

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2008040696

DECISION

Administrative Law Judge (ALJ) Rebecca P. Freie, Office of Administrative Hearings, State of California (OAH), heard this matter from December 9 to 12, 2008, in Oakland, California.

Attorney Lenore Silverman represented the District. She was assisted by attorney Jesse Raskin. Dr. Pamela Mills, Supervisor of Screening and Assessment for the District, was present for the hearing. Student was represented by attorney Natashe Abrahams. Attorney Jean Murrell Adams was also present on behalf of Student for the first day of hearing. Student's legal guardian (Parent) was present for the hearing.

The District filed the request for due process hearing on April 18, 2008. The matter was continued on May 13, 2008. Oral and documentary evidence was received during the hearing. At the request of the parties, the matter was then continued to

December 19, 2008, for the submission of written closing arguments. On December 19, 2008, the record was closed and the matter was submitted for decision.<sup>1</sup>

## ISSUE<sup>2</sup>

Is the District's offer to place Student in a special day class (SDC) for the 2008-2009 school year an offer of a free appropriate public education (FAPE) in the least restrictive environment (LRE), or does Student's FAPE in the LRE include placement in a general education class with a resource specialist program and accommodations and services?<sup>3</sup>

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<sup>1</sup> The District's written closing argument has been marked as District's Exhibit 65, and the Student's closing argument has been marked as Student's Exhibit S-10.

<sup>2</sup> The complaint contained three issues, but two of those issues have been resolved. The wording of the issue has been rephrased from the prehearing conference order.

<sup>3</sup> At the hearing and in her closing argument, Student sought to raise new issues that were outside of the issue stated in the District's complaint. Student attempted to assert that the District has failed to provide her with adequate and appropriate services in previous school years and that the District's proposed placement in an SDC is the result of the District's racial bias. The request was denied because only issues identified in the due process complaint may be decided at the hearing. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) The claim of racial bias is outside the jurisdiction of a special education due process hearing filed pursuant to the Individuals with Disabilities Education Act (IDEA). (See Ed. Code, § 56501, subd. (a).)

## CONTENTIONS

The District contends that Student has not been able to access grade level curriculum for several years, and has fallen behind her same-aged peers. The District asserts that she cannot access the fifth-grade curriculum at her current placement, even with substantial modifications and related services. The District contends that an SDC for students with mild to moderate impairments, such as that at El Dorado Elementary School (El Dorado), is the LRE for Student, and will provide her with a FAPE.

Student contends that her needs can be accommodated in a general education classroom if she is provided with additional services, such as a one-on-one aide, a behavioral coach and intensive instruction in reading. Student contends that the District's assertion that she is unable to access the general education curriculum is based on subjective assessments by District personnel based on classroom observations. She also argues that the District is now recommending placement in an SDC because Parent has had a poor relationship with the District since Parent filed a complaint that Student was allegedly physically assaulted by one of her teachers during the 2006-2007 school year. Student also contends that she will not benefit from placement in a SDC at El Dorado because she will mimic the poor behaviors of other students in the SDC.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is ten years of age and is eligible for special education under the primary category of specific learning disability, and the secondary category of other health impairment (OHI) due to attention deficit-hyperactivity disorder (ADHD). She resides with Parent within District boundaries, and has attended District schools since

kindergarten. Student currently attends KIPP<sup>4</sup> Bayview Academy (KIPP), a charter school in the District.

#### FACTUAL BACKGROUND

2. Student was in kindergarten when she was initially assessed for eligibility for special education in May 2004 at the request of Parent. A District school psychologist conducted a psycho-educational assessment of Student and an individualized education program (IEP) team then found her eligible for special education. The assessment report indicated that Student's eligibility category was OHI due to ADHD. The report further reflected that Student scored in the low average to average range on cognitive tests, and she was performing in the average range in math and broad written language skills for children of her age, and in the low-average range in broad reading skills.

3. Student attended Rooftop Alternative School (Rooftop), a District elementary school, from September 2004, when she began first grade, to June 2008, when she completed fourth grade. Pursuant to her IEP, she received services from a resource specialist program (RSP) teacher, Patricia Ryan, beginning in second grade. Ms. Ryan worked with Student's teacher to modify the curriculum in the general education classes, and also provided small group work in the RSP classroom. In 2005, Student began receiving occupational therapy (OT) for delays in fine motor and perceptual motor development. She continues to receive OT.<sup>5</sup>

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<sup>4</sup> Knowledge is Power Program.

<sup>5</sup> The District assessed Student for speech and language services in 2004 and 2006 and determined that she did not meet the criteria for these services. In 2006, Student had an audiogram and was found to have a mild hearing loss in one ear. The

4. In November 2005, Student was assessed by Diana Trichilo, Ph.D., a neuropsychologist at the University of California, San Francisco, School of Medicine. Student was attending the second grade, and also receiving the services of the RSP teacher, Ms. Ryan. Dr. Trichilo found that Student had “problems in attention/organizational skills, academic learning, and social adaptive functioning[,]” but she was found to have “intellectual functioning in the average range.” However, Student was reading below the first grade level, and her second grade teacher reported that Student was falling behind in math. Dr. Trichilo opined that Student had an “alcohol-related neurodevelopmental disorder (also referred to as fetal alcohol syndrome)[,]” as well as ADHD and a language processing disorder. She recommended that Student be placed in a “self-contained, small-sized classroom with a high teacher-student ratio[.]”<sup>6</sup>

5. Dr. Trichilo attended an IEP meeting on March 20, 2006, and her report and recommendations were discussed by the IEP team. The IEP team members, including Parent, agreed that Student would remain in her regular general education class at Rooftop with OT services for 30 minutes per week, twice a week, and up to 150 minutes per week of the services of an RSP for the remainder of the school year. The IEP team agreed that, in the fall of 2006, Student would attend an SDC for students with disabilities in the mild to moderate range, including students who were learning handicapped. Based on Parent’s concern, the team further agreed that at the end of

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audiologist recommended preferential seating, and that has been provided to Student in all of her classes. There were no further recommendations by the audiologist.

<sup>6</sup> Parent testified that Dr. Trichilo also recommended a one-on-one aide for Student, but Dr. Trichilo’s report and the notes from the March 20, 2006 IEP meeting do not reflect that recommendation.

Student's first semester attending the SDC, an IEP meeting could be called if Student was not achieving her IEP goals in the SDC. At a subsequent IEP meeting on May 5, 2006, the team confirmed Student's placement in an SDC for the fall.

6. Minoos Shah, Ph.D., a District employee, assessed Student in May and June 2006, and issued a "Three-Year Psycho-educational Assessment Report." Student's academic achievement was measured by the Woodcock Johnson III Tests of Achievement; her scores were significantly below average in the areas of basic reading skills, reading comprehension, math reasoning and written expression. Student again scored in the low average to average range on cognitive tests. Dr. Shah found that Student had "significant deficits" with tasks involving spatial skills and visual motor integration. Dr. Shah opined that Student met the criteria for special education services due to a specific learning disability, as well as OHI due to ADHD. Following the completion of Dr. Shah's report, the District staff sent out written notice of an IEP meeting. However, Parent advised the District that she did not wish to participate in this meeting, so the meeting was not held. Parent also rescinded her consent for Student to begin the 2006-2007 school year in an SDC.

7. At the commencement of the 2006-2007 school year, Student was placed in a general education classroom at Rooftop as a third-grader. Student's IEP team convened for a meeting on November 16, 2006. The IEP team agreed to continue Student's placement in the general education, third grade class at Rooftop with curriculum modifications, 30 minutes twice a week of OT, and up to 150 minutes per week in RSP. In January 2007, Parent signed her consent to this IEP.

8. Student made some progress in the third grade classroom using a modified third-grade curriculum. At some point towards the end of the 2006-2007 school year, Student reported to Parent that she had been pushed by her third-grade teacher on one occasion, and hit by the teacher on another occasion. Parent met with

the Rooftop principal, Jane Bieringer, and the third-grade teacher, and requested an investigation. The District (and possibly other agencies such as the San Francisco Police Department and Children's Protective Services), investigated at least one of these allegations, although it is unclear as to whether either incident was substantiated.<sup>7</sup> Thereafter, the relationship between Parent and Rooftop personnel deteriorated.

9. For the 2007-2008 school year, Student attended Rooftop in a general education fourth-grade classroom. Whereas Student's first through third-grade classrooms each consisted of 20 students, her fourth-grade class had 32 students. Pursuant to her last agreed-upon IEP from November 2006, Student continued to receive OT for 30 minutes twice a week, and up to 150 minutes per week of RSP services. The testimony of Ms. Ryan established that she and the classroom teacher modified the fourth-grade curriculum for Student in the general education classroom, and Student also received services in the RSP classroom.

10. Student's behavior reflected her frustration in the general education fourth-grade classroom. She was often out of her seat in the classroom, and at times she would leave the classroom to wander on school grounds, go to the principal's office, or to the RSP classroom. This created safety issues for Student, and disrupted the general education fourth-grade class. While some of this behavior was due to Student's ADHD, it was more extreme and frequent than in previous years. Student told Ms. Ryan that she liked to be in the RSP classroom because it had only a few students at any given time. Student was increasingly unable to access the fourth-grade curriculum, became aware that she was not learning the same amount as other students, and suffered from low self-esteem. Her relationships with other students suffered in the fourth grade.

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<sup>7</sup> No finding is made as to these allegations.

11. During the summer of 2008, Student and Parent decided that Student should attend KIPP, a District charter school. In August 2008, she began attending KIPP as a fifth-grader, beginning with a week and a half of "summer school" that served as a program orientation for incoming fifth-graders. Student continues to attend KIPP in a general education fifth grade classroom with multiple supports and modifications, as well as some pull-out services. Because KIPP is a middle school, students have different teachers for each subject who come into the classroom to instruct them.

12. An IEP meeting was held October 9, 2008, which was attended by Parent, teachers and staff from KIPP, and a content specialist for the District, Angela Sharbaugh.<sup>8</sup> This was the first IEP meeting Parent attended since November 2006, although the District made several attempts to meet with Parent for IEP meetings in the interim. The District team members recommended placement in a small structured classroom with a lot of adult support, and female peers in the classroom for friendship, as it had been reported for some time that Student was having some social difficulties. The District members agreed that Student required a reading intervention program that targeted students with specific learning disabilities who are more than three grade levels behind in reading. They agreed that Student should not be placed in a classroom with children who were severely impaired or had behavioral issues, and they wanted a strong school community with regular support staff onsite. The District members named El

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<sup>8</sup> A content specialist has a special education credential and is assigned to several schools to assist both general education teachers and special education teachers in modifying curriculum content for students with special needs. The content specialist coordinates IEP team meetings and must be knowledgeable about special education programs throughout the District that might be suitable for a specific student.



Dorado as the location of the proposed SDC. Parent did not agree with the placement recommendation of an SDC.

13. In November and December 2008, Student was independently assessed by Sherry Burke, Ed.D.<sup>9</sup> Dr. Burke confirmed that Student's cognitive abilities are in the low average to average range, but her academic achievements in reading, writing and math are far behind those of her classmates as she proceeds from grade to grade. Dr. Burke testified that if only academics were considered, Student would best be placed in a second or third grade curriculum.

#### STUDENT'S CURRENT EDUCATIONAL PLACEMENT

14. The IDEA requires a student with special needs be placed in an educational environment that can meet those unique needs. Many students with special needs can be accommodated in a regular classroom, if provided with related services either in the classroom, or in another location.

15. At KIPP, Student attends several general education classes. The average fifth grade class size at KIPP is 20 students, with one teacher. Several modifications and accommodations have been implemented for Student in these classes, including preferential seating in the front of the classroom, a modified curriculum, and teachers working closely with Student to make sure she understands directions and remains on-task. The RSP teacher at KIPP, Carolyn Mulloy, also assists Student in these classes several times a week. However, even with these modifications and accommodations, Student is unable to access a substantially modified fifth-grade curriculum.

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<sup>9</sup> Dr. Burke's report is dated November 17, 2008, but testimony established that Dr. Burke visited KIPP to observe Student in December 2008.

16. Student has difficulty organizing her classroom materials at the beginning of class, even with adult assistance. She often spends much of the class-time cutting out pictures from magazines and pasting them to pieces of paper, coloring pictures, or drawing. Student frequently leaves her seat in class, and sometimes leaves the classroom. Dr. Burke noted this in her report and testimony. Student is unable to attend to instruction in the general education classes, and appears to be overwhelmed. Sometimes Student is defiant with her teachers. Sometimes she requests assistance from her classmates, but that takes them away from completing their own work. Student is more engaged and successful in small-group work, but there are times when she does not want to participate in small-group activities. Although Dr. Burke testified that Student's off-task behaviors were due to her ADHD, and explained that this was why Student was not progressing academically, this was not corroborated by other evidence. Credible testimony from teachers, the principal at KIPP, and the principal and RSP teacher from Rooftop, established that Student's behaviors are also the result of her frustration and embarrassment at being unable to understand and access classroom instruction. Dr. Burke testified that a behavioral coach may be able to modify these behaviors after a few days or weeks in the classroom. However, because Student has so many academic deficits, she requires much more classroom support than can be provided by a behavioral coach if she is to succeed in school.

17. Academically, Student is far behind the other students in her general education classes, even those with IEPs who have specific learning disabilities and/or ADHD, and are also being provided with a modified curriculum. In math, the students are working with fractions, but Student is still mastering basic addition, division, and math facts. As discussed below in Factual Finding 18, Student is reading at a first to second grade level, and is writing at a level that is first grade or below. Because Student has fallen so far behind her same-aged classmates in mastering the basics in most

subjects, it is unlikely she would be able to access a modified fifth-grade curriculum even if she was able to read and write fluently.

18. Student spends 360 minutes per week in a remedial reading classroom with two other students. The remedial reading teacher, Lorraine Cathey, uses the Wilson reading program with these students. Ms. Cathey and the KIPP principal, Molly Wood, testified persuasively that Student is still reading at a first or second grade level, although she has made some progress since the beginning of the school year. However, the two other students in the same remedial reading group as Student have made much more progress, and as they have progressed, the material is becoming more difficult for Student. As a result, Student is increasingly inattentive in that class. Also, the two other students in the remedial reading group lose interest when the reading program is modified for Student.

19. In addition to receiving the remedial reading instruction noted above, Student attended a reading program called the Slingerland Method for several weeks during the summer after second grade in 2006, and again during the summer of 2008. The Slingerland teacher from this past summer, Sharon McAllister, volunteers to tutor Student in reading for two hours per week at KIPP. Ms. McAllister is a retired special education teacher with over 36 years of experience as a credentialed special education teacher, consultant and resource specialist in the District. She testified persuasively that it will take Student several years of intensive intervention to become a functional reader.

20. As noted above, Student receives services from an RSP teacher for 150 minutes per week at KIPP. The RSP teacher, Carolyn Mulloy, is responsible for coordinating and providing services for the 22 students at KIPP who have IEPs. She testified persuasively about how she spends an average of approximately one hour each day discussing Student's needs with her teachers to improve access to the curriculum, and modifying the curriculum to make it more accessible to Student. This time is in

addition to the 150 minutes per week of RSP services to which Student is entitled pursuant to her IEP. However, due to Student's significant educational gaps, and in spite of Ms. Mulloy's efforts, Student does not understand the instruction in her general education classes.

21. Student's science teacher at KIPP, Megan Brown, testified credibly that Student is failing her class. Ms. Brown has substantially modified the curriculum for Student, but Student is not successful in her class. She interacts directly with Student approximately ten times during the class period to clarify directions, answer questions and keep Student focused on her work. Ms. Brown persuasively established that 30 to 40 percent of the time in Student's science class is spent attempting to meet Student's needs and the requirements of her IEP. This detracts from the time she can spend with the other 22 students in the class.

22. Socially, Student is struggling at KIPP. Dr. Burke found that Student has low self-esteem at KIPP. Staff at KIPP established that Student attempts to win friends by offering them candy, and sometimes disrupts her classmates in attempts to engage them socially during class-time. Credible testimony established that Student is becoming increasingly isolated socially at KIPP. Dr. Burke recommended that Student participate in a social skills group, but there was no evidence that such a group exists at KIPP.

#### THE DISTRICT'S OFFER OF PLACEMENT

23. Local educational agencies are required to provide special needs students with a FAPE, and they must do so in the LRE. Education Code section 56361 describes a continuum of placements for students with special needs, beginning with the placement in a regular education classroom. RSP is the second level on the continuum, and a SDC (referred to as a "special class") is the fourth level of the nine-stage continuum. The IDEA requires that students with disabilities be able to participate in activities with non-

disabled peers as much as possible. The IEP team determines the most suitable educational placement for a student by considering the unique needs of the student, and then places the student in the most appropriate educational environment and provides necessary services to ensure that the student receives a FAPE.

24. The District offered Student placement in an SDC at El Dorado. Ms. Sharbaugh, District content specialist, testified persuasively about the SDC at El Dorado for the remainder of the 2008-2009 school year. Ms. Sharbaugh works in the SDC at least once a week. There are ten students in the class, one teacher and three aides. In addition, an RSP teacher also spends some time in the class each week to assist the teacher and aides, and there are other service providers who periodically come into the classroom to provide related services for some of the students. Several students in the SDC have ADHD and specific learning disabilities. The students in the SDC generally function academically at the first to third grade level in one or more areas. Most of the students in the SDC have difficulty in reading, and the SDC is part of a pilot program for the Voyager reading program to improve the students' reading levels. This is the second year for the program, and it was very effective last year with the students in the class. Graduating fifth-graders from the SDC last year improved their reading approximately two grade-levels in one year of working with the Voyager program.

25. Due to the small size of the class, and the high adult-student ratio, one-on-one assistance is readily available in the SDC for students who need more help to access the curriculum. Additionally, it is easier to modify classroom routines and curriculum to accommodate the specific needs of an individual student in an SDC. Finally, unlike many SDCs in the District which have many more male students than female students in the classroom, the El Dorado SDC has four female students, some of whom have ADHD, who will provide Student with an age-appropriate social group.

26. The El Dorado campus has many extracurricular activities for all of its students, which provide many opportunities for mainstreaming the SDC students with their general education peers. These activities include a structured art program, sports, and drama programs. Testimony from several witnesses established that Student enjoys art and drama, as well as cheerleading. In addition, a counseling team comes onsite four times a week and conducts social skills groups for students. Students in the SDC begin and end each school day in a regular education class, and spend recess and lunchtime with the general education students. SDC students are mainstreamed into general education classes for some subjects, depending on a student's abilities. The goal for all of the students in the El Dorado SDC class is for them to return to general education classrooms as soon as they are able.

#### PARENT'S OBJECTIONS TO AN SDC PLACEMENT

27. Parent spent the better part of a day in the SDC at El Dorado, and testified that she believed the students in that class were more impaired than Student. She also testified that she observed some students with behavioral issues and expressed concern that Student would mimic these behaviors. Ms. Sharbaugh accompanied Parent on her visit to the SDC and testified persuasively that the day Parent visited the SDC was atypical because two students were leaving the SDC for different placements, primarily because they had behavioral issues, and the children in the SDC were reacting to their departure. The remaining students in the SDC classroom do not have significant behavioral issues, and if maladaptive behaviors occur, they can be easily modified by appropriate intervention in the SDC.

28. Parent testified that she believed that Student could remain in a general education placement if she was accompanied by a one-on-one aide.<sup>10</sup> It was not clear if Student would continue to attend KIPP with such an aide, or would attend a general education class at another school with such an aide. However, unrefuted, credible testimony from Ms. Bieringer and Ms. Ryan established that when Student attended Rooftop, the District provided Student with occasional in-class services from a paraprofessional, but Student refused to accept services from this aide in the general education classroom, although she would accept help from him in the RSP room. Credible witnesses from KIPP, including Ms. Mulloy and Ms. Brown, established that Student is very resistant to any direct adult assistance in the classroom. Even if Student were responsive to such assistance, a one-on-one aide would isolate her from her peers, and hamper her independence. Finally, there was no evidence as to how such an aide would help Student access the general education curriculum.

29. Parent was the only witness who testified that an SDC was an inappropriate placement for Student. She was not convincing. Student's behavior at KIPP has deteriorated in recent weeks. Parent frequently accompanies Student to school and sits in her classroom, which improves Student's behavior. However, there was no evidence that Student's improved behavior resulted in her being able to understand more of what was being taught. KIPP is an inappropriate placement for Student, even with curriculum modifications, and even if she was accompanied by a one-on-one aide. A general education class is not appropriate for Student at this time, even with support such as a one-on-one aide. Student's own witnesses testified that an SDC was appropriate for Student. Dr. Burke's written report recommended that Student be

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<sup>10</sup> Witnesses referred to "paraprofessionals," "one-on-one aides," or "one-to-one aides." These terms are used interchangeably.

provided with a “behavioral coach” if she could not be placed in a small, self-contained classroom, and testified that if an SDC was populated with students who did not have significant behavioral issues, such a class would be an appropriate placement for Student. Dr. Burke’s report and testimony reflected an opinion that Student’s ADHD was a significant factor in her inability to access the general education curriculum. However, this testimony was not corroborated by that of the other witnesses who saw her daily at school and in the classroom at KIPP this year, and at Rooftop in previously years. Ms. McAllister testified that a classroom with nine students, a teacher, and two para-professionals, would be an excellent placement for Student, if the teacher knew how to teach reading, and behavioral intervention and other special education services were available at the school. Ms. McAllister testified that she is aware of at least one such SDC in the District, but was not familiar with the SDC at El Dorado.

## APPLICABLE LAW AND LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The District filed the request for due process, and therefore has the burden of persuasion in this matter.

### ELEMENTS OF A FAPE

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed.



Code, § 56000.)<sup>11</sup> A FAPE means special education and related services that are available to the student at no charge to the parent or guardian that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *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 requirements 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. (*Rowley, 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 that are individually designed to provide educational benefit to the student. (*Rowley, Id.* at p. 201.)

4. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. (See *Rowley* at 188; 20 U. S.C. § 1401(9).) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

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<sup>11</sup> All statutory citations to the Education Code are to California law, unless otherwise noted.

## LEAST RESTRICTIVE ENVIRONMENT (LRE)

5. Federal and state law requires school districts to offer a program in the LRE for each special education student. (See 34 C.F.R. §300.114, et. seq. (2006).) A special education student must be educated with nondisabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment 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 “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)( 5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006); Ed. Code, § 56364.2, subd. (a).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.)

6. In *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402 (hereafter referred to as *Rachel H.*), the Ninth Circuit held that the determination of whether a general education placement with additional services, or a special education classroom is the “least restrictive environment” for a particular child, involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not

suitable environments for the participation of some handicapped children." (*Rowley, supra*, 458 U.S. at p. 197.)

Is the District's offer to place Student in an SDC an offer of a FAPE in the LRE, or does Student's FAPE in the LRE include placement in a general education class with a resource specialist program and accommodations and services?

7. Student has cognitive abilities in the low average to average range, yet she has a specific learning disability which has manifested itself in her inability to read above a first or second grade level. In addition, she has ADHD that also hampers her ability to progress in a general education classroom. The District has attempted to provide Student with a FAPE in general education classrooms for several years, with the assistance of RSP services, and other accommodations, but her academic skills are still substantially below those of her peers in general education classes in the fifth grade. She also is experiencing social problems with peers. There was no convincing evidence that providing Student with a one-on-one aide or behavior coach in a general education classroom would enable her to access grade-level curriculum even with modifications, so that the District can provide her with a FAPE. (Factual Findings 1-29; Legal Conclusions 2-5.)

8. Student requires intensive reading instruction if she is to become functionally literate. Although she is being provided with reading instruction at KIPP by Ms. Cathey, as well as the services of a volunteer tutor, this is not enough, because she is progressing much more slowly than two other classmates in the same group with Ms. Cathey. Student requires a classroom with intensive reading instruction for students who have specific learning disabilities and are at least three grade levels behind what is expected. Also, because Student has been unable to acquire basic knowledge in most academic subject areas, she requires a program that will enable her to "catch-up" academically with her peers in an environment that is "safe." She cannot do so in a

general education classroom, even with the services an RSP teacher or a one-on-one aide. (Factual Findings 12, 16-20, 24, and 26; Legal Conclusions 2-5.)

9. Student requires an SDC with a high adult to student ratio, and students who have similar disabilities and academic deficits that are being remediated in a supportive environment. She needs to be able to interact with peers who, because they also have similar disabilities, can provide her with a social group. Student also requires a classroom where her ADHD behaviors can be addressed. To the extent that Student's ADHD and behavior impact her ability to learn, the SDC teacher and paraprofessionals in the class have the expertise to create an environment where her ADHD and resultant behavior can be managed. For all of the foregoing reasons, an SDC, such as the El Dorado SDC, that has a small class size, high adult to student ratio, an intensive reading program, and students who function academically at a level similar to that of Student, is a placement that will provide Student with a FAPE. In addition, Student will be provided with the opportunity to be mainstreamed with non-disabled peers at the beginning and end of each day, when she participates in extra-curricular activities, and during recess and lunchtime. When it is appropriate, she will be mainstreamed into general education classes for certain subjects. (Factual Findings 1-29; Legal Conclusions 2-6.)

#### LRE

10. In determining whether placement in an SDC is the LRE for Student, the first factor to be considered, pursuant to *Rachel H.*, is the educational benefit the student is receiving in a general education class. Currently, Student is not placed full-time in a general education class. At KIPP, she receives 360 minutes weekly of pull-out remedial reading with Ms. Cathey, as well as two hours per week of individual reading tutoring with Ms. McAllister. In addition, she has 30 minutes of OT twice a week, and 150 minutes per week of out-of-class RSP services. Even with these services, she is making very little academic progress, and cannot access the general education

curriculum for fifth grade. A full-time one-on-one aide to accompany Student throughout the school day would not facilitate Student's receipt of educational benefit in a general education class. Student has never readily accepted one-on-one adult assistance in a general education classroom, and there was no evidence that she will do so in the future. Also, there was no evidence as to how such an aide would assist Student. Additionally, because the evidence did not establish that Student's ADHD and resultant behaviors was the reason she is not receiving educational benefit in her general education classes, a behavior coach would not assist her in accessing her education in the general education classroom. (Factual Findings 9-10, 15-22, and 28; Legal Conclusion 6.)

11. The second *Rachel H.* factor that must be considered is the non-educational benefit Student is receiving in general education classes. The evidence established that Student has little positive social interaction with her classmates at KIPP, and she also had social difficulties at Rooftop during the 2007-2008 school year. Because Student is so far behind the other students academically, she has poor self-esteem, and several witnesses testified that she could benefit from a social skills group. Therefore, it appears that Student receives little non-educational benefit from her attendance at general education classes at KIPP. (Factual Findings 10 and 22; Legal Conclusion 6.)

12. The third *Rachel H.* factor to consider is the effect the student has on the teacher and other students in the class. The evidence showed that Student is often disruptive in class, including asking for assistance from nearby classmates, which prevents them from completing their own work. Student also frequently stands up, wanders around the classroom, leaves the classroom, and acts defiantly towards teachers. In addition, the amount of time teachers spend trying to accommodate Student's needs is significantly disproportional to the time spent teaching her

classmates, including those with disabilities. (Factual Findings 10, 16, 18, 20-22; Legal Conclusion 6.)<sup>12</sup> Based on the foregoing, the *Rachel H.* factors of educational and non-educational benefit to Student in regular classes, and the effect she has on the teacher and other students in the general education classes, support removal of Student from a general education classroom, and placement in an appropriate SDC. (Factual Findings 9-10, and 15-22; Legal Conclusion 6.)

13. Student requires placement in an SDC class with an intensive reading program and support services such as those in the SDC at El Dorado. This placement is the least restrictive for Student. The evidence established that she will be mainstreamed for the beginning and end of the school day, lunchtime and recess, and during her participation in extra-curricular activities in an SDC such as El Dorado, and this is appropriate for Student.

## ORDER

The District's offer of placement at the SDC at El Dorado Elementary School constitutes an offer of FAPE in the LRE.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on the single issue heard and decided in this case.

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<sup>12</sup> Neither party offered any evidence related to the cost of the proposed SDC, which is the fourth *Rachel H.* factor to consider. Therefore, that factor is not analyzed here.

## RIGHT TO APPEAL

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 5, 2009

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/s/

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings