

BEFORE THE HEARING OFFICER PANEL  
FOR THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Education of

FINAL ORDER

B. J. M.

and

Eugene School District 4J (District)

Case No. DP00-105

Ref. No. 000643

DATE OF HEARING REQUEST:

March 2, 2000

DATE OF HEARING:

April 12, 13, 24,  
& May 2, 2000

DATE OF ORDER:

**JULY 3, 2000**

HEARING OFFICER:

Darrell D. Walker  
Hearing Officer Panel

PARENTS' ATTORNEY

Mary Broadhurst

DISTRICT'S ATTORNEY:

Joe Richards

REPORTER:

Pamela Kyker

WITNESSES:

C.M., Mother

A. M., Father

John Lehmann,  
District's Director of  
Educational Support Services

Shaundele Leatherberry, Chair,  
program for students with mild  
disabilities.

Bruce Stiller, School  
Psychologist and Behavioral

Consultant.  
Larry Soberman, Resource Room  
Teacher and Assistant Principal.

LeeAnn Thompson, Math Teacher.

Eileen Babbs, English Teacher.

Betty Jane Connell, Special Education  
Consultant.

Linda Whitener, Director of Looking  
Glass Intensive Day Treatment  
Program.

Phyllis Metzker, Special Education  
Teacher.

Jennifer Mauro, Licensed Clinical  
Psychologist.

Londa Rochholz, Coordinator of  
Home and Hospital Instruction.

Chet Lundy, Computer Specialist.

Gordon Wright, Case Coordinator,  
Direction Service.

Robert O'Neill, Associate Professor of  
Special Education, University of Utah.

Nancy Smith, Educational Consultant.

Ciel Sanders, Addiction Counselor.

Dan Stuart, Marriage and Family  
Therapist.

James Ewell, Licensed Clinical  
Psychologist.

**NOTE:** At the District's request, the 45 day time frame was waived with the hearing scheduled for

FINAL ORDER

B.J.M. & Eugene School District

Page 3

April 12, 13 and 14 with the Final Order due May 14. At the parties' subsequent request, the hearing was held on April 12, 13, 24 and May 1 with closing briefs to be postmarked by May 19 and the Final Order due June 21, 30 days after receipt of final closing briefs.

**ISSUES:**

1. In December 1998, did the District fail to offer an Individualized Education Program (IEP) and placement to B.J.M. which were reasonably calculated to provide him with a free appropriate public education (FAPE) and, if so, are his parents entitled to reimbursement for the costs of the placement they secured for him?
2. In February 2000, did the District fail to offer B.J.M. an IEP and placement which are reasonably calculated to provide him with FAPE and, if so, are his parents entitled to reimbursement for the costs of the placements they have secured for him.
3. Did the District violate 34 CFR §300.345(f) of the Individuals with Disabilities Education Act (IDEA) by not providing B.J.M.'s parents a copy of the February 15, 2000 IEP until March 3, 2000?
4. Did the District violate 20 U.S.C. §1415(b)(3) by failing to provide until March 3, 2000 a written notice of its February 15, 2000 decision refusing to change B.J.M.'s placement?

**FINDINGS OF FACT:**

1. B.J.M. is a fifteen year old young man whose parents have resided within the District since at least 1995 when B.J.M. was in the 5<sup>th</sup> grade.
2. Jennifer Mauro is a licensed clinical psychologist. She has practiced with PeaceHealth Medical Group in Eugene since 1991. She was B.J.M.'s treating psychologist from February through June 1995 when B.J.M. was in the 5<sup>th</sup> grade. She was again his treating psychologist from June 1996 through October 1997, when she took a year-long maternity

FINAL ORDER

B.J.M. & Eugene School District

Page 4

leave and B.J.M.'s treatment was taken over by Jeffery Hicks, another licensed clinical psychologist with PeaceHealth, and from October through December 1998.

3. By Christmas 1996, mid-way through B.J.M.'s 7<sup>th</sup> grade year, he had developed agoraphobia with panic attacks and symptoms of depression, oppositionality, and obsessive-compulsive disorder. He was unable to leave his house for the first few months of 1997. He did not attend school for the rest of the 1996-97 school year, his 7<sup>th</sup> grade year.
4. In addition to regular treatment by his psychologists, B.J.M. was treated by his pediatrician, Dr. Roe, and his psychiatrist, Dr. Grimm and later Dr. Cohn. His treatment was coordinated and included medication and counseling therapies.
5. The District began providing B.J.M. with three hours of weekly in-home tutoring sometime during the period of January through May 1997.
6. In October 1997, the beginning of his 8<sup>th</sup> grade year, the District determined that B.J.M. was not eligible for special education and services under the IDEA but was eligible for services under §504. A §504 plan was developed. The District increased his home tutoring hours from three hours per week to five hours per week. The §504 plan called for transition to school beginning part-time in December 1997. However, through April 1998, his disabilities prevented him from entering a school. In May 1998 he began receiving his tutoring at his neighborhood middle school for two days a week. He would be tutored for an hour, attend lunch with the rest of the student body, and be tutored for another hour.
7. In May 1998, the District again evaluated B.J.M.'s eligibility under the IDEA. Dr. Stiller is a school psychologist on the District's staff. He assessed B.J.M. using the Woodcock-Johnson - Revised, the Behavior Evaluation Scale, and the Achenbach Child Behavior Checklist. He, along with the rest of the eligibility team, concluded that B.J.M. was eligible for special education and related services under the IDEA as a student with an emotional disturbance with: documented excessive behavior including significant evidence of depression and withdrawal, documented inappropriate behavior and feelings under normal circumstances, and documented development of physical symptoms, pains or fears associated with personal, social, or school problems. The team recommended that the primary goal of his IEP should be that of gradual reintegration into the regular educational environment through a "systematic desensitization format" to be implemented at South Eugene High

FINAL ORDER

B.J.M. & Eugene School District

Page 5

School (SEHS) when he entered there in the fall of 1998.

8. Deanne Crone, a psychological consultant with the Department of Applied Behavioral and Communication Sciences at the University of Oregon, was retained by the District to conduct a functional assessment of B.J.M.'s behavior, using observations and interviews which she conducted on May 19 and 20, 1998. On May 25, 1998, she submitted her report in which she succinctly, and consistent with all other credible evidence in the record in this matter, summarized B.J.M.'s problems:

“In summary, it is clear that [B] has a long history of problems with severe anxiety. These problems have significantly impaired his functioning in key areas of his life, most notably in school performance. [B] has achieved success in reducing the severity of these problems, through medication and gradual exposure to anxiety-provoking situations. It is likely that continued use of medication and gradual increase in the amount of time [B] is expected to be at school will continue to improve his anxiety-related problems. [B] has also demonstrated some conduct problems, most notably aggression towards his younger brother and a one-time instance of experimenting with gun powder and gasoline. These problems may be evidence of more serious conduct problem and should be further assessed and monitored. Finally, [B] demonstrates and reports many symptoms of depression. The area in which he reports the most problems is in not feeling interested or happy about anything. In the past, [B]'s depressive symptomatology has been so severe that he has made suicidal gestures or engaged in self-injurious behavior. Any evidence of suicidal thoughts or gestures should be closely monitored and immediate efforts should be made to protect [B]'s safety.”

She recommended that attempts be made to gradually increase B.J.M.'s school attendance - both increasing the number of hours he was at school and introducing him into some regular education classrooms in addition to his tutoring at school. She cautioned that the rate at which these goals should be accomplished needed to be decided upon in consultation with B.J.M.'s psychologist.

She recommended that he continue taking psychiatric medications as prescribed by his physicians, that he continue working with his psychologist, and that his depressive symptomatology and conduct-related problems be further assessed and addressed.

She recommended that his parents and teachers quit worrying about whether his behavior at any particular time was driven by anxiety or was simple noncompliance and concentrate on developing a simple and consistently enforced behavior plan which would include 2 or 3 specific rules he would be expected to *always* follow. She suggested that B.J.M. be involved in generating these rules. She emphasized that, despite his frequent reluctance to engage in

FINAL ORDER

B.J.M. & Eugene School District

Page 6

such discussions, he should be involved in discussion about the nature of any change in his schedule before any change is made.

Finally, she suggested immediately increasing his contacts with school staff and other students.

9. At the eligibility team's request, Dr. Crone again interviewed B.J.M. and developed an anxiety hierarchy for use in planning B.J.M.'s transitions. That hierarchy showed, among other things, that he experiences the most anxiety in new situations and would experience the most severe anxiety if placed in a class of more than twenty-five students, none of whom he knew, for a full school day.
10. On May 25, 1998 Dr. Hicks, B.J.M.'s treating psychologist during Dr. Mauro's maternity leave, wrote a letter summarizing B.J.M.'s conditions, his progress and prognosis. Dr. Hicks cautioned that:

“while most anxious patients benefit from being pushed toward more independent functioning, [B] is at risk for decompensation and such an approach should be carefully weighed against possible consequences.”
10. On May 26, 1998, the IEP team met and determined that B.J.M.'s appropriate placement was in the middle school resource room - where he had been receiving his tutoring. The placement form notes that the placement was based upon “the IEP dated May 26, 1998.” However, the “Prior Notice and Consent for Initial Placement into Special Education” form dated May 26, 1998 notes, “There was much discussion on how to develop a plan. This will be further discussed at the formal IEP meeting.” There was no IEP on May 26.
11. An IEP meeting was held on June 11, 1998. Appropriate staff from South Eugene High School (SEHS), B.J.M.'s neighborhood high school, were present at the meeting. An IEP was partially drafted. It called for B.J.M.'s annual goals to be “attend school full time in regular education classes. He will practice his skills for coping with anxiety.” It set out short term objectives of one-on-one tutoring at SEHS through November 15, transition to some work in the SEHS resource room class room beginning in November, adding one small regular class beginning in February, and adding another in March. The IEP was not completed because the team decided to wait until fall and see if B.J.M.'s conditions and/or needs had changed significantly.
12. Prior to or during the June 11 IEP meeting, the parents had requested that B.J.M. be placed in a small, private school in Eugene - a placement supported by Dr. Hicks in his letter of May 25. On June 11, 1998 the District provided the parents with a “Prior Notice and Consent for Initial Placement” which listed SEHS as the chosen placement. It stated that “Private

FINAL ORDER

B.J.M. & Eugene School District

Page 7

School” had been rejected as a possible placement because it was more restrictive than SEHS and because B.J.M. was unfamiliar with the private school and its students, conditions which seemed generally to increase his anxiety levels. B.J.M. had never attended SEHS. He knew a few of the thousand or so students at SEHS.

13. B.J.M.’s conduct worsened significantly over the summer. He was diagnosed with Oppositional Defiant Disorder. He became more uncommunicative and defiant with his parents and quite difficult to deal with at home. He would leave his house to visit friends without telling his parents where he was going or when he would be back. He would lie to his parents. He shouted at his parents. He played loud “satanic” music in his room. He drew morbid and violent pictures and hung them in his room. He wore “Gothic” makeup and chains and a studded/spiked collar. He began smoking tobacco. However, his agoraphobia left, he had few panic attacks, and his depressive symptoms lessened.
14. B.J.M.’s parents enrolled him in a three week Catherine Freer Wilderness Therapy Expedition, a residential (camping out) wilderness therapy program designed for adolescents with behavioral and/or drug and alcohol problems, from September 13 through October 3, 1998. B.J.M.’s counselor on that camping trip was Ciel Saunders, a certified addiction counselor with a B.S. degree. The trip’s leader was Elizabeth Rink, a licensed clinical social worker.

During the trip, B.J.M. reported that during January through March 1996 he had consumed at least 1/4 of a bottle of vodka a day, five days per week. He reported being drunk twice in the past sixty days and having once used marijuana in the summer of 1998. He reported that alcohol made his depression better. Expedition staff believed that he was under-reporting his drug and alcohol usage.

B.J.M. appeared to experience a panic attack while on the trip. He subsequently reported to expedition staff that he had begun using “panic attacks” as a way to get his needs met. Expedition staff noted that he required a high level of supervision but that when he was given concrete and inflexible rules, his non-compliant behaviors decreased. Expedition staff provided the parents with weekly progress reports during the trip. Early on, the staff recommended that B.J.M. go directly into some residential placement at the end of the trip. The parents did not agree with that suggestion. At the end of the trip, Ms. Sanders’ formal recommendation was that he be placed in an intensive outpatient or inpatient treatment program.

15. While B.J.M. was on the expedition, an IEP meeting was held on September 28, 1998. An IEP was developed. Exhibit #213 was presented in the hearing as the September 28, 1998 IEP. Neither the parents nor the District objected to that characterization of the exhibit. However, that exhibit is clearly the amended IEP of October 22, 1998.

FINAL ORDER

B.J.M. & Eugene School District

Page 8

16. The IEP of September 28, 1998 called for 50% participation in regular education with 7 hours per week of "home instruction," (one-on-one tutoring). It provided that B.J.M.'s extent of non-participation in regular education would be 50%.
17. The IEP had one goal with objectives. That goal was mis-labeled, "transition services." The present level of performance statement for that goal was, "[B] has a long history of problems with anxiety. These anxieties significantly impair his school attendance. [B] has greatly reduced the severity of these problems through medication and therapy. His academic skills fall into the average range. However, he has not been able to attend school or classes on a regular basis. He has been receiving home instruction twice a week for 2 hours a day at [his middle school]."

The goal was, "[B] will attend school full-time in regular education classes. He will practice his skills for coping with anxiety." There were three short-term objectives: having half his classes from tutoring and half from "the mainstream" by November 1, 1998; having "75% of his classes in the mainstream and 25% from [tutoring] by February 1, 1999; and having "100% of his classes in the mainstream with support from the resource program by May 1, 1999."

There was no consultation with B.J.M.'s psychologist about the rate at which B.J.M. would be introduced into regular classes. The IEP called for no counseling services although C.M. had requested them in May and June 1998. The IEP contained no behavior plan. The IEP called for no related services at all.

18. The meeting also re-affirmed the placement decision of June 11, 1998. On or about September 28, 1998, the District provided the parents with a typed, and slightly amended, version of the placement notice of June 11, 1998, which noted that the placement was based on the IEP dated September 28, 1998.
19. On October 1, 1998 the supervising therapist of B.J.M.'s expedition, Beth Rink, telephoned Dr. Stiller, the District's psychologist assigned to B.J.M.'s case, and informed him that, among other things, B.J.M. was "very, very manipulative" and used his panic attacks to avoid tasks he does not want to perform. She suspected that all or most of his panic attacks at that time were faked. She opined that B.J.M. was a master at manipulating his mother. She suspected that he had at times used alcohol and drugs frequently enough to interfere with the therapeutic effects of his medications. However, she did not believe him to be in an "addiction phase" at the time. She did worry that if he began using heavily he might become suicidal. She felt that the proposed placement at SEHS could work but believed that the unsupervised lunch period might prove problematic - it offered him opportunity to get into troubles. She advised that the District implement his IEP with "directiveness, encouragement for success, and confrontation of avoidance behaviors."



FINAL ORDER

B.J.M. & Eugene School District

Page 9

20. When B.J.M. returned from the trip, his parents, after consultation with expedition staff and B.J.M.'s treating psychologist, developed a behavior contract with B.J.M. covering behaviors at home and at school. The bottom line of the contract was that if he did not generally begin complying with the contract within a reasonable time, he would find himself out of the home and in a residential placement - as recommended by Ms. Rink and Dr. Mauro.
21. When B.J.M. returned from the expedition, he was placed in SEHS on October 5, 1998 on a half-day schedule.

He began school at third period in a regular English class. During fourth period he usually attended a resource room study hall - sometimes he would receive science tutoring in this period. He had lunch during fifth period. In sixth period he would work one-on-one with a tutor in social sciences. In seventh period he attended a regular math class.

His math class was Applied Math I which is a slow version of Algebra I, the usual sophomore math class, but is advanced over Pre-Algebra, the usual freshman math course. It was chosen for B.J.M., a freshman, because he is bright and it was a small class. From October 5 through December 2, 1998 he missed three classes (some of which may have been "skips") and was tardy three times out of 38 math classes. Most assignments could be completed in class with students allowed to leave class early when finished. He completed all of his work through November 29. He had an 88 test score average. He was earning a high B in the class through December 2. He had no behavior problems in the class.

His English class was English Studies, a remedial English class. It was chosen for B.J.M. because it was small, only ten students. From October 5 through December 2, 1998 he was absent three times (some of which may have been "skips") and tardy three times. There was little homework assigned. He completed more than 90% of his assignments and had a B average through December 1. He had no behavior problems in the class.

He consistently opined that both of the regular education classes were below his skill level and boring.

22. He did not perform nearly so well in his tutored/resource room classes. The District's attendance records for his tutored periods are inaccurate. However, as pointed out in B.J.M.'s closing brief, C.M.'s contemporaneous notes (Exhibit #219) show that he was absent or tardy six or seven times in his sixth period tutored class, immediately after lunch, during the October through November period - an attendance performance quite similar to his performance noted above in his regular education classes. But, his other behavior was below expectations. He consistently failed to do his homework and in-class assignments for his tutored classes. When he had study hall, he would often draw violent and morbid

FINAL ORDER

B.J.M. & Eugene School District

Page 10

“Gothic” pictures rather than do homework. He often seemed distracted and disengaged in these one-on-one classes - at least once he fell asleep during one of the discussions in his sixth period class.

B.J.M.’s tardies and trancies were no more than average for SEHS students. The behavior contract between B.J.M. and his parents called for him to do his all homework, attend all classes, and not be tardy. The parents frequently expressed their concerns to District staff about B.J.M.’s problems with attendance and homework and SEHS’s seeming reluctance to hold B.J.M. to 100% compliance.

An IEP meeting was held on October 22, 1998. The IEP was amended to add 25 minutes per day of specialized instruction in study skills in the resource room. A new goal with objectives was developed. That goal noted his present level of performance as, “[B] is passing his regular education classes. He has deficits in study skills including organization, assignment management, and time management.” The goal called for him by the end of the year to demonstrate appropriate study skills in his regular education classes. Short term objectives under this goal included 85-90% success at completing assignments, getting to class on time with the needed materials, keeping an organized notebook with sections for each class, and following rules. It did not specify any schedule for checking progress in the goal and objectives.

Although not added to the IEP, the District agreed to keep him in his math class even if he finished his homework. And, C.M. and District staff agreed to attempt to implement a homework tracking system. B.J.M. refused to cooperate with the tracking system. He consistently stated that he did not like the tutored classes and saw no reason to be on time to them or to do the homework. Or, he would lie and say he had no homework. A new goal with objectives was added.

The IEP still called for no counseling services or for any related services.

23. The behavior contract between B.J.M. and his parents called for him to remain on campus during his lunch hour. That had been discussed at the IEP meetings. However, there was no provision in the IEP for supervising B.J.M. during the lunch hour. Therefore, he was not supervised. SEHS is an open campus. He left with friends each lunch hour. He made comments to his parents, and comments to his friends overheard by his parents, indicating he spent the lunch hours hanging out at the down town mall with substance-abusing, poor-performing friends. And, he once expressed an interest in going to a gun shop on the mall during a lunch hour. His parents and therapists were concerned about what he might be getting into during those periods. His parents discussed their concerns frequently with SEHS staff. An IEP meeting was held on October 22, 1998. As the IEP said nothing about lunch period supervision and it called for no related services or behavior plans, no action was

FINAL ORDER

B.J.M. & Eugene School District

Page 11

taken other than to advise B.J.M. that he had to be at least two blocks from campus before he could smoke.

24. B.J.M. occasionally scraped, not cut, on his arm with razor blades and/or Exacto knives. He did not draw blood. He began carrying an Exacto knife in his pocket, claiming to his mother that he needed it for protection. A friend of his committed suicide "out of the blue."
25. On October 29, 1998, Dr. Alan Cohn, one of B.J.M.'s treating psychiatrists, completed a "Medical Statement for Health Assessment" form sent to him by Dr. Stiller. Dr. Cohn indicated that B.J.M. had health conditions which affected his educational performance. And, he noted, "Described as having anxiety disorder - appears more conduct disordered and oppositional to me."
26. B.J.M.'s behavior at home progressively deteriorated after his return from the wilderness trek. He became more verbally aggressive with his parents and occasionally physically aggressive with his siblings. When Dr. Mauro returned from maternity leave and took over B.J.M.'s treatment from Dr. Hicks in early October 1998, she noted that his agoraphobia had pretty much disappeared along with most of his anxiety, though he still had occasional panic attacks. However, she noted continued depression with symptoms such as depressed affect and very disturbed sleep patterns. She had some concerns about suicidal ideation in him. She also diagnosed him with Oppositional Defiant Disorder and with possible alcohol and drug abuse. She found him by that time to be something of a diagnostic mystery. She was not sure just how many and which disorders he may actually have been suffering from. She noted that the behavioral contract his parents had drawn up was most reasonable but that he seemed unable or unwilling to keep his end of the bargain. She found that he was much less amenable to treatment than he had seemed when she last worked with him. In treatment sessions he only blamed others and vented his anger. In addition, sometime prior to December 1, B.J.M. refused to go to anymore counseling sessions with Dr. Mauro and his psychiatrist. He may have developed some possible delusional thinking prior to December 1 - he had mentioned to one of this tutors that he believed there were video cameras tracking him.

Dr. Mauro considered that B.J.M. might function better in a day treatment program than he was functioning in SEHS. However, she considered that he was decompensating at a rapid rate, that day treatment would not check that decompensation, that he might not be able to function in a day treatment program, and that, if he could function in a day treatment program at that time, he would, more likely than not, reach a point in a few weeks or months where he would not be able to successfully function in a day treatment program. She also believed that none of the attempted medication regimens had worked well and that they needed adjusting again - adjustments that could, at least temporarily, further exacerbate B.J.M.'s decompensation. Dr. Mauro recommended to his parents that they place B.J.M. in a

FINAL ORDER

B.J.M. & Eugene School District

Page 12

- locked residential treatment program. His parents began searching for a such a placement.
27. By mid-November 1998, his parents had tentatively decided on placing B.J.M. at Island View Residential Treatment Center (Island View) in Utah. On November 19, they spoke with Dr. Stiller and discussed District funding for a residential placement. Dr. Stiller believed that B.J.M. needed a change in placement. He was concerned that B.J.M.'s declining emotional stability endangered his safety and the safety of his parents and siblings. An IEP/Placement meeting was set for December 1, 1998 to discuss placement. No formal, required notice of the meetings was sent to the parents. They did not know who the District would have at the meeting.
  28. The IEP/Placement meeting was held on December 1 and 2, 1998. The meeting did not consider any changes to the IEP. Dr. Mauro was present for part of the meeting. She reported B.J.M.'s decompensation, including his cessation of attendance at treatment, and her opinion that he required a locked residential facility. The meeting considered continued placement at SEHS, as well as possible placements in a residential treatment facility, in a behavioral classroom at another high school, and in the Looking Glass Intensive Day Treatment Program (Looking Glass).
  29. After two days of meeting, the IEP team, with the parents dissenting, chose to change B.J.M.'s placement to Looking Glass and to deny the parents' request for a residential placement. There was no change to the IEP. The placement notice of December 2, 1998 to the parents informs them that it is based upon the "IEP dated September 28, 1998 [as revised October 22,1998]."
  30. The Looking Glass program was a program for six to seven students which combines academic education with therapeutic modalities such as group, individual, and family treatment of mental health and/or substance abuse issues. The program is not designed for college preparation. It can provide instruction in some courses required for college admission, but not in others. No inquiry was made by the IEP team in either December 1998 or February 2000 as to where B.J.M. was at in his college perquisites and whether or not Looking Glass could provide the necessary classes to get him onto a "college prep" track. Although certain college preparatory course are not available through Looking Glass, students generally receive grade and skill level appropriate academic instruction in three classes daily. Advanced algebra is available at Looking Glass. They also receive group treatment/therapy for the equivalent of two class periods daily, and one activity/elective period daily. Instructors and therapists are certified teachers and/or B.A. level qualified mental health professionals. B.J.M.'s negative behaviors and diagnosed (both definitive and "rule-out" diagnoses) conditions were typical of Looking Glass' student body. The program operates Mon-Friday 8:30 to 2:30. The program does not take students who are, in the words of Ms. Whitener, a certified special education teacher and the program's director,

FINAL ORDER

B.J.M. & Eugene School District

Page 13

“actively psychotic like hallucinogenics and things like that and not amenable to treatment. We have had some kids with some psychosis but function with medication. But if there’s a psychosis that’s not amenable to medication or some other treatment, then we are not -- we don’t take those children.”

31. On December 2, the second day of the IEP/Placement meeting, the parents announced that they had decided to send B.J.M. to Island View. They informed B.J.M. of that decision also. B.J.M. ceased attending classes at SEHS after December 1. C.M. would take him to SEHS and he would go elsewhere after she drove off. SEHS let the parents know by automated phone call that he had missed classes. District policy required that SEHS staff inform District staff, such as Ms. Connell, whenever a special education student had extended, unexplained absences. That did not happen in this case.
32. After the placement meeting Dr. Stiller and other District staff suggested to the District’s erstwhile director of special education that, although the District was not in their opinion legally bound to fund B.J.M.’s placement at Island View, the District had a responsibility to fund the “educational portion” of the costs of that placement. The director thought otherwise.
33. Island View is a locked residential treatment center for adolescents. It is located in Syracuse, Utah. It houses over 100 students. It provides a **highly** structured, round-the-clock therapeutic and educational regimen including group therapies, individual therapies, recreational therapies, and family therapies (generally by teleconference as most students are from out of the area). There is a “levels” structure - as a student’s behavior improves, he or she is advanced to the next level with rewards such as extra phone privileges attached to each higher level. Academic subjects are taught by certified teachers in small classes and are directed to the student’s skill level, remedial through advanced placement. The academic program is accredited by Utah’s State Board of Education and by the Northwest Association of Schools and Colleges. B.J.M. was able to enroll in much the same academic courses as he had at SEHS. At Island View he took pre-algebra rather than algebra. Each student is assigned to a team of students with a therapist who is the “team director.” In addition, each student is assigned a “primary therapist.” Physicians frequently evaluate each student, beginning with exhaustive psychological assessments when they enter the school.

An individualized “master treatment plan” is developed for each student when they enter. It is comprehensively reviewed in detailed reports monthly. The master plan is updated frequently as a child’s conditions and needs change. B.J.M.’s plan included goals and objectives in family conflict, depressed mood, anger management, oppositional defiance, and substance abuse. Progress toward those goals and objectives was evaluated each month by analyzing his progress in individual therapy, group therapy, family therapy, recreational therapy, and his academic classes.

FINAL ORDER

B.J.M. & Eugene School District

Page 14

34. B.J.M. entered island View on December 29, 1998. He was initially diagnosed, on or about December 30, 1998, with Major Depression, Recurrent, Severe; Social Phobia; and Rule Out Polysubstance Abuse v. Dependence. In April 1999, he began reporting paranoid delusions about secret observation and video taping and of hearing his name called. "With Psychotic Features" was added to his Major Depression diagnosis. Substance "Abuse" rather than "Dependence" was settled upon as the diagnosis for that problem area. His medications and dosages were frequently changed in an attempt to find the right therapeutic combination.
35. He did not do well at Island View for the first ten or eleven months of his residency. After further decompensation for the first few months, he made slight and inconsistent progress in his treatment until July. When allowed to visit home in July 1999, he refused to voluntarily return to Island View. His parents had to hire an escort service to put him on the plane. Upon his return to Island View he was placed on "unit restriction," where he conspired with another restricted resident to assault a guard, steal his keys and escape. B.J.M. convinced his peer to assault the staff member, but the escape was thwarted. Due to the resulting disciplinary restrictions, he missed so many academic classes that he received credit for only two of his six academic courses that term. He never made it to the highest level in the levels structure during his fifteen months there. Most students achieve the highest level in six to nine months. He did not show significant improvement in mood stability or in social and coping skills until December 1999. Significant improvement continued through March 2000.
36. Island View staff and the parents began discussing in October 1999 what to do with B.J.M. when he had progressed to the point that he no longer needed a locked facility. Dan Stuart, an M.A. level therapist and B.J.M.'s primary therapist beginning in September 1999, recommended a residential treatment facility because he believes B.J.M. still needs a twenty-four hour structure which his parents will be unable to provide. He believes that, more likely than not, B.J.M. if enrolled in a day treatment program would be particularly vulnerable to negative distractions and decompensation during the periods he is not in school or treatment. All other members of B.J.M.'s treatment team at Island View signed off on Mr. Stuart's opinion.
37. On January 12, 2000, A.M. wrote to Dr. Stiller informing him of B.J.M.'s imminent discharge from Island View and asking for an IEP meeting to develop an appropriate placement for B.J.M. He enclosed with his letter a copy of a letter of January 10, 2000 by Mr. Stuart, countersigned by Island View's clinical director and by B.J.M.'s attending physician at Island View, which explained that B.J.M. was making progress to the extent that he would soon be requiring a transition to some less restrictive facility. It also put forth the propositions that: 1) Day treatment and home placement would be inappropriate. and, 2) The only appropriate facility would be one which provides ongoing therapeutic support, including

FINAL ORDER

B.J.M. & Eugene School District

Page 15

individual, group and family therapy and a supportive, structured academic setting with small class size. He also recommended regular community exposure.

38. The January 10, 2000 letter by Mr. Stuart is a revised version of a December 5, 1999 letter by Mr. Stuart to A.M. That version of the letter had also noted that B.J.M. had failed to make significant academic progress during his first six to nine months at Island View because it had taken that long to stabilize his medications and, thus his emotions, sufficiently to allow him to concentrate on his studies. The parents, at their attorney's request had requested that Mr. Stuart revise the letter to leave out any mention of medication management problems. And, he complied with their request.
39. An IEP meeting was scheduled for February 3, 2000. District staff were concerned about how they were to develop an IEP without having any information about B.J.M. from the past fourteen months. Dr. Lehmann, the District's current director of special education programs, advised them to obtain documents from Island View. The IEP meeting was rescheduled by the District to February 15, 2000. The District first contacted Island View, by fax, for information about B.J.M. on February 7, 2000. The District again contacted Island view on February 11 when it had received no response. Island View faxed a handful of documents to the District and mailed, on February 11, a large packet of documents. The large packet was not received by February 15.
37. Dr. Stiller suggested to the District that, because B.J.M.'s conditions had been so severe that he had required a year in locked facility before a residential facility could be considered for him, it would seem reasonable for the District to fund a residential placement at this time.
38. Ms. Metzker, the special education teacher on the IEP team, met with Ms. Connell and Ms. Leatherberry prior to the meeting. They told Ms. Metzker that she would be participating in a placement meeting for B.J.M. and that all the information she and the team would need to develop an IEP would probably come out at the meeting. One of them told her that the parents had chosen a residential placement for B.J.M. which was not the District's responsibility, and that the District had placements available for the child.
40. The IEP/Placement meeting was held on February 15. The District had invited Dr. Ewell, a licensed clinical psychologist, as an impartial expert. He declined to give any opinion about placement until after receiving the full packet from Island View. He left the IEP meeting before any placement decision was made. The District never supplied him with that information. He declines now to give any opinion on placement other than that day treatment, such as Looking Glass, would be an option he would consider along with others after he had reviewed the complete Island View packet. Phyllis Metzker, a team member and a special education teacher with the District, abstained from giving an opinion. Two other District staff persons had to leave the meeting before a placement decision was made. Ms.

FINAL ORDER

B.J.M. & Eugene School District

Page 16

Connell and Ms. Leatherberry were the only District staff who opined about placement. They chose Looking Glass.

38. Ms. Whitener was not able to be at the meeting. However, A.M. had called her prior to the meeting and discussed Looking Glass' general program and how B.J.M. might or might not fit in. District staff were aware of the program from their experience with other children placed in it.
41. Prior to the placement decision, there was some discussion of B.J.M.'s needs and abilities. The team had available to it the early evaluations from Island View, and it had Mr. Stuart available by telephone. He was able to provide the team with much information about B.J.M.'s current levels of performance and about his needs. District staff believed that, even if they waited for the full packet from Island View, they could not write a very detailed IEP for B.J.M. until they had a chance to observe him in the District. District staff who drafted the IEP describe it as "very vague." They testified that, "We spent very little time on goals and objectives."
42. The District's computerized record keeping system for special education is inadequate. Historical documents can be revised without indication that they have been changed. Revised documents generally, but not always, note a date of revision. Sometimes dates of revision are given but the precise fields revised are not indicated so that it is impossible from the face of document to know what the document looked like prior to amendment. (See Finding of Fact #15, above). The system self-generates erroneous responses in some fields on some documents. The system sets parameters in certain document fields such that some original information is dropped off into electronic limbo without any clue that it had existed. For example, if more people attend an IEP meeting than the "participants" field in the program has room for, those "excess" names will not appear on the document even though they have been typed in. Original, paper documents are not routinely kept by anyone or centrally filed by the District.
43. The IEP, as developed by the team as offered by the District as an exhibit in this matter, calls for "at least one hour per day" of specially designed instruction in behavior/social skills. It calls for 30 minutes per day of specially designed instruction in study skills. It calls for three hours per year of transition services.  
  
It calls for special transportation twice daily. It calls for a behavior support plan which is "to be developed upon enrolment." It specifies that non-participation in regular classroom activities will be "at least one hour per day."
44. The IEP provided the parents on March 3, 2000 differs from the one developed by the team in that it calls for at least three hours per day of specially designed instruction in



FINAL ORDER

B.J.M. & Eugene School District

Page 17

behavior/social skill and for at least three hours per day of non-participation in regular activities.

45. The IEP makes no provision for counseling services. It does provide goals and objectives in Behavior. The present level of achievement in the area of behavior accurately restates information given the team by Mr. Stuart. The goal in behavior is that B.J.M. will control anger and manage his anxiety during stress at least 80% of the time by utilizing various, specified coping and self-management skills which he had been taught at Island View. The short term objectives include B.J.M. having no more than three anger outbursts/anxiety attacks weekly and verbalizing his feelings in stress situations. Progress in each goal is to be monitored daily with achievement evaluated quarterly.

In the area of study skills, the IEP, using information provided the parents and Mr. Stuart, notes that he had completed 9<sup>th</sup> grade credit in small classes in a structured setting and had been completing 80% of his assignments on his own. The goal is stated as having B.J.M. continue to earn credits and to turn in 90% of his assigned work by using completion, planning, and organization strategies and to continue earning credits toward graduation. Short term objectives are that he demonstrate organization, planning, completion, proofreading and checking skills in 90% of his assignments - to be monitored daily and evaluated quarterly.

In the area of transition services, he is to complete an interest exam to determine his occupational interest and he is to take classes which prepare him for "a post-high school program."

46. At the close of the meeting, Ms. Connell and Ms. Leatherberry selected the therapeutic day treatment program at Looking Glass as the appropriate placement. Before doing so, they considered a regional resource room with a behavioral focus, a locked residential treatment center, and a therapeutic boarding school with academic program. They gave reasons for not selecting those alternatives. The parents dissented and believe that therapeutic boarding school is the appropriate placement.
47. On or about April 1, 2000, B.J.M. was transferred to the Oakley School, a therapeutic boarding school in Utah which is accredited by the Utah Department of Education. It only accepts students who are there voluntarily. It employs a cognitive behavioral approach.
48. The parents were provided with copies of the February 15 IEP and placement decision on March 3, 2000.
49. In April 1995 standardized testing by the District showed B.J.M. to be in the 90<sup>th</sup> percentile in reading and the 35<sup>th</sup> percentile in math. May 1998 testing by Dr. Stiller showed him to be

FINAL ORDER

B.J.M. & Eugene School District

Page 18

in the 94<sup>th</sup> percentile in reading and the 84<sup>th</sup> percentile in math. In January 1999 standardized testing by Island View showed him to be in the 45<sup>th</sup> percentile in overall reading (90<sup>th</sup> percentile in expression) and the 26<sup>th</sup> percentile in math.

**CONCLUSIONS AND REASONS:**

The District has the burden of proving compliance with the IDEA at an administrative hearing, including the appropriateness of its proposed IEP's and placements. *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396 (9<sup>th</sup> Cir. 1994).

“There is both a procedural and a substantive test to evaluate compliance with the IDEA. Reviewing courts must inquire first, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982) (footnote omitted)” - *Seattle School District, No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9<sup>th</sup> Cir. 1996).

1. *In December 1998, did the District fail to offer an Individualized Education Program (IEP) and placement to B.J.M. which were reasonably calculated to provide him with a free appropriate public education (FAPE) and, if so, are his parents entitled to reimbursement for the costs of the placement they secured for him?*

Yes.

The parents alleged many violations of the IDEA's provision by the District prior to December 1998. However, they chose only to request a hearing about, and seek remedies for, alleged violations beginning with the December 2, 1998 IEP and placement offerings. They dispute the appropriateness of both the IEPs and the placements offered on and after that date.

A. *The IEP*

The IEP drives placement; not vice versa. A placement can not be made without an IEP; a placement must be based on the existing IEP. E.g., former 34 CFR Part 300, Appendix A(42); 34 CFR §300.552(b)(2).

## FINAL ORDER

B.J.M. & Eugene School District

Page 19

The parents correctly point out that the District selected a placement for B.J.M. in June 1998 before it had completed an IEP. That placement was future effective, it was to start when he started school in the fall. However, it was the basis for denying in June the parents' request that a private school be the placement for the fall.

The parents allege that B.J.M. began school on September 8, without an IEP. However, the evidence shows that, although school may have begun in early September, B.J.M. did not begin school until his return from the wilderness trek, October 3. The District had held an IEP and placement meeting on September 28, developed an IEP, and then re-affirmed the placement decision it had made in June. Since that re-affirmation included a new notice to the parents stating that the placement was based on the September 28 IEP, the placement was procedurally correct as of September 28. And, since B.J.M. did not begin school until October 3, both the IEP and the placement were timely.

The September 28 IEP was then amended in a meeting on October 22, 1998. That IEP appears in the Districts computer with the headings, "IEP Date (Full Review): 9/28/1998" and "Date IEP Amended: 10/22/98." It is the September IEP with the October amendments which is referred to in the December 2, 1998 notice of placement decision which states that placement "is based on the IEP dated: 9/28/99."

An IEP is judged by whether or not it is reasonably calculated to enable the student to receive educational benefit. *Rowley*. The adequacy of an existing placement is judged by whether or not "the child makes progress toward the goals set forth in her IEP." *County of San Diego v. Cal. Special Educ. Hearing*, 93 F.3d 1458, 1467 (9<sup>th</sup> Cir. 1996). Therefore, it seems that a proposed placement should generally be judged by whether or not it is reasonably calculated to allow the child to make progress toward the goals set forth in his IEP. And, an appropriate proposed placement would generally be the least restrictive placement which is reasonably calculated to allow the child to make progress toward the goals set forth in his IEP. 34 CFR §300.552.

An IEP is a comprehensive statement of the educational needs of a student with a disability and the specially designed instruction and related services to be employed to meet those needs. *Burlington v. Dept of Educ. Massachusetts*, 471 U.S. 358, 368 (1985).

An IEP must include "a statement of the child's present level of educational performance including - (I) how the child's disability affects the child's involvement and progress in the general curriculum. ..." 34 CFR 300.347(a)(1).

The IEP in effect in December 1998 accurately spelled out B.J.M.'s "present" level of performance in the area of attendance as it was **prior** to September 28, 1998. It stated that, because of his anxiety, he had not been able to attend school or classes and had been receiving home instruction.

## FINAL ORDER

B.J.M. & Eugene School District

Page 20

An IEP must include a statement of the special education and related services and supplementary aids and services and program modifications or supports provided to the child to address a child's present levels of performance and to make progress toward the identified goals and objectives. 34 CFR §300.347(a)(3); 34 CFR Part 300, Appendix A(1). And, it must specify the extent to which the child will participate with non-disabled children. 34 CFR §300.347(a)(4).

The IEP in effect in December 1998 specified that B.J.M. would be provided 7 hours per week of one-on-one tutoring, "home instruction" in the District's jargon, and 25 minutes daily of study skills instruction. It also provided that B.J.M. would participate 50% of the time with children without disabilities.

An IEP must include measurable annual goals, including benchmarks of short-term objectives. 34 CFR §300.347(a)(2).

"Measurable Annual Goals, including Benchmarks or Short-term objectives, are critical to the strategic planning process used to develop and implement the IEP for each child with a disability. Once the IEP team has developed measurable annual goals for a child, the team (1) can develop strategies that will be most effective in realizing those goals and (2) *must* develop either measurable, intermediate steps (short-term objectives) or major milestones (benchmarks) that will enable parents, students, and educators to monitor progress during the year, and if, appropriate, to revise the IEP consistent with the student's instructional needs. ... The purpose of both [short-term objectives and benchmarks] is to enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP, to gauge, at intermediate times during the year, how well the child is progressing toward achievement of the annual goal." - 34 CFR Part 3000, Appendix A (1). See also, Former 34 CFR, Part 300, Appendix A(37-41 and 42 {"IEP objectives must be written before placement."}).

There were two goals stated in the IEP in effect in December 1998. The "measurable annual goal" dealing with attendance and anxiety was, "[B] will attend school full time in regular education. He will practice his skills for coping with anxiety." The short term objectives to measure the progress toward this goal were: 50% participation in regular classes by November 1, 1998, 75% participation by February 1, 1999, and 100% by May 1, 1999. That goal and those objectives dealt with B.J.M.'s primary problem, getting him to the educational environment.

That goal developed in September 1998 could not be carried over into the offered placement at Looking Glass. Looking Glass' program involved only children with disabilities. The offered placement at Looking Glass would entail 100% non-participation in regular education, not 50% as specified on the IEP. B.J.M. would receive some 30 hours of instruction at Looking Glass weekly. Some fifteen hours of that would be in therapy sessions, specialized instruction. Fifteen hours of the Looking Glass instruction, the academic instruction part, might be called tutoring but certainly could not be called one-on-one tutoring or "home instruction." And, it is well more than 7 hours per week.

## FINAL ORDER

B.J.M. & Eugene School District

Page 21

Getting B.J.M. back into regular education classes full-time *might* still have been a reasonable annual goal on December 2. However - given that the offered placement puts him back at 0% regular education in December - the old short-term objectives of 50% regular education by November 1998, 75% by February 1999 and 100% by May, were not reasonable.

The IEP does not enable Looking Glass staff to know what they are supposed to be doing with B.J.M., how they are to do it, or how their progress will be reviewed. The IEP does not tell the parents what B.J.M.'s individualized educational program will be at Looking Glass.

The District offered a placement without an IEP that could be implemented in it. The District seems to have, as it did in June, determined a placement without first determining the IEP - the child's needs, how to address those needs, and how to measure his progress. This time the error was fatal. The parents were unaware of the Looking Glass program prior to the meeting. The District had, in violation of the IDEA, failed to inform them that Ms. Whitener would be at the meeting. By itself, that failure is a minor error. Ms. Whitener explained Looking Glass' general program at the meeting.

The parents probably understood and could remember, despite the unchanged IEP cover sheet, that the offered placement would put B.J.M. in a special education environment 100% of each school day. That error, by itself and without specific evidence from the parents of resulting confusion or harm, would not rise to the level of authorizing reimbursement for a unilateral placement.

However, she did not explain and could not have explained what B.J.M.'s goals and objectives would be at Looking Glass. The primary goal/objectives of the September 1998 IEP - the desensitization through gradual increase in attendance in regular education - could not have been implemented in Looking Glass. It had been abandoned. The IEP was thus effectively silent as to B.J.M.'s attendance and other behavioral problems. And, no new goals/objectives to deal with B.J.M.'s primary problems were discussed. No new IEP for B.J.M. was ever discussed or developed.

Parents are not obligated to send their child off to a placement without an IEP specifying the required information about what measurable goals are being pursued. Without that required information they could not make an informed decision about where to place B.J.M.

There was no IEP process in December 1998 for the parents to have an opportunity to participate in. There was only a placement process. That procedural error left B.J.M. without any meaningful IEP for Looking Glass and clearly resulted in the denial of a FAPE. *W.G. v. Bd. of Trustees of Target Range Sch.*, 960 F.2d 1479 (9<sup>th</sup> cir.).

### B. *The Placement*

Disabled children, to the maximum extent appropriate, should be educated with children who are not

## FINAL ORDER

B.J.M. & Eugene School District

Page 22

disabled, i.e., they should be mainstreamed. The education of a disabled child should take place in the least restrictive environment. However, residential placement is appropriate for a disabled child if necessary for him to receive benefit from his education. If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program including non-medical care and room and board, must be at no cost to the parents of the child. 34 CFR §300.302. *Seattle School District, No. 1 v. B.S.*, 82 F.d.. 1493, 1500 (9<sup>th</sup> Cir. 1996).

Island View is akin to a cross between a reform school and psychiatric security hospital. It seems about as restrictive a placement as can humanely exist. Looking Glass is clearly less restrictive and, therefore, would be the proper placement for B.J.M. if an IEP could be implemented there.

The parents placed great weight throughout the hearing and in their closing brief on the comment made by Ms. Whitener, and noted in Finding of Fact #30, above, about Looking Glass not accepting students with a psychosis which is not amenable to treatment and which is like “hallucinogenics.” The parents argue that this demonstrates that B.J.M., who had psychotic features, would not have been accepted, and could not have made progress, in Looking Glass’ program. From Ms. Whitener’s testimony and her demeanor when she gave that testimony, it seems clear that she was referring to circumstances such as a child who during group therapy might begin screaming about the flying hedgehogs which had landed on his hands and were slowly devouring them - an active, disturbing hallucination. Such a child - if a change in medications did not end, or at least temper the intensity of, the psychotic delusions - would clearly not be appropriate for the Looking Glass program. I find it clear that Ms. Whitener was not referring to mild delusions about being observed or being eavesdropped on or hearing one’s name called occasionally - the psychotic features of B.J.M. B.J.M.’s psychotic features did not make Looking Glass. inappropriate.

Dr. O’Neill, the District’s expert witness, was asked if he had a professional opinion as to the type of program and placement that would have been for appropriate for B.J.M. in December 1998. His answer dealt only with placement. He opined that “it would have been appropriate to try some less restrictive alternatives to the residential placement” such as a self-contained classroom or day treatment combined with an educational placement, Looking Glass.

Dr. O’Neill had not spoken with either of B.J.M.’s tutors from 1998. He had spoken with the parents who had mentioned, among other things, that B.J.M. had completely ceased attending school on December 2nd and that as a result he had been “unenrolled” by SEHS due to his absences. He testified that he did not consider that fact in his assessment of the appropriate 1998 placement because he had not been given “any documentation” of the fact. He testified that in forming his opinion he had considered how long it would have taken B.J.M. to make meaningful progress in a self-contained or day treatment placement. When asked how long it would have taken, he responded that he couldn’t give a reasonable estimate. Dr. O’Neill had a long discussion with Mr. Stuart. He never asked Mr. Stuart why he believed that B.J.M. would not have succeeded in day treatment in

## FINAL ORDER

B.J.M. & Eugene School District

Page 23

December 1998. He had not spoken with Dr. Mauro. He opined that day treatment would not be effective if the child refuses to be compliant in therapy or to participate in therapy. He was unaware that B.J.M. had refused to participate in therapy with Dr. Mauro or with his psychiatrist. He testified that he would have needed evidence that B.J.M. was some danger to himself or others before he would have considered a residential placement appropriate. Dr. Stiller testified that he had those fears.

All in all, I think Dr. O'Neill concentrated on reviewing B.J.M.'s recent circumstances and the February 2000 proposed IEP and placement. He did not adequately research B.J.M.'s circumstances in December 1998 and the proposed placement. Since he did not mention the glaring inconsistencies between the September 1998 IEP and the proposed Looking Glass placement, he apparently never looked at the September 1998 IEP in relation to the proposed placement. I give his opinions about the appropriateness of the District's 1998 placement little weight.

But I do give weight to his comments to the effect that a child's refusal to participate in therapy would make gaining benefits from a day treatment placement problematic. And I give weight to his comments that posing a danger to one's self or others is an indicator of the need for a residential placement rather than day treatment placement.

Dr. Hicks warned in May 1998 that putting B.J.M. back into school gradually, although the called-for therapy, could lead to serious decompensation of his anxieties and depression. Dr. Mauro believed by late November 1998 that such a decompensation was occurring and that B.J.M. needed a residential placement to deal with it. I give great weight to the opinions of treating psychologist, Dr. Stiller, who had done a thorough evaluation of B.J.M. in May and had kept abreast of his progress and lack thereof at SEHS, and had fears for the safety of B.J.M. and his family. B.J.M. ceased participating in therapy in late November. B.J.M. ceased attending school on December 2. He was not helped by the District's failure to follow its usual policy of investigating and intervening in cases of extended absences by special education students. Dr. Mauro's poor prognosis for B.J.M. was borne out at Island View. Fortunately, he was in a highly structured environment by that time.

Ms. Connell, a school social worker and special education consultant with the District, was the District's decision maker at the December IEP meetings. She is of the opinion that as long as B.J.M. was able to attend SEHS half-time, then his mental health needs were not educational needs that had to be considered in the placement decision, but that if there were a reasonable expectation in December 1998 that B.J.M.'s mental health conditions would, within 6-8 weeks, cause him to be completely unable to attend SEHS or a day placement, then it would have been appropriate in December 1998 to consider a residential placement. (Tr 395-96) As noted above, a preponderance of the evidence shows that in early December 1998 it was reasonable to expect B.J.M. in a short time to be unable to attend school without benefit of a residential placement. Therefore, by Ms. Connell's standards, B.J.M. did need a residential placement rather than day treatment.

Ms. Connell's decision in December 1998 was also colored by her belief that a child's placement

## FINAL ORDER

B.J.M. & Eugene School District

Page 24

should be increased in restrictiveness only one step at a time. That is, she was reluctant even to approve the Looking Glass placement because B.J.M. had not first been tried in a placement in a regional behavior program in a District high school. (E.g., Tr 370) That belief, echoed by other District personnel, is dangerously close, and at times seemed indistinguishable from, the impermissible methodology of a “fail through” requirement. *Richards*, 211 EHLR 433 (1987). See also *Seattle School District, No. 1 v. B.S.*, 82 F.d. 1493, 1501 (9<sup>th</sup> Cir. 1996).

Ms. Leatherberry, a school social worker and the District’s decision maker in the fall of 1997 and the spring and summer of 1998, and other District staff had trouble believing and were “uncomfortable” with the proposition that B.J.M.’s non-attendance was caused by any psychological condition such as agoraphobia. This discomfort was based upon reports from middle school staff that B.J.M. seemed to fit in well at regular lunch at school. This discomfort existed despite the consistency of the opinions of the District’s own experts, Dr. Stiller and Dr. Crone, as well as B.J.M.’s treating psychologists, Dr. Hicks and Dr. Mauro. Their expert reports carefully explained how B.J.M. could appear gregarious and deny all anxieties when in fact he was anxious and suffering. It is clear from Dr. Soberman’s testimony and demeanor that he also was, and is, quite uncomfortable with the experts’ conclusions.

The District argues that B.J.M. was attending 80% of his classes and, therefore, had no major problems with attendance. For the period through December 1, that attendance figure may be technically correct or not. The District never offered either of his two tutors to testify to his attendance or behavior in his tutored classes. The attendance sheets showing 100% for the tutored classes are clearly erroneous. C.M.’s contemporaneous notes only cite approximately six absences or tardies in one of the classes - absences or tardies that B.J.M. happened to mention to her or which the tutor was concerned enough to call her about. Even if it is technically correct, its apparent significance is belied by the fact that B.J.M. was only scheduled to attend a 50% load of class time, and only half of that in regular education. And, it ignores the fact that he had not attended school at all for the greater part of the previous one and one-half academic years. And, it ignores that the fact that B.J.M. ceased attending school at all after December 1. B.J.M.’s actual attendance record does not belie the opinions of Dr. Mauro.

The December 1998 placement decision was based upon an erroneous understanding of the least restrictive environment requirement and upon a disregard of the expert opinions of the treating psychologists and the District’s own experts. A preponderance of the credible evidence shows that it was not reasonably calculated to allow B.J.M. to obtain some educational benefit from an IEP, if he had one.

### C. *Remedy*

If a school district fails to offer a FAPE, parents may be reimbursed for their costs of a unilateral placement obtained for their child during the period the district failed to offer a FAPE. *Burlington v. Dept. of Educ. Massachusetts*, 471 U.S. 358 (1985); *Florence County School Dist. Four v. Carter*,



FINAL ORDER

B.J.M. & Eugene School District

Page 25

114 S.Ct. 361 (1993). Although Island View is in certain respects similar to a psychiatric security hospital, it is not a psychiatric hospital. Its program has a major educational component. Island View would be eligible for IDEA reimbursement under *Clovis Unified v. Office of Administrative Hearings*, 903 F2d 635 (9<sup>th</sup> Cir. 1990). Although Dr. Ewell, the District's psychologist-consultant in the February 2000 IEP/placement meeting, would not, without further information, opine about whether Looking Glass would have been appropriate for B.J.M. in December 1998 or currently, he did opine, as noted in the district's closing brief, that the Island View program had been appropriate for B.J.M. B.J.M. made some educational progress at Island View.

The District seemed to argue that Island View had let "B.J.M.'s IEP lapse" to his detriment. As noted above, the IEP of September 1998 was substantially meaningless and irrelevant to the offered placement in Looking Glass. The District itself had "lapsed" the IEP by failing to revise it when it proposed the change in placement that was incompatible with the IEP. And, the "master treatment plan" and monthly reviews at Island View are as comprehensive as any set of IEP goals and objectives I have ever seen.

The District raised no objections to the parents claimed costs. The parents are entitled to reimbursement for their expenses involved in B.J.M.'s placement and attendance at Island View. However, those costs do not include their attorney fees, some of which seem to be included in one of the parents' monthly itemized billings. Hearing Officers in these matters have no authority to award attorney fees.

Because of the District's failure to offer a FAPE, the parents had to find and provide a placement and program for B.J.M. at their own expense. The District did not offer a FAPE to B.J.M. until March 3, 2000. The parents could not be expected to understand the IEP and placement, accept the offer, and remove B.J.M. from Island View overnight. In this particular case, it is equitable to require reimbursement of the parents' expenses through March 31, 2000.

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II. *In February 2000, did the District fail to offer B.J.M. an IEP and placement which are reasonably calculated to provide him with FAPE and, if so, are his parents entitled to reimbursement for the costs of the placement they have secured for him?*

No.

Reimbursement for unilateral placement is an equitable remedy. *Carter*, 364. It would not be equitable to require the District the fund the parents' current unilateral placement when that placement is more restrictive than the child requires and when the District has offered an IEP and

## FINAL ORDER

B.J.M. & Eugene School District

Page 26

placement which, although procedurally flawed, are reasonably calculated to enable B.J.M. to receive educational benefit in the least restrictive environment.

Dr. O'Neill interviewed and evaluated B.J.M. He interviewed A.M., C.M., Dan Stuart, and Ms. Whitener. He reviewed Island View records and his District records. The foundation for his opinions about B.J.M.'s current placement is more substantial, and has fewer holes, than the foundation for his opinions about the appropriate placement for B.J.M. in 1998. Dr. O'Neill easily qualifies as an expert in special education programs and placements. His opinion about the appropriate placement for B.J.M. at this time is entitled to weight. His opinion is that B.J.M. could make educational progress in a day treatment setting, including Looking Glass, or even in a self-contained classroom.

Mr. Stuart was B.J.M.'s treating therapist. That status would generally entitle his contrary opinion to even greater weight. However, I was troubled by his responses, along with those of A.M., to queries about his revision, at the request of the parents' attorney, of the letter of December 1999 - removing all reference to medication management problems. The substance of Mr. Stuart's response did not really seem to make any sense. A.M.'s response seemed contrived. I don't know what they thought the problem with the original letter's wording might be, but they clearly thought it a problem and changed it accordingly - deliberately removing the therapeutically important information about the problems (accurately forecast by Dr. Mauro in November 1998) with finding the right mix of medications for B.J.M. Mr. Stuart knew his letter would be offered to the District to help it determine an appropriate IEP and placement for B.J.M. The revision of his letter - leaving out therapeutically important information - detracts greatly from the weight his opinions as treating therapist would normally be due. I think a preponderance of the credible evidence shows that B.J.M. could make educational progress in Looking Glass, or even in a self contained classroom, at this time.

The parents point out that, as in 1998, the District made some questionable decisions and some errors in the February 2000 IEP and placement process procedurally.

The parents object that the District did not wait until the majority of the Island View documents arrived. It might have been a better practice to wait. However, the team had their interview with Dan Stuart to use as a basis for understanding B.J.M.'s current needs and levels of performance.

The IEP provided to the parents notes that the extent of non-participation in a regular classroom would be three hours, less than 60%. The District continues to misunderstand the meaning of "extent of non-participation in regular classroom, ... and other ... activities." As noted in the discussion of the 1998 IEP, above, it means "the extent to which child will participate with nondisabled children in the regular class." 34 CFR Part 300, Appendix A (1). Given that the District asks the question in the negative on its IEP cover sheet, the correct figure on the currently offered IEP is 100% non-participation - just as it was the correct figure on the 1998 IEP after the

## FINAL ORDER

B.J.M. & Eugene School District

Page 27

December 1998 placement offer. The Looking Glass program consists only of disabled children. They do everything together including lunch. However, the parents were this time aware of the nature of the Looking Glass program and that it entailed 100% participation with emotionally disabled students.

The IEP offered to the parents by Ms. Connell on March 3, 2000, provides for 3 hours of special instruction in behavior/social skills daily. The IEP in the District's files, drafted by Ms. Metzker based upon the decision at the IEP meeting, provides for 1 hour of special instruction in behavior/social skills daily. Ms. Connell unilaterally changed the IEP to something other than what was decided by the team at the meeting. Given that the Looking Glass program includes about three hours daily in various group and individual therapies, Ms. Connell obviously changed the IEP to more closely conform the IEP to the proposed placement. As noted in the discussion of the 1998 IEP, above, that is the reverse of what the law requires - the placement must conform to the IEP.

Dr. Ewell was the clinical psychologist chosen by the District to help it interpret the data from Island View vis-a-vis an appropriate placement for B.J.M. and to give his expert opinion. The District made the decision without waiting the day or two for the necessary data to arrive. Dr. Ewell never formed an opinion. Ms. Metzker was the special education teacher chosen by the District to help the team decide the placement. She was unable to make a decision. The decision was made by Ms. Connell and Ms. Leatherberry. One of the two had very strong preconceived opinions as to the appropriate placement and had so informed Ms. Metzker prior to the meeting.

The IEP team was composed of the team of persons required by the IDEA. They met and considered data about B.J.M., including a teleconference interview with Mr. Stuart. Dr. Ewell was able to answer some questions for the team. He did opine that Looking Glass was in the realm of placements to consider. His refusal to give a firm opinion as to the appropriate placement did not prevent the District from making a decision. Ideally, the IEP is developed and placement is determined by consensus. However, if consensus is not reached, the District has the final decision making authority. That decision is not made by majority vote. 34 CFR, Part 300, Appendix A(9). Ms. Leatherberry and Ms. Connell were the District decision makers. A district may not come to the meeting with the IEP or placement forms already completed. However, team members may, and frequently do, come to meetings with preconceived notions. That does not void the decision.

The February 2000 IEP contains two items which were noticeably absent from the 1998 IEP. First, it addresses B.J.M.'s behavioral problems with a measurable goal and short-term objectives describing his current level of performance at Island View (gathered from the team's interview with Mr. Stuart) and describing the desired, measurable results it expects from the special instruction to be provided - continued 80% success by B.J.M. in the use of the various coping techniques he had learned at Island View and would continue to be taught by the District. The goal and objectives address B.J.M.'s problems with more detail than did the September 1998 attendance goal and objectives which became meaningless after the proposed placement change in December 1998.

FINAL ORDER

B.J.M. & Eugene School District

Page 28

And, the February 2000 IEP proposes a behavior support plan as a supplementary service. The plan is to be developed after he enrolls. This recognition of the need for a behavior support plan is a significant improvement over the 1998 IEP. Waiting until enrollment to develop the details of such a plan is reasonable.

Most importantly, the goals and objectives and services offered in the February 2000 IEP can, unlike those of the 1998 IEP, be implemented in the offered placement, Looking Glass.

In addition, the February 2000 IEP offers transition services as required. The goal of those services is for B.J.M. to take courses which will prepare him for a “post high school program.”

Any post-high school program requires completion of high school. Looking Glass is able to provide the academic course work required for graduation. However, it does not offer certain upper division, college preparatory courses. It was unclear from Ms. Whitener’s testimony just what college preparatory course offered by, say, SEHS could not be taken at Looking Glass. What is clear is that courses such as advanced algebra are available at Looking Glass. Given that B.J.M. is only a sophomore and was in the midst of a pre-algebra course at Island View with a “C” grade, he will need nothing higher than algebra for at least another year.

The February 2000 IEP is reasonably calculated to allow B.J.M. to receive educational benefit. The District offers B.J.M. a placement which is reasonably calculated to allow him make progress in his IEP and which is a less restrictive placement than Oakley, a residential placement seven hundred miles from his neighborhood school. The parents had an opportunity to participate in the development of the IEP and placement. The IEP was developed from an adequate knowledge base. The parents did understand the nature of the IEP and placement. Any procedural errors in developing the IEP and in describing it on the IEP forms do not rise to level requiring reimbursement of the parents’ unilateral placement after March 31, 2000 or any other remedy.

III. *Did the District violate 34 CFR §300.345(f) of the Individuals with Disabilities Education Act (IDEA) by not providing B.J.M.’s parents a copy of the February 15, 2000 IEP until March 3, 2000?*

No.

That regulation provides that “The public agency shall give the parent a copy of the child’s IEP at no cost to the parent.” It seems that the District “offers” a FAPE when it provides the parents with the IEP and a placement decision notice. The District provided the parents with both. Current 34 CFR Part 300 Appendix A(8) merely restates the regulation. However, former 34 CFR Part 300 Appendix A(31) recommended that parents be given a copy of the IEP within “a reasonable time following the meeting.” I find that there is still an implied requirement of timeliness in getting a copy of the IEP to the parents. Seventeen actual, thirteen working, days is probably at the edge of, but within, the

boundary of “a reasonable time.” That is, waiting seventeen days to give the parents the IEP was not in itself a violation of the IDEA.

IV. *Did the District violate 20 U.S.C. §1415(b)(3) by failing to provide until March 3, 2000 a written notice of its February 15, 2000 decision refusing to change B.J.M.’s placement?*

No.

That section of the IDEA requires the District to provide adequate written notice to the parents of its refusal to initiate a requested change. The District did so. There is no time frame specified in the statute. And, there is no regulation explicating the statutory provision. As with the regulatory requirement for a parental copy of the IEP discussed above, there seems to be an implicit requirement of timeliness which the District appears to have met.

**FINAL ORDER:**

Eugene District 4J failed to offer B.J.M. a FAPE during the period of December 1998 through March 2000. It shall reimburse his parents their costs involved in the unilateral placement they obtained for him during that period. The District is currently offering B.J.M. a FAPE. The District did not violate the IDEA in the timing of its provision of copies of the February 15, 2000 IEP and placement decision to the parents.

Darrell D. Walker, Hearing Officer  
Hearing Officer Panel

DDW:jeo

**NOTICE TO ALL PARTIES:** If you are dissatisfied with this Order you may, within 120 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(e)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

FINAL ORDER  
B.J.M. & Eugene School District  
Page 30

**ENTERED** at Salem, Oregon this 3<sup>rd</sup> day of July, 2000 with copies mailed to:

Linda Carter, Oregon Department of Education, Public Service Building, 255 Capitol St. N.E.,  
Salem, OR 97310-0203