

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

FAIRFIELD-SUISUN UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007050139

DECISION

Judith A. Kopec, Administrative Law Judge Office of Administrative Hearings, Special Education Division, State of California, heard this matter on September 4 through 6, 2007, in Fairfield, California.

Jan E. Tomsy, Attorney at Law, represented Fairfield-Suisun Unified School District (District). Anna Mattos-Massey, Coordinator of Special Education for District, also attended.

Taymour Ravandi, Attorney at Law, represented Student. Kathleen Rossow assisted Mr. Ravandi. Student's parents (Parents) also attended.

District filed the complaint on May 4, 2007. On May 30, 2007, the hearing was continued. The record remained open until September 24, 2007, when closing arguments were received and the record was closed.<sup>1</sup>

## ISSUE

Was District's offer of 60 minutes of applied behavior analysis (ABA) and 50 minutes of small group instruction in the Transitional Academic Program (TAP) special day class at Weir Elementary School (Weir) necessary to provide Student a free and appropriate public education (FAPE) in the least restrictive environment from January 2007 to January 2008?

## CONTENTIONS OF THE PARTIES

District contends that because of Student's unique needs, he requires instruction at a slow pace and without complex language in a small group setting, a dense reinforcement schedule, significant visual supports, and instruction in a group setting to foster generalization of skills and develop greater independence. District contends that the offered program meets Student's needs and is reasonably calculated to provide educational benefit in the least restrictive environment. District contends that Student received only minimal educational benefit during his diagnostic placement in a full time general education environment even with significant supports. District also contends that Student is unable to meaningfully benefit from whole group instruction in a general education classroom and that his behavior in a general education classroom was disruptive. While acknowledging that Student and his peers received social benefits from

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<sup>1</sup> Student filed a complaint on May 29, 2007 (OAH Case Number 2007050860), which had been consolidated with this matter. On August 14, 2007, Student withdrew the complaint and the matter was dismissed.

Student's presence in a general education classroom, District contends that his lack of educational benefit from a general education classroom requires a determination the TAP classroom specified in its offer is the least restrictive environment in which FAPE can be provided.

Student contends that District's offer is not a FAPE in the least restrictive environment. Student contends that his unique needs can be met in a regular education classroom with sufficient supports, aids and modifications. Student contends that he made substantial progress in the areas of communication, behavior and academics during his full time placement in the general education classroom. Student also contends that he made progress generalizing skills and has grown less dependent upon his behavior assistant in the general education classroom. Student contends that he gained significant non-academic benefits from the general education classroom and did not have a negative impact on the teacher or his peers.

## FACTUAL FINDINGS

### BACKGROUND

1. Student is an eight-year-old boy who completed the second grade during the 2006-2007 school year. He is eligible for special education services as a child with autistic-like behaviors. As a preschooler, he attended specialized programs through the Solano County Office of Education (County). For most of the 2004-2005 school year, he attended a County-run special day class for preschool and kindergarten children and participated in a general education kindergarten class for part of the day. In February and March 2005, County conducted reassessments in anticipation that Student would transition to a District-run program. In April 2005, Student transferred to District's Fairview Elementary School

(Fairview). He attended a TAP special day class for kindergarten through second grade students.<sup>2</sup>

2. Student remained at home and did not attend school in early fall 2005 because Parents were concerned that he was learning inappropriate and aggressive behaviors and was not safe in the TAP classroom. Parents wanted Student to be in a full inclusion setting. He returned to school in October 2005. After several individualized education program (IEP) team meetings, his time in the general education setting was increased from 960 minutes a month in October 2005 to almost 1,300 minutes a month in December 2005. Beginning in January 2006, Student began exhibiting significant maladaptive behaviors, including running away and tantrums. In February 2006, Parents removed Student from school and he again remained at home. The IEP team met five times between February and May 2006. District offered Student a placement in a nonpublic school at an IEP team meeting on May 1, 2006. Parents did not consent.

3. The IEP team met on August 17, 2006, to consider offering another placement in order to have Student return to school. The TAP special day class that was previously held at Fairview had been moved to Weir. District offered Student placement in the TAP class at Weir with integration into the general education environment to be determined once he returned to full day instruction. Parents did not consent to this offer.

4. The IEP team met on September 13, 2006. District's members continued to recommend placement in the TAP class at Weir. They continued to believe that the TAP class was required to meet Student's needs. Nevertheless, District staff were very concerned that Student was not attending school. Aware of Parents' desire to have Student attend a general education class on a full time basis, District offered him, as a "diagnostic placement" for 30 to 60 days, full time inclusion in a second grade general

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<sup>2</sup> The TAP program prepares students for placement in less restrictive educational settings.

education classroom with a full time behavior assistant from a nonpublic agency. The behavior assistant was supervised by a behavior specialist from a nonpublic agency. District characterized this as a diagnostic placement because it was a temporary placement to allow staff to see how Student performed and to determine what services and supports he needed in order to be successful. Parents consented to the placement, although they objected to the fact that it was only a temporary placement. The IEP team met on October 26, 2006, to review Student's placement. His transition to the general education classroom went smoothly. He did not engage in any significant maladaptive behaviors.

#### INFORMATION AVAILABLE TO IEP TEAM IN JANUARY 2007

5. District conducted several reassessments during the diagnostic placement, including a speech and language reassessment, two behavioral reassessments and two skills reassessments.

#### SPEECH AND LANGUAGE REASSESSMENT OF OCTOBER 2006

6. Susan Smith, speech and language specialist for District, conducted a speech and language reassessment in September and October 2006<sup>3</sup>Ms. Smith reviewed Student's records, interviewed his mother and District staff, observed Student in different settings, and employed several standardized tools.

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<sup>3</sup> Ms. Smith holds a master's degree in speech and language pathology, a speech and language pathology license, a clinical rehabilitative services credential, and a certificate of clinical competence. She has been a speech and language specialist with District for two years. Prior to that, she worked for El Dorado County Office of Education for five years and Yolo County Office of Education for a year in the same capacity. Ms. Smith received training in and implements strategies and techniques for children with autism, including the picture exchange system, ABA, and floor time.

7. The results on the Test for Auditory Comprehension of Language, Third Edition, which tests the ability to comprehend spoken language, showed that Student was severely impaired in his ability to understand spoken language. The results on the Peabody Picture Vocabulary Tests indicated that Student's ability to understand single words without any visual cue was very low. Ms. Smith determined that he required visual cues to remember and understand information provided orally. His pragmatic skills were also severely impaired.

8. Ms. Smith administered the Assessment of Social and Communication Skills for Children with Autism, which evaluates social language abilities, using information from Mother, Student's behavior assistant, and her own observations. The results indicated Student was best able to communicate when others used simple language. He engaged in "self talk" when he was left alone or was not engaged in an activity.<sup>4</sup> He did not attend to most auditory stimuli in the classroom. His motor imitation skills were strong; verbal imitation was present for words and sentences with visual supports. He required adult support for activities such as making choices, waiting to hear instructions before responding, completing activities, and working independently. He was able to request a break if an adult cued him upon noticing signs of fatigue. His basic conversational skills were emerging.

9. Ms. Smith determined that Student demonstrated a severe developmental language disorder. He had a very small vocabulary, both receptively and expressively. His grammar development was significantly delayed. It was difficult for him to understand verbal language at any level unless it was accompanied by strong visual cues. Extensive verbal explanations and repeated directions, particularly when there was background noise, could cause him to shut down. He had emerging skills in the areas of social and

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<sup>4</sup> When Student engaged in "self talk" he talked to himself, generally by repeating movie dialogue.

pragmatic language, and demonstrated excellent potential for continued growth in speech, language and social communication skills.

#### MS. WORCESTER'S SKILL REASSESSMENT OF SEPTEMBER 2006

10. Cheri Worcester, behavior specialist for District, conducted a preliminary skill reassessment in late September 2006.<sup>5</sup> She reviewed Student's records; interviewed Mother, District staff, and Student's behavior assistant; observed Student; and administered the Assessment of Basic Language and Learning (ABLL), which assesses a child's early learning skills. The skills that were assessed ranged from those typical of older infants to those of first and second grade students.

11. The results of the ABLL indicated that Student was easy to motivate in teaching situations, but self-stimulatory behavior often impeded his ability to work. He needed high rates of social and tangible reinforcement and engaged in off-task behavior when reinforcement was not presented immediately. He had extensive early receptive language skills, and was able to follow simple and more complex directions. He imitated simple gross motor and oral motor actions. He had difficulty waiting for a series of instructions to be finished before beginning a task. Student imitated most sounds, words and phrases that he heard. He requested desired items and activities, but did not regularly use "wh" questions to request information.<sup>6</sup> His social interaction skills were relatively weak. He rarely showed interest in peers, did not respond to peers' attempts to interact with him, and did not initiate interactions with peers. He interacted well with

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<sup>5</sup> Ms. Worcester holds master's degrees in social work and teaching. She has worked as a behavioral specialist for District for one year. She has extensive experience providing behavioral assessments and services to children with autism spectrum disorders in a variety of settings, including educational settings.

<sup>6</sup> Who? What? When? Where? Why? are examples of "wh" questions.

adults. Student had difficulty with group instruction, particularly in large groups. He did not follow instructions given to the group, did not raise his hand, and was not interested in peers during group instruction. He did not consistently learn new information in a group setting. Student was able to get into line, retrieve materials, and perform work at his desk with prompting.

12. Based on the results of the ABLL, Ms. Worcester determined that Student's functional language, including his ability to make requests and engage in social interactions, needed to be developed. He also needed to develop his ability to follow group instructions and routines and interact with peers. He had emerging skills in the basic academic areas. Ms. Worcester determined that systematic programming and curriculum modification were necessary to maintain and increase his academic skills.

13. Ms. Worcester made a variety of recommendations. She recommended that Student be in a language-based classroom with a high level of structure, a high frequency of direct interaction, and a consistent schedule. Student required teaching methods using ABA techniques such as systematic reinforcement. He needed a mixture of independent and small and large group activities. Instructions needed to be clear and simple, with immediate and consistent consequences for his actions. She recommended that instructions given to the whole group closely mirror those given to Student to allow for generalization of whole group instruction. Student also needed exposure to peers for Student to practice his communication skills.

#### MS. WORCESTER'S BEHAVIOR REASSESSMENT OF OCTOBER 2006

14. Ms. Worcester developed a behavior support plan, dated October 21, 2006, to address Student's off-task behavior. Data showed that Student was off task an average of 49 times per hour, with the time periods ranging from five seconds to 15 minutes per incident. Ms. Worcester determined that Student's difficulty maintaining attention and his off-task behavior severely affected his ability to benefit from a large group setting. She



proposed a variety of strategies to increase Student's independence and to generalize his skills.

#### DR. MEADE'S BEHAVIOR REASSESSMENT OF OCTOBER 2006

15. Christine Meade, Ph.D., a clinical supervisor with the nonpublic agency providing behavioral services to Student in the classroom, assessed Student's behavior on October 26, 2006.<sup>7</sup> Dr. Meade found that Student can read silently, listen to preferred stories, and draw independently. He often required redirection when noise increased or peers engaged in off-task behavior. Student demonstrated that he can work independently during tasks he enjoys, but when he was required to work on tasks he did not enjoy or felt he previously mastered, he required continual monitoring and prompting. Dr. Meade determined he was not performing up to his ability within the general education classroom. She offered strategies to address each of Student's noncompliant behaviors. Dr. Meade recommended that Student receive instructions in a quiet, non-distracting work space when teaching him alternative assignments or "how to learn" skills, or previewing new concepts.

#### DR. MEADE'S CURRICULUM REASSESSMENT OF DECEMBER 2006

16. Dr. Meade assessed Student's skills in December 2006 against those required by the state's curriculum standards in December 2006. Student, who was in second grade, did not meet the majority of the kindergarten standards in reading; he met

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<sup>7</sup> Dr. Meade holds master's degrees in education and special education and doctoral degrees in special education administration and ABA. She has extensive experience providing behavioral services to children with autism spectrum disorders in a variety of settings, including educational settings. She trained and supervised Student's behavior assistant.

the majority of them in writing. Student did not meet the majority of the first grade standards in reading or math.

#### DISTRICT'S OFFER

17. A school district must provide a program of special education and related services that meets the child's unique needs and is reasonably calculated to provide some educational benefit.

18. The IEP team met on December 5, 2006, and on January 5 and April 18, 2007. In December, District drafted goals in the areas of communication and language, mathematics, writing, reading, and behavior. In January, District offered Student special education services for two hours and 45 minutes a day, and placement in a general education class for three hours and 20 minutes a day.<sup>8</sup> In April, District clarified that the special education services include 60 minutes of individual instruction using ABA, and 50 minutes of small group activities provided in the TAP class at Weir.<sup>9</sup> The individual ABA time was to focus on academic goals addressing areas in which Student was significantly below grade level. The small group activities were to focus on generalizing skills, increasing independence in classroom routines, and pursuing goals in the area of social skills and independence. Parents did not consent to the offer.

#### STUDENT'S UNIQUE NEEDS

19. District contends that Student requires instruction at a slow pace and without complex language, a dense reinforcement schedule, significant visual supports,

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<sup>8</sup> The other services that were offered, including occupational therapy, speech therapy, and behavior support, consultation, and supervision, are not at issue.

<sup>9</sup> District also offered instructional consultation, which is not at issue.

and instruction in a group setting to foster generalization of skills learned in individual instruction and to develop greater independence.<sup>10</sup>

20. Student contends that District relied on flawed and outdated assessments that do not accurately reflect his needs. For example, Student contends that the ABLL is normed for children who are in early childhood programs, not those in regular academic programs. He contends that he has acquired some of the skills he lacked at the time of the ABLL assessment. Student also contends that he made significant progress since the October 2006 speech and language reassessment.

21. There is no evidence that the assessment tools District employed were not reliable or valid for the purpose for which they were used. While Student may be correct that he developed some of the skills he lacked at the time of District's reassessments, that does not show that it was inappropriate for District to use them at the time the offer was made in January 2007.

22. Student has unique needs in the core academic areas of reading, writing, and mathematics, and in speech and language and communication. He has unique needs for instruction to be presented using clear and simple language and with visual support. He requires the use of a reinforcement system that is consistently implemented. He needs to generalize his academic and social skills across different settings. He also needs to develop skills to remain on task more independently.

23. District's offer of 110 minutes per day in the TAP class met Student's unique needs and was reasonably calculated to provide him educational benefit when the offer was made in January 2007 and it continues to do so. Ms. Smith opined that Student

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<sup>10</sup> A dense reinforcement schedule allows a student to earn the desired item or activity after a relatively small number of tasks. For example, a student who is given a desired item after successfully completing three tasks has a denser reinforcement schedule than a student who earns a desired item after successfully completing 15 tasks.

needed to be in an optimal environment for him to learn new concepts in the core academic areas. To her, District's offer represents the optimal environment. Dr. Meade opined that Student needed a quiet, non-distracting work space to learn new concepts and "how to learn" skills. Student can receive individualized, one-on-one instruction, and small group instruction in the TAP class. The TAP class has six students for the current school year and three adults, the special education teacher and two instructional assistants. The students in the class are appropriate communication partners and models for Student, since some of them have more advanced communication skills. The special education teacher can readily provide appropriate materials that Student may need.<sup>11</sup>

24. Student contends that the TAP classroom did not meet Student's needs because Student was distracted by the toys when he was in the TAP classroom at different times during last school year. However, Student was likely distracted by the toys in the TAP classroom because they were new and different from what was available in the general education classroom. Student would likely adjust to them over time, or the classroom could be modified as necessary.

#### LEAST RESTRICTIVE ENVIRONMENT

25. A school district must provide a FAPE to a child in the least restrictive environment. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. A child cannot be removed from a general education setting solely because he requires modification in the curriculum. When determining whether a placement is the least restrictive environment for a child, four factors must be evaluated and balanced: the educational benefits of full time placement in the general education classroom; the nonacademic benefits of full time placement in

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<sup>11</sup> The compositions of the TAP class during the last half of the 2006-2007 school year was comparable.

the general education classroom; the effect the presence of the child with a disability has on the teacher and children in the general education classroom; and the cost of placing the child with a disability full time in the general education classroom.<sup>12</sup>

26. At the time District made the offer to Student, he had been in the general education classroom for about three months. At the beginning, Ms. Smith observed that Student appeared to be “in his own little world” while in the general education classroom and was not participating in classroom activities. He did not pay attention when others attempted to talk to him. According to the general education teacher, Student initially engaged in loud outbursts. When she initially worked with him in a small group for reading, he turned his back and did not participate in the group if he was not interested in the book they were reading. Student did not respond to the teacher’s questions. Student required constant supervision to the extent that it was difficult for his behavior assistant to take a short break. Student was unable to pay attention and perform school work without almost constant prompting and redirection.

27. In January 2007, District appropriately concluded that Student would not gain any academic benefit from being in a general education classroom on a full time basis. His deficits in the ability to understand spoken language and to maintain attention in group settings, his need for very high levels of reinforcement to perform tasks, and his deficits in the core academic subjects indicated that Student would not be able to make satisfactory progress in academic areas in the general education classroom alone.

28. At the time of the offer, Student would have received some nonacademic benefits from full time placement in the general education classroom. Although Student did not initially respond to peers’ attempts to interact with Student, he did not object to their presence or efforts at communication.

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<sup>12</sup> District did not raise the issue of the cost of educating Student full time in the general education classroom, so it need not be addressed.

29. In January 2007, Student's full time placement in the classroom would improperly disrupt the teacher and other students. Student engaged in disruptive behavior, including yelling, screaming, falling off his chair, and banging his head. He required constant and active redirection from his aide.

30. Student's experience during the first few months of his full time placement in the general education classroom supports a finding that District's offer of the TAP classroom was the least restrictive environment for Student at the time it was made in January 2007. Student's unique needs could not be met and he would not benefit academically if he remained in the general education classroom for the entire day. In addition, his behavior disrupted the classroom.

31. However, Student remained in the general education placement for the rest of the 2006-2007 school year. The evidence shows that Student's behavior and compliance with classroom routine improved. His teacher became familiar with Student's needs and adjusted her techniques accordingly. She used shorter and simpler instructions. She implemented his reinforcement system when she worked with him in small groups. Student gained greater independence from his behavior assistant so that she was able to take breaks, sit behind him when he participated in a group, and walk behind him outside of the classroom. He was able to complete math worksheets with greater independence.

32. The educational benefit that Student received while he was full time in the general education classroom is in dispute. District contends that even with the support of a highly qualified behavior assistant, the consultation services of highly qualified behavior specialists from District and a nonprofit agency, and consultation among all those providing services to him, Student received only minimal educational benefit from his general education teacher and no benefit from whole group instruction.

33. District's view is too narrow. The question is not whether Student benefited from his general education teacher or whole group instruction, but whether he benefited

educationally from full time placement in the general education class. By the end of the school year, Student had made progress on his writing, reading, mathematics, communication, and language goals. He was able to take instruction from the general education teacher in a small group setting. He was better able to participate in large group activities, particularly when he was interested in the activities. He learned and followed classroom routines. His behavior improved. He performed at grade level in spelling and was able to take spelling tests with the whole class.

34. District also contends that Student requires an alternative curriculum that cannot be provided in the general education classroom.<sup>13</sup> However, there is insufficient evidence of this.

35. By the end of the school year, Student made educational progress while in the general education classroom on a full time basis. He benefited from small group instruction he received from his teacher, the assistance of the behavior assistant, the modified curriculum he received, and the consistent use of a reinforcement system by his teacher and behavior assistant. While it is likely that Student would have made greater and faster progress if he spent time in the TAP classroom as offered by District, this does not negate the fact that he made satisfactory progress while full time in the general education classroom by the end of the 2006-2007 school year.

36. There is no dispute concerning the second factor, the nonacademic benefits of Student's full time placement in the general education classroom. As Student contends, he made significant progress in the areas of behavior, communication, and social relationships. He developed important and necessary social skills. For example, by

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<sup>13</sup> An alternative curriculum is one that is wholly different than that of the rest of the students in the classroom. This contrasts with a modified curriculum which generally follows the regular classroom curriculum, but uses different materials or strategies to meet the student's needs.

the end of the school year, he had identified peers with whom he preferred to play, and he learned to play games on the playground with his peers. In addition, Student's peers benefited from his presence in the classroom. His teacher described seeing "wonderful things happen" with the other students as a result of Student's presence in the classroom. They learned valuable lessons understanding and accepting differences in others.

37. The final factor to be considered is Student's effect on the teacher and other students in the general education classroom as the school year progressed. District contends that Student required a substantial amount of prompting throughout the day, which is "at least somewhat disruptive" to the other children. District also contends that Student continued to engage in behaviors that were disruptive, such as self talk, crying, and leaving the area. Student contends that there was no evidence that he disrupted the teacher or the children in the classroom.

38. While his behavior assistant testified that there were times later in the year when Student cried or left the room, there is no evidence that this unreasonably disrupted the classroom. Ms. Smith, Ms. Worcester, Dr. Meade, and Student's teacher and behavior assistant all agreed that Student's behavior significantly improved with time. Contrary to District's contention, there is no evidence that the level of prompting Student required was disruptive to either the teacher or the other students. Student continued to engage in self talk and required prompting and redirection at the end of the school year. However, according to Ms. Worcester, it did not interfere with the teacher or the other students. Similarly, although District staff testified about the inordinate amount of time that Student would require of a teacher if he were in a general education classroom on a full time basis, the testimony from the general education teacher who had Student in her classroom did not support this. The general education teacher offered no testimony concerning the time she spent with or preparing for Student in her classroom.

39. In contrast to January 2007 when District made its offer, Student's behavior and performance by the end of the school year shows that his unique needs were met in



the general education classroom and he received satisfactory educational benefit in the least restrictive environment.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. District argues that Student has the burden of proof because he is the party challenging the IEP. District contends that because it had repeatedly offered Student placement in the TAP class at Weir and the full time placement in the general education class was a temporary, diagnostic placement, it is Student who is challenging the IEP. Student contends that District bears the burden of proof because it seeks to change the status quo.

2. District misconstrues *Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528], which applied the “ordinary default rule” to claims under the IDEA, namely, that plaintiffs bear the risk of failing to prove their claims. (*Id.* at p. 56.) The law governing the burden of proof in IDEA cases is clear: the party seeking relief from the tribunal bears the burden of proof. (*Schaffer v. Weast, supra*, 546 U.S. at pp. 57-58; *Van Duyn v. Baker Sch. Dist 5J* (9th Cir. Sept. 6, 2007, No. 05-35181) 2007 U.S.App. LEXIS 21285; *R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. July 16, 2007, No. 05-16404) 2007 U.S.App. LEXIS 16840, fn. 6.) Accordingly, District bears the burden of proof in this matter.<sup>14</sup>

Was District’s offer of 60 minutes of ABA instruction and 50 minutes of small group instruction in the TAP special day class classroom at Weir necessary to provide Student a FAPE from January 2007 through January 2008?

3. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Improvement Act (IDEA) and California law. (20 U.S.C.

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<sup>14</sup> The outcome would not change if Student bore the burden of proof.

§1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child, whose needs cannot be met with modification of the regular education program, and related services needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

4. A school district must provide "a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) A school district must offer a program that meets the student's unique needs and is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) A school district is not required to provide either the best education to a child with a disability, or an education that maximizes the child's potential. (*Bd. of Educ. v. Rowley, supra*, 458 U.S. at p. 197; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

5. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56342.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (*Ibid.*) A child with a disability shall not be removed from an age- appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).)

6. When determining whether a placement is the least restrictive environment for a child, four factors must be evaluated and balanced: the educational benefits of full time placement in the general education classroom; the non academic benefits of full time placement in the general education classroom; the effect the presence of the child with a disability has on the teacher and children in the general education classroom; and the cost of placing the child with a disability full-time in the general education classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by and Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The IEP's goals and methods are evaluated as of the time they were developed to determine whether they were reasonably calculated to confer an educational benefit to the student. (*Ibid.*)

8. Based on Factual Findings 23, 26 through 30, in January 2007 when District made the offer to Student, it met Student's needs and was reasonably calculated to provide him educational benefit in the least restrictive environment. After three months full time in a general education class, Student was not participating in classroom activities, required constant and active assistance to pay attention, and engaged in disruptive behavior. While he may have received some additional nonacademic benefit from full time placement in the general education class, it was not sufficient to overcome the lack of academic benefit and the disruption to the class.

9. However, Student's continued full time placement in the general education class showed that by the end of the school year, his needs could be met and he could receive satisfactory educational benefit in the general education classroom. Based on Factual Findings 31 through 39, Student made progress on his goals, took instruction from his teacher in a small group setting, participated in whole group activities, and interacted socially with peers. Although he continued to engage in some maladaptive

behavior, it no longer disrupted the class. Although Student may have made greater or faster progress if he spent time in the TAP classroom as offered by District, it was not required for him to gain satisfactory educational benefit. By the end of the school year, full time placement in the general education classroom met Student's needs and provided satisfactory educational benefit in the least restrictive environment. Student does not require 110 minutes in the TAP classroom as offered by District to receive a FAPE during the 2007-2008 school year through January 2008.

## ORDER

1. District's offer of 60 minutes of ABA instruction and 50 minutes of small group instruction in the TAP special day class at Weir was required to provide Student a FAPE when it was offered in January 2007 through the end of 2006-2007 school year.

2. District's offer of 60 minutes of ABA instruction and 50 minutes of small group instruction in the TAP special day class at Weir is not required to provide Student a FAPE for the 2007-2008 school year through January 2008.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. District and Student prevailed equally on the issue heard and decided.

## RIGHT TO APPEAL THIS DECISION

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: October 9, 2007

A handwritten signature in black ink, appearing to read "J. A. KOPEC". The signature is fluid and cursive, with a large initial "J" and "A" that are connected to the rest of the name. The letters "KOPEC" are written in a more standard, slightly cursive font. The signature is positioned above a horizontal line.

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JUDITH A. KOPEC

Administrative Law Judge

Office of Administrative Hearings