

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT, on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008040189

DECISION

Stella L. Owens-Murrell, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 27, 2008, and June 3-4, 2008, in Los Angeles, California.

Los Angeles Unified School District (District) was represented by Rhonda L. Chow, Attorney at Law, of Lozano Smith. Lisa Kendrick, Due Process Specialist, was present at the hearing on May 27, 2008, and June 4, 2008. Susan Glickman, Administrative Coordinator, Due Process Unit, was present for the hearing for a part of the day on June 3, 2008, and Maureen Rubin, Due Process Specialist, was present for a part of the day on June 3, 2008.

Student, in pro se, was represented at the hearing by his parent (Mother). Interpreting services were provided for the entire hearing.

Student filed a Due Process Hearing request (Complaint) on April 3, 2008. The due process hearing commenced on May 27, 2008, and concluded on June 4, 2008. Sworn testimony and documentary evidence were received at the hearing. At the conclusion of hearing, the record remained open for the parties to file a closing brief on or before June 11, 2008. The District's closing brief was received and filed with OAH on June 10, 2008, and was timely. Student's closing brief dated June 9, 2008, was received and filed with OAH on

June 17, 2008, and therefore was not timely. Accordingly Student's closing brief will not be considered in rendering this decision. The record closed and the matter was submitted on June 11, 2008.

ISSUES¹

1. Whether the District denied Student a free appropriate public education (FAPE) during the 2006-2007 and the 2007-2008 school years due to one or more of the following:

- A. Failing to provide an appropriate placement and special education services in the least restrictive environment in a full-inclusion setting as specified in the Individualized Education Programs (IEP) dated June 13, 2006, and June 20, 2007;
- B. Failing to provide adequate supervision of Student by a trained additional adult assistant (AAA) as specified in the IEP dated June 13, 2006, and June 20, 2007; and
- C. Failing to provide for Student's unique physical and health needs.

REMEDIES

2. Student requests placement at another school in the District with a one-to-one aide, or placement in a home school.

¹ The ALJ has revised the issues without changing their substance, for purposes of organizing this Decision. The issues were derived from the Prehearing Conference Order as further clarified by the District's evidence at the due process hearing and in District's closing brief.

FACTUAL FINDINGS

JURISDICTION

1. Student, born on March 2, 1994, is 14 years of age. He currently lives with his Mother within the jurisdictional boundaries of the District. His school of residence is Joseph Le Conte Middle School International Humanities Magnet (Le Conte) where he has been enrolled since the 2005-2006 school year in a general education inclusion program. He is in the eighth grade. He has not attended school since November 29, 2007, when his Mother unilaterally removed him from school.
2. Student is eligible for special education services under the disability category of autism.

JUNE 13, 2006, IEP

3. District convened an IEP team meeting on June 13, 2006 to review Student's triennial IEP. The IEP established Student's present levels of performance and goals and objectives in speech and language (LAS), health, gross motor functioning, general classroom participation and readiness, reading comprehension, mathematics, social/emotional skills, and behavioral support.
4. The IEP team noted Student's gross motor functioning had improved over the past school year in his ability to catch a softball and kick and dribble a soccer ball. Student was increasingly more spontaneous in game-playing activities. In the areas of classroom participation and readiness Student had strengths in his willingness to complete class work, follow instructions, and stay on task with class work. He had strengths in the areas of reading decoding. Student had deficits in speech and language. Student was assessed at the second grade level in his ability to recognize words and at the third grade level in his oral reading skills. Student was still delayed in bilateral motor planning and eye-hand coordination, and physical fitness. He had a severe disability which required

significant modification of activities for safe participation in the general education physical education (PE) program which made him eligible for adapted physical education (APE) services. Student's primary weakness in the area of classroom participation was that he could not work independently and required the assistance of a one-to-one aide or AAA.

5. The IEP team also noted that Student's reading comprehension skills and writing skills were delayed. Student had difficulty maintaining attention. Student's present levels of performance in mathematics established Student's ability to perform mathematical calculations involving simple addition and subtraction, but his disability precluded Student from understanding abstract mathematical concepts. Student required accommodations and modifications to his core academic curriculum in the form of prompts and visual supports from his AAA and classroom teacher to stay focused and attentive to the reading material, his writing assignments, and mathematics assignments. In the areas of behavioral supports Student had difficulty tolerating stressful activities including transition time moving from one class to another on campus, unplanned changes in schedule, and new people. In the area of social/emotional skills Student needed to interact more with his peers and to develop independence from his AAA. The IEP team noted Student would be given opportunities for involvement in cheering at sporting events, club membership, as in the computer club, and after school events.

6. With respect to Student's present levels of performance in health, the IEP team noted Student had a medical history of skin allergy and sensitivity to the sun.

7. The IEP offered continued placement at Le Conte, and special education services within the general education curriculum for the 2006-2007 school year, with inclusion facilitator support, in addition to the following: (1) instruction in the general education setting for six periods per day taught by general education teachers; (2) inclusion facilitator direct services two-to-three hours per week in the classroom teaching individual, small and large group lessons, and indirect support services of one-to-two

hours a week to create appropriate learning materials, modify academic work as needed, and consult and collaborate with staff; (3) speech and language therapy twice per week for a total of 60 minutes per week; (4) an additional adult assistant (AAA) for 6.6 hours per school day; (5) modification of Student's mathematics, reading, and writing courses to comport with his developmental level, which was the second-to-third grade; (6) an extensive list of accommodations; and (7) extended school year for the 2006-2007 school year supported by an AAA and inclusion facilitator. The IEP established that Student's health needs were limited to Student needing constant supervision, and noted that Student had a history of skin allergy, which Mother treated by application of ointments. Although the IEP also provided for APE, at Mother's request Student did not participate in APE for the school year because Mother believed Student was not being challenged in APE. Rather Mother requested Student's inclusion in general education PE. District granted that request. Mother consented to the IEP.

8. The IEP was amended on June 22, 2006, to provide Student with AAA support for the entire school day for a total of seven and one-half hours per day. Mother consented to the amendment.

9. Student's teachers found Student to be a happy and helpful Student who appeared to enjoy participating in classroom activities, and doing his class assignments. Student worked well with the support of his AAA and inclusion facilitator.

JUNE 20, 2007, IEP

10. District convened the annual IEP team meeting on June 20, 2007, to review Student's IEP for the 2007-2008 school year. The IEP team noted that Student made meaningful progress and had met all of his objectives and all of his goals from the prior year except in reading comprehension and in social/vocational education.

11. The IEP team reviewed present levels of performance and established goals

and objectives in the areas of language and speech, reading comprehension, mathematics, behavioral support, writing, comprehension and social/vocational education. The IEP team noted that Student continued to be eligible for LAS in a group with only one other pupil due to his speech deficits. In the area of reading comprehension the team noted that Student loved reading picture books and that his reading fluency continued to increase. However, his comprehension skills were still delayed. Student continued to improve in the area of writing. He had the ability to copy from the classroom board and he liked to complete writing assignments. In the area of mathematics Student continued to improve and was able to solve problems using addition and subtraction. Student also enjoyed participating in mathematics activities with his peers. Student continued to have difficulty with multiple step problems. In all of his academic subjects Student had difficulty maintaining attention when he had no interest in the material, which required maximum prompts from his teachers and his AAA to keep him focused and on task. A series of modifications and accommodations were included in the IEP for use by Student's teachers, AAA and inclusion facilitator to redirect Student and to keep him on task.

12. In the areas of social/emotional and behavioral support the IEP team noted that Student responded well to positive rewards and understood consequences. He enjoyed participating in activities with his peers. As noted in his prior year IEP Student still did not tolerate transitions and unplanned changes in his schedule well. He did not initiate interactions with his peers and in social settings he tended to walk away from others, especially when on the school yard, or he initiated repetitive behaviors. The IEP team discussed the need for Student to begin interacting more with his general education peer group. The team recommended that Student be given continued opportunities for Student to seek assistance from peers, and to be involved in school activities, sports and after school events.

13. The IEP team agreed to continue Student's placement, program and services

that were offered in the June 13, 2006, IEP, as amended. The IEP team also noted that while Student made progress his disability continued to greatly impact his ability to reason, comprehend, draw inferences, and remember multiple step procedures and to create grade level work. Student continued to require the support of an inclusion facilitator and the services of a one-to-one aide or AAA for the entire school day. The IEP team also noted Student worked very well in some areas independently of his AAA. For example, he loved to read and began reading independently of his AAA. Mother did not voice a concern or question Student's participation in the full-inclusion general education curriculum; she agreed as part of the IEP team that full-inclusion was appropriate for Student. She did not express dissatisfaction with Student's AAA. Mother consented to the IEP.

ADEQUACY OF THE AAA'S SERVICES

14. Jessie Genie (Ms. Genie) had been employed as a Special Education Assistant with District for 10 years. In the last six years, Ms. Genie worked exclusively as an AAA with children with autism. Ms. Genie received college and District training in working with special needs children, including children with autism. She was trained in providing accommodations and modifications as prescribed in Student's IEP. Ms. Genie was qualified as an AAA.

15. Ms. Genie was assigned as Student's AAA. She worked with Student for three years including the entire 2006-2007 school year and extended school year, and in the 2007-2008 school years up to October 2007. She was the only AAA at Le Conte assigned to work for the entire school day. She reviewed Student's IEPs and was familiar with his present levels of performance, goals and objectives. She assisted Student and worked with Student's teachers in the implementation of his IEP goals and objectives. She was familiar with Student's unique needs in mathematics, writing and reading

comprehension. Ms. Genie testified that she was with Student at all times during the school day except during her breaks. If no one was available to attend to Student during her breaks, she would forego breaks. She reported Student's activities and progress weekly to Student's mother. She provided services to Student that comported with the IEPs.

16. In May of 2007, near the end of the 2006-2007 school year, Mother began to observe Student on the school grounds wandering off on his own away from his AAA. Mother did not speak to District about her observations until after Student returned to school for the 2007-2008 school year.

17. Mother contended that on September 6, 2007, Student came home from with a bruise on his arm. On September 10, 2007, Mother complained about the bruised arm to Laurie Cooley, Special Education Bridge Coordinator for Le Conte. She complained further that when she questioned Ms. Genie about the bruise Ms. Genie could not explain how Student had been bruised. Mother was upset about the situation and she requested Ms. Cooley interview Student's teachers to determine the cause of Student's bruise. Mother also attempted to file a police report. Mother was advised by the police that there was no basis for an investigation because there was no evidence of a crime.

18. Ms. Genie was with Student on the day Mother contends Student was bruised at school. Except for her breaks, Ms. Genie was with him at all times during the day. Student did not complain to her that he was hurt, she did not see Student get bruised, nor did she see a bruise on Student's body.

19. Ms. Cooley examined Student the day following Mother's complaint and found no bruising. She also questioned Ms. Genie and Student's teachers about Student's activities and whether he had reported being hurt or injured. Student had not reported being hurt or injured.

20. When questioned by Ms. Cooley, Student's PE teacher, Katherine Orendorff

(Ms. Orendorff) reported to Ms. Cooley that Student may have received a bruise from his participation in a PE game called "Octopus." According to Ms. Orendorff "Octopus" was a popular tag game that comported with Student's IEP. Student could have been tagged by another Student during the game in PE, which could explain any bruising on his arm. Ms. Orendorff contacted Mother and informed her that Student may have been bruised while playing a game with the other children in PE. Ms. Orendorff also advised Mother that neither Student nor his AAA reported he was hurt or injured during PE. Mother was not satisfied with the explanations provided by Ms. Genie, Ms. Cooley, and Ms. Orendorff.

21. Mother contended further that sometime following the bruised arm incident, Student came home from school with a "tear" in the cuff of his pants and on another occasion Student arrived home from school with "his bottom all muddy" because he had not cleaned himself after using the toilet. Mother believed these incidents occurred as a result of failures in supervision by Ms. Genie or any other AAAs who may have been assigned to Student in Ms. Genie's absence. Mother reported these incidents to District and requested District convene an IEP team meeting to discuss replacing Student's AAA.

SEPTEMBER 19, 2007, AMENDMENT IEP

22. District convened an IEP team meeting on September 19, 2007, to discuss Student's accommodations and modifications and to discuss the type of adult assistance District provided to Student. The IEP team amended Student's June 20, 2007; IEP to include additional monitoring of Student by an AAA including maintenance of a log book to enter significant events during the school day, such as incidents involving Student's sustaining an injury. The IEP was also amended to provide for Student to be taken to the nurse's office to change for PE and to use the restroom as needed. Mother consented to the amendments.

23. District assigned new AAAs who were trained as was Ms. Genie to support

Student. However, Student stopped attending school on October 2, 2007. Mother reported to the school that she kept Student home because of illness. Mother notified the District that Student no longer liked attending Le Conte and requested placement at another District school. Mother further notified District she would keep Student out of school until the matter of Student's AAA and his placement was resolved. She requested that District convene another IEP team meeting to discuss Student's placement.

24. Ms. Cooley referred the matter of Student's absence to Selena Ledesma, pupil services and attendance counselor at Le Conte. As of the date of the referral Student had been absent from school four days. Ms. Ledesma reviewed Student's attendance record. Student had been absent from school two days per week the entire 2006-2007 school year for a total of 56 days. District determined that Student had a record of excessive absenteeism.

25. Student was absent from school from October 2, 2007 to November 8, 2007 for a total of 27 school days. District investigated Mother's claims that Student was too ill to attend school. District obtained medical releases to determine whether Student required home hospital instruction. Student's physician verified that Student was ill from October 2 to October 18, 2007, and was able to return to school from October 19 to October 30, 2007. Student's physician further verified that Student was ill from October 31 to November 7, 2007, and Student was released to return to school on November 8, 2007. Based upon the medical information provided by Student's physician District determined home hospital instruction was not required. Mother refused to return Student to school.

NOVEMBER 7, 2007, IEP

26. In response to Mother's request, District convened an IEP team meeting on November 7, 2007, to discuss Student's placement and services. Mother requested Student's placement at Virgil Middle School. The request was based upon mother's belief

that Student was not adequately cared for at Le Conte and Student had not made progress toward his goals in the full-inclusion program. The IEP team reviewed Student's goals and objectives and concluded that, but for Student's excessive absences from school, Student had made steady progress toward his goals and objectives for the 2007-2008 school year, and Student continued to improve in his mathematics, writing and reading skills. The District IEP team members agreed that the IEP provided Student with a FAPE and there was no basis to change Student's placement. The IEP team offered continued placement at Le Conte, and services in a full-inclusion general education program with the support of a full-inclusion facilitator and AAA in the least restrictive environment. The offer was consistent with Student's prior IEPs to which Mother had previously consented. Mother did not consent to the IEP offer.

27. Student remained absent from school until the end of November 2007 when he attended classes on November 28 and 29, 2007. Student's last day of attendance at Le Conte for the 2007-2008 school year was November 29, 2007. Mother refused to return Student to school and he is currently without District-provided special education services. District referred Student's case to the Los Angeles City Attorney's office for investigation and further action.

FULL-INCLUSION IN THE GENERAL EDUCATION CURRICULUM IN THE 2006-2007 AND 2007-2008 SCHOOL YEARS

28. Student's general education curriculum in the 2006-2007 school year included academic classes in Mathematics, English and Science. Student's general education curriculum in the 2007-2008 school year was enhanced to include the following academic classes: Algebra, Science, U.S. History, English, and Introduction to Computers.

29. Both the June 13, 2006 and June 20, 2007, IEPs provided for Student's full-inclusion in each of his classes and the support of an AAA with appropriate accommodations and modifications and the services of a full-inclusion facilitator, trained

in developing strategies for working with and instructing children with autism. The IEPs also provided a comprehensive list of accommodations to be used by Student's teachers to help him access the general education curriculum.

30. Stephanie LeFleur-Boorman (Ms. Boorman), District inclusion specialist, was District's expert on the benefits to Student of full-inclusion. She was trained to provide inclusion services to children with autism. She had worked with Student since April 2006. She had worked with Ms. Genie over the 2006-2007 and 2007-2008 school years up to October 2, 2007, to develop modifications to Student's curriculum specifically in mathematics, writing and reading. She worked with Ms. Genie and Student's teachers to ensure full implementation of his IEPs. Some of the accommodations provided in Student's program included preferred seating to accommodate Student and his AAA, early departure from class to assist Student in transitioning to his next class, and frequent breaks when Student engaged in self stimulating behaviors. The accommodations were implemented to ensure Student was able to access his education and not to isolate him or single him out in the classroom. Student was also provided with rewards for completing assignments. His preferred reward was extra computer time in the computer lab.

31. Mother complained to District that Student was not fully included in his general education classes on one occasion in the 2006-2007 school year and four occasions in the 2007-2008 school year as follows: (1) in May 2007 and in September 2007, she observed from a distance outside the school fence that Student was excluded from play activity by other Students in his PE class. she also she observed his classmates take the ball from him to taunt him; (2) she was present with Student on November 28, 2007, in his computer lab class when Student was given too much time on the computer, while others in the class worked on projects; (3) she was present with Student in his science class on November 29, 2007, when he was compelled to sit at a separate table in the back of the room while the class conducted an experiment; and (4) she observed Ms. Genie taking

Student out of class too early or before the end of a class to take him to his next class or activity, which Mother believed deprived Student of full-inclusion.

PE Class

32. Both the June 13, 2006 and the June 20, 2007, IEPs provided for Student's participation in PE with significant modifications to protect him from sun exposure and to ensure his safe participation. When a PE activity could not be modified for Student's participation or other circumstances precluded his participation Student was provided alternative activities such as basketball.

33. Ms. Orendorff was Student's PE teacher in both the 2006-2007 and 2007-2008 school years. She reviewed Student's IEPs and worked in conjunction with the full-inclusion facilitator and AAA to implement the IEPs. Student was previously assigned a fourth period PE class but was reassigned to a first period PE class to accommodate his sensitivity to the sun. He was permitted to wear clothes to cover up his skin and a hat to shield him from the sun. Student was always accompanied by Ms. Genie or a similarly qualified AAA during PE. He was fully engaged in PE activities with the appropriate modifications. Ms. Genie accompanied him to PE classes where his activities were modified for his safety. He was permitted to play selected games and activities in small groups. He participated in roll call and other safe class activities. Student could not play certain types of more "physical" or sport contact games, like football, because of the risk of injury to Student. At those times Student would be provided activities to play with his AAA. According to Ms. Orendorff and Ms. Genie Student, was not isolated from his classmates; he was well liked by his classmates and at no time had they observed or become aware that Student taunted or teased by his classmates.

Science Experiment

34. Tony Nwanyanwu (Mr. Nwanyanwu) was Student's science teacher in the

2007-2008 school year up to the end of November 2007. Mr. Nwanywanwu reviewed Student's IEP and understood that Student required accommodations and modified assignments. He worked with the full-inclusion specialist and Student's AAA to fully implement the IEP. Student was frequently absent from class. When Student attended class he was given preferred seating in the second row with his AAA. Whenever the class had experiments Student performed the same experiments in modified form. Student last attended his class on November 29, 2007. He was accompanied by two adult females, one of whom was Mother. The class was working on the "ice cream" experiment. Mr. Nwanywanwu first determined Student had no milk allergies and he gave the tools for the experiment to Student's new AAA. Mr. Nwanywanwu seated them at a table set aside for Student and the AAA to provide sufficient room for Student to perform the experiment with his AAA. At no time did Mr. Nwanywanwu exclude Student from the class or seat Student in the back of the classroom to separate him from his peers. Student was fully included in and worked on the experiment with his AAA's support.

Computer Lab

35. Craig Hopkins (Mr. Hopkins) was Student's computer lab teacher in the 2007-2008 school year. He reviewed Student's IEP and understood that accommodations and modified assignments were sometimes required. He also worked with the full-inclusion facilitator and Student's AAA to implement the IEP. He testified that Student was assigned to work the same projects as his general education classmates. The projects were scaled to Student's developmental level. Student was closely supervised by his AAA. Student was seated in the back row of the class with other Students and was not excluded from class activities. Mr. Hopkins testified further that it was occasionally difficult to keep Student on task. When Student stayed on task and completed a class project he was rewarded with extra computer time. Student was fully included in the class.

STUDENT'S UNIQUE PHYSICAL AND HEALTH NEEDS IN THE 2006-2007 AND 2007-2008 SCHOOL YEARS

36. As discussed in Factual Findings 6 and 32 to 33, the June 13, 2006 and June 20, 2007, IEPs both addressed Student's sensitivity to the sun. The IEPs required accommodations to Student's PE class to preclude and minimize Student's exposure to the sun. For example, Student's PE class schedule was changed from fourth period, an afternoon class, to the first period, an early morning class. Additional accommodations were made regarding Student's PE attire. Student was permitted to wear non-regulation PE attire to cover his body and he was permitted to wear a hat during PE class. District further addressed Student's health needs by modifying the types of activities and exercises Student was permitted to participate in during PE class.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of persuasion on all issues (*Schaffer vs. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUE ONE: DID DISTRICT DENY STUDENT A FAPE IN THE 2006-2007 AND 2007-2008 SCHOOL YEARS BY FAILING TO PROVIDE AN APPROPRIATE PLACEMENT AND SPECIAL EDUCATION SERVICES IN THE LEAST RESTRICTIVE ENVIRONMENT IN A FULL-INCLUSION SETTING AS SPECIFIED IN IEP DATED JUNE 13, 2006 AND JUNE 20, 2007, AS AMENDED?

2. Student contends that he was not fully included in his general education classes on one occasion in the 2006-2007 school year and four occasions in the 2007-2008 school year as follows: (1) in May 2007 and in September 2007, Student was excluded from play activity by other Students in his PE class and his classmates took the ball from him to taunt him; (2) On November 28, 2007, in his computer lab class Student was given too much time on the computer, while his peers in the class worked on projects; (3) On November 29, 2007, in his science class, Student was compelled to sit at a separate table

in the back of the room while his peers conducted an experiment; and (4) Ms. Genie took Student out of class too early to transition him to his next class or activity, which Student believed deprived him of full-inclusion. Student also contends Le Conte was not an appropriate placement because District did not fully include him in the general education curriculum, and thereby failed to provide him a FAPE. Student contends further that he has not made progress and requires placement in a small structured classroom setting or in the alternative home schooling. Student finally contends District failed to implement the IEPs of June 13, 2006 and June 20, 2007, as amended. District contends Student's IEPs were implemented in every respect. District further contends that the IEPs provided a FAPE. Student substantially met his goals and objectives and made meaningful progress in his program. District also contends that the November 7, 2007, IEP offer of placement at LeConte in the full-inclusion general education program was appropriate.

3. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services are also referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

4. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed

the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

5. To determine whether a school district substantively offered FAPE to a student, the adequacy of the school district's proposed program must be determined. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301.)

6. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid*) The focus is

on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist*, supra, 811 F.2d at p. 1314.)

7. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412, subd. (a)(5)(A); Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.) In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento Unified School District v. Holland (Rachel H.)* 9th Cir. 1994) 14 F.3d 1398, 1403.)

8. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE only if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the Student's IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770 (*Van Duyn*))

9. Ms. Boorman testified credibly regarding the appropriateness of District's offered placement. Ms. Boorman's testimony established that placement at LeConte in the full-inclusion program was the least restrictive environment and appropriate. Ms. Boorman also testified that full-inclusion was appropriate because Student's behaviors were not such that he distracted other students in his class. Student improved academically and socially. Student was well liked by the general education Students, and Student was outgoing and happy when he was at school. In her opinion full-inclusion with general education peers was appropriate for Student because it provided opportunities for stimulation and a chance for Student to model the behaviors of his non disabled peers. She believed Student continued to make steady progress in his current program. The only factor hindering his progress was his excessive absences. In her opinion, Student's placement in a smaller more structured class setting or home school would be too restrictive an environment and wholly inappropriate. Applying the first three factors set forth in *Rachel H.*, the evidence established that Student benefited academically from inclusion in general education classes, with the appropriate accommodations and modifications to the curriculum; Student's socialization skills also greatly improved from his interaction with his non disabled classmates; and his presence in the classroom had a positive impact on his teachers as well as the non disabled Students. The fourth factor under *Rachel H.* of the cost of inclusion was not raised and is not addressed in this analysis.

10. Each of the *Rachel H.* factors enumerated above weighs in favor of District's offer of continued placement at Le Conte. Student failed to produce any evidence that LeConte was not appropriate. Student also failed to produce any evidence of what he considered to be a more appropriate placement. Moreover, Student presented no evidence to support Student's placement in a home school setting or that home schooling was the least restrictive environment. (Factual Findings 3 to 13 and 23 to 35; Legal

Conclusions 1 to 10.)

11. Student contended District failed to implement the IEPs in both the 2006-2007 and 2007-2008 school years, by not including Student in certain PE activities, class experiments, and other class projects and by requiring Student exit certain classes before his peers. Student asserts that failure to include him in these instances constituted serious lapses in the implementation of Student's IEPs, such that Student was denied a FAPE. The evidence does not support Student's contentions. According to Ms. Boorman certain accommodations were implemented to ensure Student was able to access his education and not to isolate him or single him out in the classroom. He was allowed early exit from his classes to accommodate certain behaviors and for his safety. Student was also provided with rewards for completing assignments. His preferred reward was extra computer time in the computer lab.

12. Here, Student's IEPs provided for a full-inclusion general education program with the support of an inclusion facilitator who provided direct support to Student and indirect support by working with his teachers. Ms. Boorman worked with Student, his teachers and his AAAs to ensure implementation of the IEPs in both the 2006-2007 and 2007-2008 school years. Ms. Orendorff saw that Student was fully engaged in PE activities with the appropriate modifications. Ms. Genie accompanied him to PE classes where his activities were modified for his safety. He was permitted to play selected games and activities in small groups. He participated in roll call and other safe class activities. Student could not play certain types of more "physical" or sport contact games, like football, because of the risk of injury to Student. At those times Student would be provided activities to play with his AAA. Student was not isolated from his classmates; he was well liked by his classmates and at no time had Ms. Orendorff or Ms. Genie observed or become aware that Student taunted or teased by his classmates. Student was frequently absent from Mr. Nwanyanwu's science class Student was not excluded from the "ice

cream” experiment on November 29, 2007, rather Mr. Nwanyanwu provided Student preferred seating in accordance the accommodations provided in the IEPs to enable Student to perform the experiment with the support of his AAA. On November 28, 2007, Mr. Hopkins gave Student more computer time in the computer lab as a reward in accordance with the accommodations provided in the IEPs, and not to exclude him from class projects. Ms. Orendorff, Ms. Genie, Mr. Hopkins, and Mr. Nwanyanwu, all credibly testified that Student was never isolated from his peers and he received educational benefit and rewards from his participation in class projects. The only evidence presented by Student was Mother’s testimony. Mother testified that she observed Student not being included in his classes. She further testified that Student made little or no progress in his program because of District’s failure to ensure his inclusion in the general education curriculum. Mother’s testimony was not persuasive for two reasons. First, the testimony of Student’s teachers established that District carefully and consistently implemented modifications to Student’s program in the classroom, which did not constitute exclusion nor was he isolated from his peers in the classroom. Second, the evidence established that Student’s excessive absences, not District’s failure to implement full-inclusion, would account for the loss of progress, if any, by Student toward his goals and objectives. Student presented no persuasive evidence to support his contentions that he was not fully included in the general education full-inclusion program as provided in the June 13, 2006 and the June 20, 2007 IEPs. The evidence established that Student was, at all times, fully included in the general education program with appropriate accommodations and modifications. (Factual Findings 3 to 13 and 23 to 35; Legal Conclusions 1 to 11.)

13. The evidence established that Student continued to receive the full support and services provided in the IEPs. Student failed to meet his burden of persuasion that District denied him a FAPE. (Factual Findings 3 to 13 and 23 to 35; Legal Conclusions 1 to 13.)

ISSUE TWO: DID DISTRICT DENY STUDENT A FAPE IN THE 2006-2007 AND 2007-2008 SCHOOL YEARS BY FAILING TO PROVIDE ADEQUATE SUPERVISION OF STUDENT BY A TRAINED ADDITIONAL ADULT ASSISTANT (AAA) AS SPECIFIED IN THE IEP?

14. Student contends that the IEP required District to provide an AAA adequately trained to supervise him and to ensure he received the services provided in the IEP. Student further contends he suffered injury and loss of educational benefit because the assigned AAA was negligent and inattentive to his needs. District contends Student received AAA services prescribed in the IEP and was not denied a FAPE.

15. According to the IEPs of June 13, 2006 and June 20, 2007, as amended, Student was provided the services of an AAA for 7.5 hours of the school day. The AAA was also required to provide academic support to Student in the classroom in conjunction with the classroom teachers, to work with the inclusion facilitator to provide modifications and accommodations to the curriculum and to ensure Student's safety on campus.

16. Ms. Genie was qualified to work with children with autism. She provided all services as required under the IEP. She was not aware of any bruises sustained by Student while he was under her supervision and she was not negligent or inattentive to Student's toileting needs. Other qualified AAA's provided the same supports to Student in Ms. Genie's absence. If no other AAA's were available to attend to Student she would forego her breaks. Ms. Genie also kept Mother informed of Student's progress. Ms. Cooley testified that Ms. Genie was highly qualified as an AAA. She further testified that Ms. Genie was a dedicated AAA in that she was the only AAA at Le Conte assigned to work the full school day with Student. Ms. Boorman and Ms. Orendorf's testimony was consistent concerning Ms. Genie's qualifications. The testimony of Ms. Cooley, Ms. Boorman, and Orendorff regarding Ms. Genie's services was consistent with that of Ms. Genie. Moreover, Mother's observations of Student during school from a distance were not reliable. Some of her observations were made from a vantage point outside the school fence and from

one-to two blocks away. In addition, Mother was not present at school when the incidents concerning Student's arm, his pants and his toileting allegedly took place. Student provided no credible evidence that these incidents occurred at school or that he was not properly supervised by his AAA on the days these incidents were to have occurred. Student failed to produce any evidence that District failed to provide adequately trained AAAs as specified in the IEP, which resulted in loss of educational benefit and injury to Student. Student provided no credible or persuasive evidence that Student's AAA's did not provide services in conformity with the IEPs. (Factual Findings 3 to 23 and 28 to 35; Legal Conclusions 1 to 16.)

ISSUE THREE: DID DISTRICT DENY STUDENT A FAPE IN THE 2006-2007 AND 2007-2008 SCHOOL YEARS BY FAILING TO PROVIDE FOR STUDENT'S UNIQUE PHYSICAL AND HEALTH NEEDS?

17. Finally, Student contends that District failed to provide for his unique health needs. District contends that Student's skin sensitivity and sensitivity to the sun were addressed in the IEP. The IEP appropriately provided for modifications to Students physical activities and thus District did not deny Student a FAPE.

18. The testimony of Ms. Orendorff, Ms. Boorman, Ms. Genie, and Ms. Cooley establish that the only health needs of which District was aware was Student's skin sensitivity. District made accommodations to Student's PE schedule to minimize his exposure to the sun. District scheduled Student's PE class for the first period in the morning. Student was also permitted to wear long-sleeved clothing and also had the option of wearing a hat to shield himself from the sun. Student failed to produce any evidence to support his claim that District failed to provide for his physical and health needs. (Factual Findings 3 to 13 and 32 to 33 and 36; Legal Conclusions 1 to 18.)

19. In sum, Student produced no persuasive or credible evidence in support of his claims that District denied him a FAPE in the 2006-2007 and 2007-2008 school years.

Student has not met the burden of persuasion on any of the issues in his Complaint.
(Factual Findings 3 to 35; Legal Conclusions 1 to 19.)

ORDER

Student's request for relief is denied.

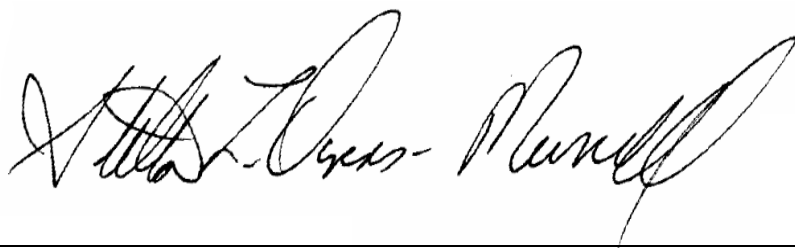
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

DATED: July 1, 2008

A handwritten signature in black ink, appearing to read "Stella Owens-Murrell", is written over a horizontal line.

STELLA L. OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings