class. However, there is no evidence in the record suggesting this as a potential difficulty in the placement offered by the District.

The Court does not find that the ALJ ignored or impermissibly weighed Dr. Fuentes’ testimony.

C. Dr. Liebert

The student contends that the ALJ summarily dismissed Dr. Liebert’s concerns in a single footnote. The ALJ placed more weight on Dr. Fuentes’ formal assessment of the student than she did on Dr. Liebert’s familiarity with the student in a social skills class setting. In contrast to Dr. Fuentes, Dr. Liebert believed that the student was properly diagnosed with a disorder in the autism spectrum, pervasive developmental disorder not otherwise specified (“PDD NOS”). Dr. Liebert agreed with Dr. Fuentes,

however, that the student also suffers from ADHD. The student's position appears to be that Dr. Liebert's extensive interaction with him makes Dr. Liebert the most qualified to render an accurate diagnosis.

The ALJ clearly understood that the testifying experts were at odds on a number of issues, including the diagnosis upon which Dr. Fuentes and Dr. Liebert disagree; however, the ALJ also clearly focused on the issue most relevant to the placement offer, upon which the experts agreed: The type of learning environment the student needed. See ALJ's decision at 10 ("Importantly, although the testifying psychologists did not agree on some things, they all agreed that Student needed a small structured environment with attention to his behavior and grade level or higher curriculum.").

The Court does not find that the ALJ ignored or impermissibly weighed Dr. Liebert's testimony.

D. Dr. Owen

The student contends that the ALJ placed undue weight on Dr. Owen's testimony, especially in light of the limited time Dr. Owen spent observing the student and that Dr. Owen did not conduct an assessment of the student. However, there is no indication that the ALJ placed "great weight" on Dr. Owen's testimony; to the contrary, the student cites to only one page of the ALJ's decision that mentions Dr. Owen (and the Court has found no other mention of Dr. Owen in the decision), and in that part of the discussion, the ALJ merely sets forth Dr. Owen's qualifications and his observations of the student at the Winston School. ALJ Decision at 9, and n. 20.

The Court does not find that the ALJ ignored or impermissibly weighed Dr. Owen's testimony.

E. Dr. Helm

The student contends that the ALJ “gave great credence” to Dr. Helm’s testimony, but ignored the parts of Dr. Helm’s testimony that supported the student’s position. Dr. Helms’ diagnosis differed from that of Drs. Fuentes and Liebert, in that Dr. Helms believed that, in addition to ADHD (on which all three agreed), the student suffered from an emotional disturbance.¹ See ALJ decision at 4 (“Helms . . . concluded Student displayed the characteristics of serious emotional disturbance.”). When testifying, it appears that Dr. Helms left room for the possibility that the student’s behaviors were appropriately attributed to biological rather than emotional factors, a view consistent with Dr. Fuentes’ opinion.²

Again, the experts disagreed regarding the student’s proper diagnosis. All agreed he suffered from ADHD. Some believed an emotional disturbance was at issue. One believed the student suffered from an autism spectrum disorder; another disagreed with that conclusion. However, the ALJ found no need to resolve these conflicts and indeed, she would be ill-equipped to do so. Instead, she focused on the relevant inquiry, upon which the experts agreed: The student’s need for a small structured, environment with attention to his behavior.

¹ As noted above, Dr. Fuentes also acknowledged that the student's behavior met the criteria "for the educational diagnosis of emotional disturbance," while Dr. Liebert believed that the student suffered from a disorder on the autism spectrum.

² In truth, it is difficult to assess Dr. Helms’ exact testimony on this issue. Because of transcription problems, the portion of the transcript to which student cites is incomplete. See A.R. at 492 (thirteen passages marked “indiscernible”).

F. Sensory Diet

The student contends that the sensory diet recommended by the occupational therapist is cannot be implemented in the SDC-ED class. The record belies this contention. The SDC-ED testified that he has experience in implementing sensory diets and assessing a child's level of frustration as well as ways of relieving that frustration. A.R. at 1157 ("Q: So do you have experience in implementing a sensory diet that a child in your class may have? A: Yes.").

G. Restrictiveness

The student contends that the ALJ failed to compare testimony regarding the restrictiveness of the environments found in the SDC-ED and the Winston School, arguing that the testimony establishes that Winston School is less restrictive environment. To be sure, the cited-to testimony establishes that the students at the Winston School enjoy greater freedom of physical movement, changing classes independently, while students at in SDC-ED are under the supervision of their teacher and two aides the entire school day, generally in the two classrooms described herein.

This argument raises the issue of whether a mainstream placement was appropriate for the student. Although mainstream placement is desirable where feasible, students may be removed from a mainstream educational environment when the use of supplementary aids and services fail. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i)-(ii). The student's 2006-2007 school year represents an abysmal failure of a mainstream classroom setting for the student. Even when assigned a one-to-one aide, the student was unable to attain a level of attentiveness that allowed his teacher to conduct an undisrupted class, his was openly defiant and often violent toward

his classmates, and his academic performance suffered.

Additionally, the Winston School consists entirely of disabled students, such that “mainstreaming” of the student would not result in his placement with other non-disabled students. That opportunity exists, as the student progress allows it, at the placement offered by the district.

The Court can find no evidence that the ALJ failed to consider the relative restrictiveness of the two alternative placements. She simply weighed the evidence and found that the placement offered the student provided him with a FAPE in the least restrictive environment.

H. The Winston School

Finally, the student contends that his needs can be met at the Winston School, where he was enrolled in a summer program. It appears from the testimony of the Assistant Head of the Winston school that, although the school is not equipped to deal with some of the student’s past violent behavior, it could meet his sensory and academic needs. However, even if the Court were to find that the Winston School could provide a FAPE, it does not necessarily follow that the District’s offer did not comply with the IDEA. See Gregory K. v. Longview School Dist., 811 F.2d 1307, 1314 (9th Cir. 1987) (“Our . . . review, however, must focus primarily on the District’s proposed placement, not on the alternative that the family preferred.”)

Upon review of the student’s arguments, the Court does not find that a *de novo* review is warranted. Instead, the Court finds that the ALJ considered and weighed the evidence, making thorough and careful findings; thus, the Court’s review of the ALJ’s decision is deferential. Wartenberg, 59 F.3d at 891. Upon that deferential review, and

taking into account the student's arguments, discussed *supra*, the Court finds that the ALJ correctly determined that the District's placement offer for the 2007-2008 school year provided the student with a FAPE in the least restrictive environment.

VI. CONCLUSION

Accordingly, and for the foregoing reasons, the Court **AFFIRMS** the ALJ's decision.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: May 19, 2010

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, May 19, 2010, by electronic and/or ordinary mail.

S/Julie Owens
Case Manager, (313) 234-5160